SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: ***Murray v. McDougall***, 2015 NSSC 215

Date: 2015 - 07 - 23
Docket: SFH-MCA 059371
Registry: Halifax

Between:

Melissa Jaye Murray

Applicant

v.

John McDougall

Respondent

Judge:	The Honourable Justice Elizabeth Jollimore
Heard:	June 11 and June 18, 2015
Oral Decision:	June 30, 2015
Written Decision:	July 23, 2015.
Counsel:	Michèle Poirier for Melissa Murray Judith A. Schoen for John McDougall

[3]

By the Court (Orally):

[1] I am rendering this decision orally. I reserve the right to edit it for grammar, structure, complete citations and organization if I decide to issue a written version of the decision. A portion of this decision relating to summer access was released as an endorsement last week, anticipating that the school year might end during that week. The terms of the endorsement are repeated in this decision.

Introduction

[2] This decision relates to Melissa Murray's application under the *Maintenance and Custody Act*, R.S.N.S. 1989, c. 160, for custody and child maintenance and, pursuant to the common law of unjust enrichment, for a division of John McDougall's pension and other property. When she filed her application in 2008, Melissa Murray claimed spousal maintenance, exclusive occupation of the family residence and authorization to move the couple's child to Alberta. She didn't pursue these claims when the application was heard.

[3] I'll deal with the issues by addressing the unjust enrichment claim first. Then, I'll deal with custody and access, which needs to be resolved before I can determine child maintenance.

Ms. Murray's unjust enrichment claim

[4] Ms. Murray claims there has been unjust enrichment and asks for an equal division of the existing equity in the West Pennant home through a lump sum payment and a division of Mr. McDougall's employment pension. Mr. McDougall says that she is entitled to neither.

Mr. McDougall's pension

[5] Before I start my analysis of Ms. Murray's unjust enrichment claim, I want to explain why Mr. McDougall's pension is considered in this context.

[6] On her application form, Ms. Murray's claim against Mr. McDougall's pension is framed as pursuant to the *Pension Benefits Act* or the *Pension Benefits Standards Act, 1985*. Mr. McDougall is a teacher, and any division of his pension is governed by the *Pension Benefits Act*, S.N.S. 2011, c. 41.

[7] In *Morash*, 2004 NSCA 20, at paragraph 28, Justice Bateman (with whom Chief Justice Glube and Justice Cromwell concurred), explained that a decision to divide a pension and the proportion of the division is made pursuant to the *Matrimonial Property Act*, R.S.N.S. 1989, c. 275, while the *Pension Benefits Act,* R.S.N.S. 1989, c. 340 "provides no more than a mechanism for division of pension credits at source, with a limit on source division to fifty percent of the pension benefits earned" during the relationship. Her Ladyship said that it was "obvious from the wording of the **PBA** that it does not purport to govern entitlement." For Ms. Murray and Mr. McDougall, who were not married to each other, the initial decision about the pension is made under the common law of unjust enrichment and the mechanics for the division are found in the *Pension Benefits Act*.

[8] In *Morash*, 2004 NSCA 20, Justice Bateman was referring to the *Pension Benefits Act*, R.S.N.S. 1989, c. 340. This was repealed by section 144 of the *Pension Benefits Act*, S.N.S. 2011, c. 41, which came into force on June 1, 2015. Part 7 of its regulations, NS Reg 200/2015, addresses the division of pension entitlements between spouses. The term "spouse" is not defined in the Regulations, but is defined in subclause 2(ax)(v)(2) of the *Pension Benefits Act* to include those who are not married to each other but who cohabited in a conjugal relationship with each other for at least one year, if neither party was married. Neither Ms. Murray nor Mr. McDougall were married to anyone else, so this is the definition which would apply to them: Ms. Murray claims they were spouses within the meaning of the *Act*, and Mr. McDougall claims they were not.

[9] Part 7 of Regulation 200/2015 does not address a person's entitlement to a share of his or her spouse's pension: it describes how the division is to be effected. Unmarried cohabitees have no statutory entitlement to a share of their spouse's pension. If a person is married, the pension is a matrimonial asset and divisible under the *Matrimonial Property Act*, R.S.N.S. 1989, c. 275. If unmarried, an unjust enrichment claim must be made and the Supreme Court of Canada's decision in *Kerr v. Baranow*, 2011 SCC 10 is applicable. Mr. McDougall made no reference to this decision in his pre-hearing brief, but referred to a number of decisions which pre-date it. I accept *Kerr v. Baranow*, 2011 SCC 10 states the law I must apply.

Unjust enrichment

[10] Unjust enrichment is best characterized, according to Justice Cromwell at paragraph 142 of his reasons in *Kerr v. Baranow*, 2011 SCC 10 as "one party leaving the relationship with a disproportionate share of wealth that accumulated as a result of the parties' joint efforts".

[11] At paragraph 38 of *Kerr v. Baranow*, 2011 SCC 10, Justice Cromwell explained that to prove her unjust enrichment claim, Ms. Murray must prove that she gave something to Mr. McDougall that he received and retained. The benefit must be tangible, even if it is not permanent. It must have enriched him and be capable of restoration to her in money or in kind. The benefit may be positive or negative. A negative enrichment allows the recipient to avoid an expense.

[12] The second requirement, described by Justice Cromwell in paragraph 39 of *Kerr v. Baranow*, 2011 SCC 10, is that of corresponding deprivation: Mr. McDougall's gain must come at Ms. Murray's expense.

[13] The final element of an unjust enrichment claim is the requirement that there be "no reason in law or justice" for Mr. McDougall to retain the benefit that Ms. Murray has conferred.

[14] The parties began their relationship in 2000, and they began to cohabit in the fall of that year. Mr. McDougall was employed full-time as a teacher while Ms. Murray worked as a barista and attended school. She financed her education with her earnings and student loans. Together they travelled to Korea, staying there from September 2001 until the spring of 2002. They returned from Korea separately, the future of the relationship uncertain. On his return in the spring of 2002, Mr. McDougall first rented, then purchased, a condominium from his brother-in-

law. Ms. Murray and Mr. McDougall reconciled, and Ms. Murray moved into the condominium with Mr. McDougall in August 2002. Mr. McDougall returned to his full-time job as a teacher.

