SUPREME COURT OF NOVA SCOTIA
Citation: *Braithwaite v. Turner*, 2015 NSSC 221

Date: 20152707
Docket: ST No. 430678
Registry: Truro

Between:

Terri Olivia Braithwaite

Applicant

v.

Alexei Mansel Turner

Respondent

Decision

Judge:	The Honourable Justice Denise M. Boudreau
Heard:	June 24, 2015, in Truro, Nova Scotia
Counsel:	Kerri-Ann Robson, for the Applicant Alexei Turner, for himself

By the Court:

[1] This is an application made by Ms. Braithwaite, seeking an order pursuant to the *Partition Act* R.S.N.S. 1989, c. 333. The application concerns a property at 2651 Highway 202, East Gore, Nova Scotia (" the Property"), which is jointly held by the parties.

Facts

[2] These parties are former common-law partners. They lived together for a number of years and had two children together.

[3] There was some dispute in the evidence regarding the exact dates they started living together. The applicant testified that the parties resided together for a short time in 2003 – 2004, at a home owned by the respondent. In 2005 the parties separated and the applicant resided alone in an apartment. In 2006 the applicant made the decision to purchase the Property from her parents, and she and the respondent moved in together at that address.

[4] The respondent testified that he and the applicant lived together from approximately 2003 or 2004, until 2007, "except for a few rocky patches" when they did not live together. He agreed that the Property was purchased by the

applicant in 2006, but testified that he was involved in this decision. He testified that the applicant was reluctant to buy the Property from her parents but that he essentially convinced her, feeling that it was a "good deal". He believed that they did not commence living together at the Property until 2007, at which time he sold his home.

[5] The respondent testified that some of the proceeds of the sale of his home went to the benefit of the Property; however, he was unable to say how much, or exactly how it was used.

[6] The Property consists of over 200 acres of land; a home, barn, riding arena and several out buildings. The applicant runs a business from the Property; she boards and trains horses and provides riding lessons. She did so prior to her actual purchase of the Property.

[7] The applicant paid $150,000 to her parents to purchase the Property in 2006. The riding arena had been built/purchased by the applicant (on what was then, her parents' land) in 2002, for approximately $100,000; in 2006 the loan for the construction of this arena remained outstanding in the approximate amount of $90,000. The applicant testified that she entered into a mortgage at the time of purchasing the Property in the amount of $300,000, an amount which included the

remaining debt for the arena. Both title and mortgage were taken in her name at that time.

[8] The parties are also the parents of two children, born in 2008 and 2010.

[9] During their co-habitation, the parties agreed to a somewhat unusual division of financial responsibilities, given (and in spite of) a significant difference in their annual incomes. The applicant earned approximately $28,000 per year; the respondent earned much more, approximately $100,000 per year.

[10] The applicant was to be responsible for all day-to-day living expenses at the Property, including the mortgage, the taxes, the insurance, and the utilities. The respondent would be responsible for vehicle payments, including farm vehicles that he had purchased. The respondent would also "maintain" the Property, which the respondent testified included maintenance of fencing, snow removal, mowing hay, cutting of firewood, and other farm chores.

[11] The parties have significant disagreement about the respondent's actual contributions to the Property. The applicant agrees that the respondent purchased various vehicles that he used on the Property, including a bush hog, generator, tractor, and wood splitter. However, she described his use of these items on the Property as, essentially, entertainment for the respondent; to allow him to "play in

the woods". The applicant disputes that the items were truly necessary for the maintenance of the Property. She further disputes that the respondent ever mowed hay on the Property, or that he ever helped with the equestrian business.

[12] It is to be noted that since the parties' separation in 2014, the respondent has removed all of the vehicles and farm equipment from the Property, and has sold them. He has kept all proceeds for himself. Notably, in April 2014, the respondent attended at the applicant's place of work and, unbeknownst to her, took the vehicle she was using, leaving the applicant stranded. The respondent has sold that