[15] According to Mr. McDougall, Ms. Murray would pay him up to $200.00 each month and pay for part of the groceries. He said that she did minimal work at the condominium, which was extensively renovated: he said she painted one wall, helped tape drywall and removed carpet. She claims she did more.

[16] Following the condominium's sale in the spring or early summer of 2004, they separated a second time. When the sale closed, Mr. McDougall gave Ms. Murray $2,750.00 from the sale proceeds, and she moved to Cunard Street.

[17] In July 2004, Mr. McDougall purchased land in West Pennant and began building a home there.

[18] Mr. McDougall said he and Ms. Murray were not involved in a relationship with each other between May 2004 and August 2004, and they "reconnected" in late August and early September of that year when they had casual sex. Their daughter, Ella, was conceived. Learning that she was pregnant, Ms. Murray didn't return to school. She found full-time work at a dinner theatre and worked part-time at a local book store.

[19] In the months following Ella's conception Ms. Murray said that she and Mr. McDougall were spending time together and pursuing a romantic relationship. Mr. McDougall denied the relationship was romantic. Mr. McDougall said that after Ella was conceived "we made a decision to renew the relationship to the extent that we would reside together because of Ella". Ms. Murray doesn't accept this characterization of their relationship.

[20] The parties moved into the unfinished West Pennant home in May 2005. According to Mr. McDougall, Ms. Murray planted two trees on the property, took part in a construction weekend during the fall of 2005, did some varathaning and treated stair treads with sand for safety. He admitted she did a lot of the cleaning and said that they shared housekeeping and that both of them did the cooking.

[21] Ms. Murray said that they agreed a portion of her wages would be considered a contribution to the mortgage and this would be honoured, in some way, if they separated. She paid for groceries, the Eastlink bill, some of the car's gas and most of Ella's costs.

[22] Ms. Murray cared for Ella during a maternity leave. When that ended and she took a three-month business course and Ella attended daycare for two days each week, Ms. Murray paid for the daycare. It cost between twenty-five and thirty dollars each day. When Ms. Murray returned to the work force, her options were limited by the couple's remote home and single car. During the summer of 2006, she and Ella spent between five and six weeks in Alberta, during which Mr. McDougall didn't contribute to Ella's costs.

[23] Mr. McDougall described sharing household and parental duties with Ms. Murray. Ms. Murray disagreed and described Mr. McDougall's various recreational activities. Most were in

the city and rather than driving in and out of the city between his activities, she said he would stay in the city. She also quoted his comments to her that since he worked full-time, he should have more time off when he was at home than Ms. Murray did. As Ella has grown up, Mr. McDougall has become more involved with her.

[24] Mr. McDougall acknowledged that he never took a leave of absence from work to care for Ella and that he didn't take time off work to care for her.

[25] During the summer of 2007 while the West Pennant property was rented, Ms. Murray and Ella spent between four and seven weeks in Alberta and Mr. McDougall stayed at his parents' home in Halifax. During this time, Ms. Murray again shouldered Ella's costs. The couple remained together in the home until May 12, 2008 when Ms. Murray and Ella left.

[26] A few days after the separation, Ms. Murray and Ella travelled to Alberta. At the time, she and Ella had no place to live in Nova Scotia, and she used the time in Alberta to consider her future, including applying for work in Alberta. Understandably, Mr. McDougall was very concerned that Ella was so far away and that Ms. Murray wanted to remain in Alberta. Ultimately, Ms. Murray and Ella returned to Nova Scotia. A court application had been filed and Mr. McDougall paid the cost of their return tickets.

[27] After the separation, the parents alternated paying for Ella's daycare: one month one parent would pay and the next month the other would. As such, daycare costs were equally shared.

[28] While daycare costs were equally shared, the sharing was disproportionate. For example, in 2008 Ms. Murray had earnings of $8,010.00, UCCB payments of $1,200.00, RRSP income of $50.00 and net business income of $2,970.00. Inclusive of child maintenance and spousal maintenance, her income for the entire year was less than $27,000.00.

[29] I wasn't told what Mr. McDougall earned in 2008. I expect it was greater than his 2007 earnings. As a teacher, his income increases with his level of qualification and his years of experience. His 2005, 2006 and 2007 tax summaries show that his income increased by $5,100.00 between 2005 and 2006, and by $3,300.00 from 2006 to 2007. Mr. McDougall's earnings in 2007 were $61,202.00, exclusive of the summer rental income from the property in West Pennant.

[30] Considering his unreported rental income, even after paying child and spousal maintenance to Ms. Murray, Mr. McDougall's income would still have been almost twice as much as her income inclusive of his child and spousal maintenance payments. An equal sharing of daycare costs was vastly disproportionate to their incomes.

[31] In *Peter v. Beblow*, [1993] 1 S.C.R. 980, the Supreme Court determined that doing housework could support an unjust enrichment claim. Housework is of value to the family and to work without compensation, as is commonly the case with housework, is to be deprived.

[32] I find that Mr. McDougall was enriched by Ms. Murray's financial contribution and by her labour in the home and in caring for Ella. She paid for groceries and the Eastlink bill. She contributed to gas for the car and paid most of Ella's costs and, at times, paid all of them. I accept her evidence of the labour she did on the West Pennant home and property, and the housework she did. She spent more time at the home and more time with Ella.

[33] Paying expenses for the household and for Ella deprived Ms. Murray of the sums spent. Caring for Ella and the home deprived Ms. Murray of the opportunity to work, to improve her income and to advance her career.

[34] I find that Ms. Murray was deprived by her contribution to Mr. McDougall.

Juristic reason

[35] There may be many reasons why one person enriches another to his or her detriment. The most frequent example is a gift. In *Garland v. Consumers' Gas Co*., 2004 SCC 25, Justice Iacobucci, writing on behalf of unanimous court, outlined two steps for analysing the absence of juristic reason. He said, at paragraph 44, "[f]irst, the plaintiff must show that no juristic reason from an established category exists to deny recovery". Established categories include contract, disposition of law, donative intent, and other valid common law, equitable or statutory obligations. If there's no juristic reason to deny recovery at this stage, then the claimant has made out a *prima facie* case. Justice Iacobucci said that the *prima facie* case is rebuttable where the defendant can show there's another reason to deny recovery. There's a *de facto* burden of proof on the defendant to show why he should retain the enrichment. This analysis allows an opportunity to look at all of the circumstances of the transaction to see if there's some other reason to deny recovery.

[36] Neither party has suggested any juristic reason for the benefit and deprivation which has occurred. I find that unjust enrichment has been proven.

Joint family venture

[37] Where unjust enrichment is proven, I need to determine an appropriate remedy. Most often, a monetary award is a sufficient remedy. It's in the context of discussing whether monetary remedies should be restricted to *quantum meruit* claims that Justice Cromwell addressed joint family ventures. He did so at paragraphs 87 to 99 in *Kerr v. Baranow*, 2011 SCC 10, to highlight the fact that the analysis of unjust enrichment claims must consider the unique circumstances of each relationship, acknowledging that the circumstances of these relationships mean that I cannot presume a joint family venture exists.

[38] As Justice Cromwell said, at paragraph 88, "The goal is for the law of unjust enrichment to attach just consequences to the way the parties have lived their lives." His Lordship offered four main concepts to use in analysing unjust enrichment claims, saying that they provide a "useful way to approach a global analysis of the evidence", and he provided examples. The four concepts were: mutual effort, economic integration, actual intent and the priority of the family.

I note that none of these concepts considers the nature of the parties' intimate relationship, whether they were sexual partners or shared a bed. The focus is elsewhere.

[39] Mr. McDougall went to lengths to deny that he and Ms. Murray were cohabiting as conjugal partners. He insisted they were "roommates". Unjust enrichment claims are not restricted to common law partners. Ms. Murray has proven unjust enrichment. The nature of the parties' relationship (whether a joint family venture or not) is relevant in determining the appropriate remedy. Finding there was a joint family venture does not require finding that the two were sexual partners.

Mutual effort

[40] Justice Cromwell recognized, at paragraph 91 in *Kerr v. Baranow*, 2011 SCC 10, that "parties may also be said to be pooling their resources where one spouse takes on all, or a greater proportion, of the domestic labour, freeing the other spouse from those responsibilities, and enabling him or her to pursue activities in the paid workforce". He said, at paragraph 90, that indicators of collaborative work toward common goals included "the pooling of effort and team work, the decision to have and raise children together".

[41] Justice Cromwell's words accurately describe the relationship between Ms. Murray and Mr. McDougall: she took on all or a greater proportion of the domestic labour, freeing Mr. McDougall to pursue economic activities. For the first year of Ella's life, Ms. Murray was at home caring for her. When Ms. Murray took a course, it was part-time and she arranged Ella's care. During the summers when Mr. McDougall would have been able to care for Ella because he was not working, the West Pennant home was rented, so Ms. Murray took Ella to Alberta and cared for her there, while Mr. McDougall remained in Nova Scotia.

Economic integration

[42] According to Justice Cromwell at paragraph 92 in *Kerr v. Baranow*, 2011 SCC 10, "The more extensive the integration of the couple's finances, economic interests and economic well-being, the more likely it is that they should be considered as having been engaged in a joint family venture."

[43] Mr. McDougall denies that there was economic integration. They did not share bank accounts, investments, property or debts. All property was kept separate and neither had direct access to the other's income. This is all true. Their finances were not integrated on paper.

[44] While incomes and debts were isolated and Mr. McDougall isolated his property (Ms. Murray had little property to isolate), they shared a household. Ms. Murray paid most of Ella's expenses and she paid for the household's groceries and other expenses, such as the Eastlink bill. I've already noted that during the summers when Ms. Murray and Ella spent considerable time in Alberta with her family, Mr. McDougall made no contribution to Ella's expenses. Mr. McDougall paid most of the household bills, including expenses of Ms. Murray's, such as her housing.

[2]

[45] Each party was primarily responsible for certain areas of expenditure. In this way, their finances were integrated: she paid expenses for his child, he paid expenses for her shelter. Each contributed to their expenses. This wasn't a situation where each was solely responsible for all of his or her own expenses.

[46] Mr. McDougall was dependent upon Ms. Murray for the care of their daughter, and Ms. Murray was dependent upon Mr. McDougall for her support. He knew that her employment opportunities were compromised by living with him in West Pennant. Her income was always less than one-half Mr. McDougall's. Ms. Murray's income was used for the family, while Mr. McDougall was able to isolate some of his income. Neither accounted to the other for his or her expenditures and their incomes weren't pooled so that they each had direct access to each other's resources, but each was dependent on the financial contribution of the other.

Actual intent

[47] Intention may be expressed or inferred from conduct. According to Ms. Murray there was an explicit intention that she would be compensated for her contribution if they separated. Mr. McDougall denies this. Mr. McDougall was clear, at various points, about his intention that his finances were to be separate from Ms. Murray's. He reminded her that he owned the house and car and that she did not.

[48] Mr. McDougall didn't live by his words. While he claimed to be independent from Ms. Murray, he fully relied on her to care for and support their daughter. He didn't ever disadvantage his own work situation in the interests of his daughter's care, but depended on Ms. Murray to shoulder a disproportionate share of Ella's care and costs.

[49] In his testimony, Mr. McDougall struggled to credit Ms. Murray in almost every regard. He claimed their relationship was one of "roommates", and only when confronted with his 2005, 2006 and 2007 tax returns did he acknowledge that he had described his status as "common law" to the Canada Revenue Agency.

[50] Together, Mr. McDougall, Ms. Murray and Ella socialized extensively with his family while they cohabited. Mr. McDougall had no other girlfriend from 2005 until 2008.

[51] Mr. McDougall said he "didn't think" that Ms. Murray had a boyfriend during this period. From 2005 to 2008, the couple was living in a rural area in an open concept home. Mr. McDougall owned the car and controlled the car keys. Ella was under the age of three and couldn't be left alone. In these circumstances, it's difficult to imagine that Mr. McDougall would be unaware of Ms. Murray pursuing another relationship. Mr. McDougall's testimony was framed to suggest the parties were so independent of each other that he would not be aware of her circumstances. Given their living situation, this testimony is not credible.

[52] In many regards, Mr. McDougall attempted to diminish Ms. Murray's contribution or their relationship to a degree which is not believable: his statement that he "didn't know" whether she had a boyfriend while they lived together in West Pennant and his statement that they were "roommates" while he was claiming common law status on his tax return are examples

of this. Clearly they struggled with their relationship. They hadn't planned to become parents, and Mr. McDougall's choice of a rural life isolated Ms. Murray. Regardless, they lived together for three years and, as their relationship ended, they approached its end recognizing the consequences of their union by trying to manage the transition as separating spouses.

Priority of the family

[53] At paragraph 98 in *Kerr v. Baranow*, 2011 SCC 10, Justice Cromwell said that relevant to the question of whether the parties were engaged in a joint family venture is "whether there has been in some sense detrimental reliance on the relationship, by one or both of the parties, for the sake of the family". Justice Cromwell described this at length, referencing financial sacrifices made by the parties for the welfare of the collective or family unit and whether the parties fell into the traditional division of breadwinner and homemaker.

[54] Justice Cromwell made specific reference to Patrick Parkinson's article "Beyond *Pettkus v. Becker*: Quantifying Relief for Unjust Enrichment" (1993), 43 U.T.L.J. 217, at paragraph 99 of his reasons. His Lordship said a joint family venture may be identified where "[o]ne party has encouraged the other to rely to her detriment by leaving the workforce or forgoing other career opportunities for the sake of the relationship, and the breakdown of the relationship leaves her in a worse position than she would otherwise have been had she not acted in this way to her economic detriment".

[55] Again, this language is an accurate description of this couple's circumstances.

[56] On learning she was pregnant, Ms. Murray didn't return to her studies. She continued with employment, working at two jobs, until Ella was born. She moved in with Mr. McDougall in West Pennant shortly before Ella was born. There were no job opportunities for Ms. Murray in West Pennant and she had no way to get into the city. Ms. Murray cared for Ella during her maternity leave. Once her maternity leave ended, she arranged for Ella's daycare while pursuing short-term studies. When she found work, she paid disproportionately for Ella's daycare.

[57] According to Mr. McDougall, he had not intended his property in West Pennant to be occupied by a family when he selected its design. However, when it was completed, he and Ms. Murray moved into it, and they planned to raise their child there.

[58] Ms. Murray and Mr. McDougall were engaged in a joint family venture for the three years following Ella's birth when they moved into the West Pennant home. During the first five years of their relationship they did not continuously cohabit or share the objective of raising a child together. While Ms. Murray claimed unjust enrichment from 2000 to 2008, I find the parties' joint family venture existed from May 2005 until May 2008.

Remedy

[59] Where all three elements of unjust enrichment have been proven I am to consider remedies. Both monetary and proprietary remedies are available. Monetary remedies have

priority: proprietary awards are to be considered when a monetary award is inappropriate or inadequate. The claimant bears the burden of proving that a monetary award is insufficient.

[60] Ms. Murray seeks a monetary remedy which is consistent with Mr. McDougall's continued residence in the West Pennant home. As a result I don't need to consider whether a monetary remedy is inappropriate or inadequate.

[61] In deciding Ms. Vanasse's appeal, Justice Cromwell said, at paragraph 157 in *Kerr v. Baranow*, 2011 SCC 10 that, "The unjust enrichment is thus best viewed as Mr. Seguin leaving the relationship with a disproportionate share of the wealth accumulated as a result of their joint efforts."

[62] Here, Mr. McDougall seeks to leave the relationship with the West Pennant home, a cottage property in Maplewood, a vehicle, his pension and certain household contents. Shortly after the couple separated, Mr. McDougall swore a Statement of Property. He claimed that the West Pennant home had recently been appraised for $310,000.00, though he didn't provide a copy of the appraisal. He said the riverfront lot in Maplewood had been "assessed by a realtor" in June 2007 as worth $35,000.00. Mr. McDougall said he kept the fridge, washer and stove (worth $1,200.00) and the table, chairs, sofa, two frameless beds and two armoires that were worth $1,500.00. He valued his car at $6,000.00, for trade in purposes. At the time, his only debt was a mortgage which consolidated debt related to the house, the Maplewood lot and his car and it was approximately $209,000.00, according to his 2008 Statement of Property. The gross value of his assets was at least $353,700.00 (without considering any disposition costs).

[63] Mr. McDougall's tax materials show that in 2005, 2006, 2007 and 2008, he was contributing between $6,000.00 and $7,000.00 each year to his employment pension. Over these years, between $18,000.00 and $21,000.00 was diverted from Mr. McDougall's income, which could have been used for household needs, and dedicated to his sole benefit. This is in addition to the assets noted in paragraph 62.

[64] Ms. Murray, in contrast, would leave the relationship with little. Her current Statement of Property shows that she owns household contents worth $2,500.00 and an eight year old PT Cruiser worth $3,450.00 which she acquired after separation. She has no savings or pension and no insurance. She owes $37,000.00 for her student loan.

[65] The share of wealth that Mr. McDougall took from the relationship is vastly disproportionate to that Ms. Murray took and I have concluded that it comprises an unjust enrichment. Considering their financial contributions and their contributions of household labour and child care, I consider the parties have, overall, contributed equally to a joint family venture during the period from May 2005 until May 2008.

[66] Ms. Murray asks for an equal division of the existing equity in the home through a lump sum payment of $10,000.00 and a division of Mr. McDougall's employment pension.

[67] According to Mr. McDougall's 2008 Statement of Property, the West Pennant home had recently been appraised for $310,000.00 and he owed approximately $209,000.00 on it, the

Maplewood property and his vehicle. At the hearing he said the property was "maybe worth $275,000.00" at the end of the relationship and $200,000.00 was owed on it. In his testimony, he reduced the value of the West Pennant property by $35,000.00 from the value an appraiser placed on it seven years earlier. Considering notional realtor and legal costs that would accompany a sale, the property had equity in the range of $50,000.00 to $93,000.00. Ms. Murray didn't provide a Statement of Property identifying the value of the West Pennant home. She claimed $10,000.00, saying this was one-half of the equity in the West Pennant property.

[68] The evidence regarding the value of the West Pennant property was inadequate to allow me to fix the amount of its equity with any certainty. The best I can do is accept Ms. Murray's claim that one-half its equity is $10,000.00. Mr. McDougall shall pay her this amount forthwith.

[69] A second aspect of the accumulated wealth is Mr. McDougall's pension, which was financed with his diverted earnings.

[70] Having found that the parties contributed equally to a joint family venture, I find that Ms. Murray should receive an equal share of Mr. McDougall's pension entitlement earned during the period from May 1, 2005 until May 12, 2008. Mr. McDougall provided these dates for the start and end of their final period of cohabitation and Ms. Murray doesn't dispute them.

[71] In making this decision I am cognizant of the *Pension Benefits Act*'s requirement that pensions can be divided between spouses and, for those who are unmarried, this means living together in a conjugal relationship for one year. I have two comments to make with regard to this. First, by Mr. McDougall's admission in cross-examination, he and Ms. Murray were conjugal partners in 2005 and, whether they shared a bed at any other time, neither had other partners, and they socialized as a family. I conclude they were spouses and the *Act* allows a division of Mr. McDougall's pension. Second, I query the appropriateness of the *Pension Benefits Act* restricting division to conjugal partners. To the extent that a division is required to reflect unjust enrichment, which is not limited to conjugal partners, the *Act* is too narrow.

[72] In reaching this conclusion I am adopting the approach taken by Justice Blishen in *Vanasse v. Seguin*, 2008 CanLII 35922 (ON SC) at paragraph 139. This approach was not contested before the Supreme Court of Canada in *Kerr v. Baranow*, 2011 SCC 10 at paragraph 141. I am not compensating Ms. Murray for the entire period of the couple's relationship, but only for the period from May 1, 2005 to May 12, 2008. Mr. McDougall's payment to Ms. Murray on the sale of the Hollis Street condominium adequately compensated her for her contribution during that stage of their relationship. No compensation is merited for the earlier timeframe.

Custody and access

Legal context for parenting applications

[73] The statutory context for the parenting applications is section 18 of the *Maintenance and Custody Act*. According to subsection 18(5), my paramount consideration in determining Ella's parenting arrangement is her best interest.

[2]

[74] In determining Ella's best interest, I am required to consider those factors outlined in subsection 18(6) of the *Maintenance and Custody Act*. This means considering her physical, emotional, social and educational needs, including her need for stability and safety, her age and stage of development. I am also to consider each parent's willingness to support the development and maintenance of Ella's relationship with the other parent, and the history of Ella's care. I am to consider the plans each parent offers and Ella's cultural, linguistic, religious and spiritual upbringing and heritage. I am to consider the nature, strength and stability of the relationship between Ella and each of her parents, her grandparents and other significant individuals in her life. I am to consider each parent's ability to communicate and cooperate on issues affecting Ella and the impact of family violence, abuse or intimidation.

[75] Subsection 18(8) of the *Maintenance and Custody Act* demands that I give effect to the principle that "a child should have as much contact with each parent as is consistent with the best interests of the child". Maximum contact is not the goal: the goal is as much contact as is in Ella's best interest.

[76] Ms. Murray and Mr. McDougall agree that Ella should equally divide her time between them during the summer months when she isn't in school. This hasn't occurred in the past and the details of how it would work weren't agreed upon. They don't agree on how Ella should divide her time with each of them during the school year.

[77] Mr. McDougall and Ms. Murray agree that either parent may travel with Ella. Each must provide the other with a specific itinerary and consent to travel shall not be withheld unreasonably.

The evidence

[78] Ella has just turned ten. Her parents separated when she was not quite three years old, in May 2008.

[79] I heard a considerable amount of evidence about Ella's care arrangements when her parents were living together and from the time of their separation. Those circumstances are so far in the past and so reflective of the nature of the parents' relationship with each other at that time that they offer little in guiding me as to Ella's best interests today.

[80] I have been given no information which suggests Ella's stage of development is either particularly advanced or delayed for her age, having regard to clause 18(6)(a) of the *Act*. No plans have been identified regarding her cultural, linguistic, religious, spiritual upbringing and heritage. Accordingly, there is nothing to consider having regard to clause 18(6)(e).

[81] Each parent has pointed to occasions in the past when the other parent has not supported Ella's contact with him or her. These occasions are in the past. When Ms. Murray and Mr. McDougall stopped living together, the uncertainty of their situation and their fears about what the other might do prevented them from being "their best selves". I am convinced that their ability to parent Ella today is not represented by their past failures.

[82] Clause 18(6)(c) requires me to consider the history of Ella's physical, emotional, social and educational needs. I find that Ms. Murray has been the primary force in meeting these needs.

[83] Following the separation, Ms. Murray and Mr. McDougall participated in a binding settlement conference with Justice B. MacDonald on September 11, 2008. An interim "without prejudice" order resulted from the conference. That Order was granted on October 22, 2008. It provided the parents would have joint custody and they would keep each other informed about matters relating to Ella's care. Ella was to be with Mr. McDougall on alternate Tuesdays from 3:30 p.m. until Wednesday at about 8 a.m., and during the following week from Friday at 3:30 p.m. until Monday morning at about 8 a.m. This arrangement was to repeat itself over two week cycles. Transitions took place at Ella's daycare, where Mr. McDougall would collect her. As well, Mr. McDougall was to be given the chance to pick up Ella from daycare when Ms. Murray wasn't available and each parent was to be offered the opportunity to spend time with Ella when child care was needed. This Order has never been varied by any other, though the parents have adjusted the schedule to meet their needs.

[84] According to Mr. McDougall, the schedule "never really changed": it continued to see Ella spend five out of fourteen days with him and nine out of fourteen days with her mother. Mr. McDougall says he sometimes had two or four more daytime hours with Ella, but that it wasn't until 2014 that he and Ella spent seven consecutive days together.

[85] Mr. McDougall was very particular about how he described adjustments to Ella's schedule. He said he was "reluctant to characterize" changes to the schedule as offering him additional time, though it was clear that he did have additional time with Ella, particularly over holidays. Ultimately he was willing to admit that in recent years he was spending more time with Ella.

[86] Ella has strong and healthy relationships with her mother and father. She is integrated into her extended paternal family: her grandparents, aunt and one uncle all live in Nova Scotia. Ella has, as well, a close relationship with her maternal grandmother, whom she's visited in Alberta and with whom she has frequent electronic contact. They all describe Ella in unfailingly positive terms.

[87] Each parent has the ability to communicate and to cooperative on issues affecting Ella. They are both thoughtful and intelligent.

[88] Mr. McDougall seeks to have Ella in a shared parenting arrangement. Described in his brief, during the school year Ella would be with her father every Tuesday after school until Thursday morning and alternate weekends from Friday after school until Monday morning. If Monday was a holiday, the weekend would extend to Tuesday. If this schedule didn't continue in the summer, he proposed a weekly alternation during the summer months – which could become a fortnightly alternation if Ms. Murray wanted an extended period to travel with Ella.

[89] Mr. McDougall has referred me to a number of cases involving shared parenting where

[2]

parents' homes were distant from each other: *Murphy v. Hancock*, 2011 NSSC 197 and *Moore,* 2013 NSSC 252.

[90] The latter, a decision of mine, was an application to vary a consent order for shared parenting. Under the existing shared parenting arrangement (which had lasted for approximately six years) the child had spent most of her life in a shared parenting arrangement where her father's home was proximate to the only school she had ever attended, and included two stepsisters and a stepmother who had been part of her life since she was a toddler. Ms. Moore wanted a parenting arrangement that would remove the child from her familiar school and from frequent contact with her stepsisters and stepmother. Additionally, she would move to a new neighborhood and new school. I dismissed the variation application. This was not a case where I determined that shared parenting at a distance was in the child's best interests, but that it was in the child's best interests not to sever her longstanding family relationships and school arrangement.

[91] In *Murphy v. Hancock*, 2011 NSSC 197, Associate Chief Justice O'Neil identified a number of factors which he felt were "refinements" to a consideration of best interests. Some are relevant here: the proximity of the parents' homes (the child's school, disruption to recreational or social relationships); and whether mid-week contact can be structured without disrupting the child.

[92] From Ms. Murray's perspective, one significant challenge to the couple's relationship was Mr. McDougall's desire to live outside the city and her desire to live in the city where she could work. The parents have not reconciled their views on this: Mr. McDougall lives in West Pennant, and Ms. Murray lives on the Halifax peninsula. Mr. McDougall's West Pennant home is a little less than thirty kilometres from St. Catherine's Elementary School. It's a twenty-five minute drive if there's no traffic.

[93] There is no disagreement that Ella will continue to attend St. Catherine's Elementary School, approximately 500 metres from Ms. Murray's home. Ms. Murray shares her home with her partner, Craig Hamlin. His two daughters are also members of this household, though they don't live there all the time. Ella has many friends in this neighborhood. Mr. McDougall confirmed Ella has no friends her age in West Pennant. Ella's extracurricular activities are in the vicinity of her mother's home.

[94] At present, Mr. McDougall teaches both at the Sambro Elementary School which is approximately 25 kilometres from Ella's school and her mother's home, and at William King Elementary School, which is approximately 13 kilometres from Ella's school and her mother's home. For Mr. McDougall to get to work on time, he needs to wake Ella earlier than she wakes at her mother's. Mr. McDougall drives Ella to her mother's where she has her breakfast and waits until she can go to school.

[95] Mr. McDougall said this arrangement was a result of the parents' shared view that getting sleep is important for Ella. Mr. McDougall's work schedule required him to be at work before he could drop Ella at her school. Rather than wake Ella early enough to have breakfast with him,

Ella would be woken later and her breakfast would be delayed until she arrived at her mother's home.

[96] Recently, Mr. McDougall has learned that he will be teaching at Burton Ettinger and Duc d'Anville schools during the upcoming, 2015-2016, school year. This means that he will be able to leave his home later in the morning, allowing Ella to sleep in longer or to wake at the same time and have her breakfast at his home. In either event, she may still go to her mother's home before she goes to school because her father's work day starts before she can be dropped off at school. Mr. McDougall said that he and Ms. Murray hadn't yet discussed Ella's morning routine for the upcoming school year. However her schedule is adjusted at her father's she will still be awakened earlier than at her mother's.

[97] In addition to telling me that Ella's sleep is important, Mr. McDougall tells me that Ella doesn't like surprises. She likes to know what's coming, so she can be prepared.

[98] In deciding the time Ella should spend with each of her parents, the information of greatest relevance to her best interests has to do with her sleep, her desire for a known schedule, and the extent to which her life (school, friends and activities) has centered on her mother's home, rather than her father's.

[99] Each parent may live where he or she chooses. Neither Ms. Murray nor Mr. McDougall has compromised with the other in choosing her or his residence. To impose a shared parenting arrangement requires that there would be compromises and places the burden for making those compromises on Ella. She is the person who would be living near her friends only part of the time. She is the one, at age 10, who would need to adjust her sleep schedule at least once every two weeks or, if Mr. McDougall had his preference, adjust her sleep schedule three times during every Monday to Friday stretch during the school year to accommodate shared parenting. The greater the number of transitions between her parents' homes, the greater the uncertainty of her schedule. Increased time with her father means more time away from her step-sisters and friends. Viewing this from the perspective of Ella's best interests, a shared parenting arrangement is not in her best interests.

[100] In closing submissions Mr. McDougall asked me to craft an order that considers the possibility of him moving to the Halifax peninsula. However there was no evidence that he is planning to do this, or has considered doing this, or has ever given a thought to doing this in the ten years since Ella was born.

[101] In making the decision about Ella's best interests I can only consider the evidence. I cannot speculate on what might happen and make an order on that basis. I am mindful of the Court of Appeal's decision in *Slawter v. Bellefontaine*, 2012 NSCA 48, where that Court quashed a decision that a parent's access be supervised. The trial judge had given no indication during trial that he contemplated making such an order. It hadn't been claimed by any of the parties or sought by any of them during the hearing. This meant that no one had the opportunity to lead evidence, cross-examine or make submissions on this possible outcome. The Court of Appeal held that ordering supervised access, in these circumstances, constituted an error of law.

[2]

[102] Here, Mr. McDougall offered no evidence that a move was in the offing or being considered. Ms. Murray was not able to address the prospect of Mr. McDougall residing on the peninsula in her evidence. She certainly identified the location of his home as an impediment to shared parenting but I do not accept her evidence that if Mr. McDougall lived in the city shared parenting would be possible, as meaning that this controversy would be resolved.

[103] That said, I know the parties have spent years attempting to resolve Ella's parenting on a consensual basis. If Mr. McDougall does relocate, that may enable the parties to negotiate a resolution different from what I am ordering.

Summer schedule

[104] The parties have agreed that Ella should be in shared parenting during the summer months. Typically, summer vacation is approximately nine weeks long. I order that the summer vacation be divided between the parents starting on the Friday afternoon following the conclusion of school until the Friday afternoon before school resumes in September. In odd-numbered years, Ella will spend the first week following the conclusion of school with her father, and the remainder of the summer she will alternate between her parent's homes at weekly intervals, with transfers occurring on Friday afternoons. This should mean Ella will spend Canada Day with one parent and she will have Natal Day with the other.

[105] In even-numbered years, Ella will spend the first week following the conclusion of school with her mother, and the remainder of the summer she will alternate between her parent's homes at weekly intervals, with transfers occurring on Friday afternoons. This should ensure that annually, Ella is alternating the parent with whom she spends Canada Day and Natal Day.

[106] The pattern of weekly alternation will continue until the Friday afternoon before school resumes. Regardless of whether it is in an even-numbered year or in an odd-numbered year, Ella will spend the weekend before school resumes with her mother so Ms. Murray can re-establish the school year routine and, if necessary, prepare Ella for school. To be clear, this may mean that the last two weeks of the summer Ella is with her mother.

[107] If either parent wants to take an extended holiday of more than seven days with Ella, the parents may agree to adopt fortnightly alternation. If each parent is to maintain one of the two statutory holidays (Canada Day and Natal Day) with Ella, they may wish to adopt fortnightly alternation for one month and weekly alternation for the other month or to otherwise rearrange the schedule.

[108] In some years, Labour Day occurs before school starts. When this happens, Ella will be with her mother on Labour Day.

Holidays during the school year

[109] During the school year there are as many as six statutory holidays (Labour Day which sometimes occurs after school has started, Thanksgiving, Remembrance Day, the February holiday, Good Friday and Victoria Day) and five of these are adjacent to weekends.

[2]

Additionally, Christmas, Boxing Day and New Year's Day fall within a school holiday period. Lastly, the March Break is another school holiday period. As a teacher, Mr. McDougall enjoys all school holidays, while Ms. Murray is restricted to statutory holidays.

[110] Given the schedule I've ordered around the resumption of school, when school starts before Labour Day Ella will be with her father for the Labour Day weekend, including Labour Day.

[111] To allow Ella to maximize her time with her father, I order that she spend Easter Monday with him every year, while she spends Good Friday with her mother. Ms. Murray may not have that Monday as a holiday, while Mr. McDougall will. If the Easter weekend isn't his weekend, Mr. McDougall will pick Ella up at 5 p.m. on Sunday and return her on Monday at 5 p.m. If it is his weekend, he'll simply return her at 5 p.m. on Monday. Otherwise, Ella will spend the statutory holiday that is a Monday or Friday with the parent with whom she is spending the adjacent weekend. In Mr. McDougall's case, this means a weekend may start on Thursday after school or end on Monday at 5 p.m. when he'll return her to Ms. Murray.

[112] Remembrance Day can fall on any day of the week. If it falls adjacent to a weekend it will extend the weekend for the parent who has Ella that weekend. If it falls on Tuesday, Wednesday or Thursday, in odd-numbered years, Ella will be with her father from after school on November 10 until 5 p.m. on November 11. This will happen this year. In even-numbered years, if Remembrance Day falls on a Tuesday, Wednesday or Thursday, Ella will be with her mother.

[113] Christmas and March Break are the significant holiday breaks during the school year. Mr. McDougall isn't required to work during the March Break, while Ms. Murray doesn't have an automatic holiday period then.

[114] From the end of classes before Christmas until December 25 at noon in 2015, Ella will be with her mother and she will be with her father from noon on December 25, 2015 until 5 p.m. two days before school resumes. In even-numbered years, she'll be with her father from the end of classes before Christmas until December 25 at noon and spend the rest of the break with her mother.

[115] In 2017 and other odd-numbered years, Ella will spend the majority of the March Break with her father – from after school on Friday until 5 p.m. the following Friday, when she'll return to her mother's. In 2016 and even-numbered years, Ella will be with her mother from the end of school when the break begins until 5 p.m. the following Friday when she'll be with her father until 5 p.m. on Sunday. In this way, the parent who had the shorter period with Ella at Christmas during any given school year, will spend more of the March Break with her.

[116] Otherwise, during the school year, Ella will reside with her mother. She will spend time with her father starting on the first Thursday after school has resumed, from after school until Sunday afternoon, unless school started before Labour Day, in which case Ella will be with her father until 5 p.m. on Labour day. The following week, she will be with him from Thursday after school until Friday morning. This biweekly pattern will be followed until the summer

[2]

schedule takes over. To the extent it is disturbed by the Christmas and March Breaks, the parents will determine the schedule as if those breaks had not happened: if the last weekend before the Christmas schedule intervened was Mr. McDougall's the first weekend after the Christmas schedule will be Ms. Murray's.

[117] I have focused Ella's times with her father on Thursdays and Fridays because these are the days that Ms. Murray works.

[118] The schedule I am imposing does not replicate the current schedule. Ella's best interests are the paramount consideration and I have focused on her particular needs (sleep, a predictable routine, her familiar friends and social relationships), maximizing her time with her father in this context.

Child maintenance

Income determination

[119] There are a number of issues related to Mr. McDougall's income. As a teacher, he receives a regular paycheque and pays professional association dues. He is currently on a reduced salary, receiving eight-nine percent of his earnings so he can take a leave of absence in 2017 to complete studies that will improve his teaching qualifications and increase his income.

[120] According to Mr. McDougall, he has completed two credits toward his improved qualifications and has two more "sitting on his desk at home". He plans to take time off to complete the remainder. He admits that this plan is currently "on hold" because the institution offering of the courses (Drake University) has come under scrutiny by the provincial Department of Education.

[121] Mr. McDougall wants his child support payments based on his reduced salary.

[122] In *Montgomery,* 2000 NSCA 2, the Court of Appeal dealt with a variation application where a parent left a managerial position in the provincial government where he earned approximately $60,000.00 annually to attend law school part-time, preparing to pursue a career as a lawyer. To qualify as a lawyer, Mr. Montgomery was required to article. His articling salary was approximately one-third of his pre-law school income. On behalf of the Court of Appeal, at paragraph 39, Justice Pugsley accepted the decision of the Chambers judge that Mr. Montgomery's "election to work as an articled clerk for a period of twelve months at approximately one-third of his previous income, did not constitute a "reasonable educational need" of the appellant pursuant to the provisions of the *Guidelines*." Accordingly, Mr. Montgomery's child support obligation continued to be based on his pre-law school salary.

[123] Here, Mr. McDougall's decision to defer a portion of his salary to fund a future leave of absence is not a reasonable educational need and I find his employment earnings, for the purpose of the Nova Scotia *Child Support Guidelines*, NS Reg 53/98, are $70,786.00. I am imputing the additional income to him based on clause 19(1)(a) of the *Guidelines* and I impute to him the amount of his income, as if he had not deferred any portion of it. Mr. McDougall's earnings are

reduced by $750.00 for his Nova Scotia Teachers' Union dues. The dues figure is an estimate taken from his 2014 tax return because his 2015 paystubs didn't show his union dues. Based on his employment, Mr. McDougall's income for child support purposes is $70,036.00.

[124] A second issue relating to Mr. McDougall's income arises because he owns a condominium which he rents throughout the year, and he rents the West Pennant property for as many as four months each summer.

[125] The fundamental principle in determining Mr. McDougall's income is that I must estimate the actual means which he has available for child maintenance. If a parent arranges his affairs to pay substantially less tax on income, then that income must be grossed up before the table is applied: this summary of the law is found in Justice Arrell's decision in *Wood*, 2008 CanLII 116 (ONSC) at paragraph 47. Mr. McDougall repeatedly said that he rents out his home and condominium because those are viable ways to raise much needed money. Based on his tax returns, he doesn't make money directly from these rentals. According to his tax returns, he loses money.

[126] Mr. McDougall just recently began to disclose the income he earns renting his home and condominium on his tax return. Claiming rental income has two effects: first, it lets him deduct expenses for his home that most people cannot deduct. Second, to the extent that the expenses he incurs for his home and condominium exceed the rent, this reduces Mr. McDougall's taxes. In 2014, his taxable income was reduced by $2,787.00, saving him taxes of approximately $585.00, calculated at an average marginal rate of twenty-one percent.

[127] In *Hood v. Fost*, 2000 NSCA 34, Justice Chipman acknowledged that rental income may properly be offset against expenses. I do not suggest that the expenses Mr. McDougall deducted are inappropriate. Having regard to subsection 19(1) of the Nova Scotia *Child Maintenance Guidelines*, I am prepared to gross up Mr. McDougall's income to reflect the reduction in income taxes that results from the rental losses. I note that in 2014, the net rental income contributed to his receipt of an income tax refund of almost $1,000.00.

The table amount

[128] The parenting arrangement I have ordered means that Mr. McDougall's child maintenance payment is based on the tables.

[129] Considering his earnings of $70,786.00, including the imputed earnings, and the income I have imputed to him from his tax saving of $585.00, then subtracting his union dues of $750.00, I find Mr. McDougall has income for child maintenance purposes of $70,621.00. Mr. McDougall shall pay monthly child maintenance of $597.00 each month based on the child maintenance tables.

Special or extraordinary expenses

[130] Ms. Murray filed a Statement of Special or Extraordinary Expenses, seeking a contribution to Ella's dance classes, which cost approximately $670.00 each year. She has

offered no evidence to address any of the requirements of section 7 of the *Guidelines* to establish that this is an extraordinary expense, so I am unable to conclude that these are expenses to which Mr. McDougall should contribute. I dismiss her request for a contribution to Emma's dance costs.

[131] Ms. Poirier shall prepare the order. Counsel will advise me if there is any need to address the issue of costs.

Elizabeth Jollimore, J.S.C.(F.D.)

Halifax, Nova Scotia

[2]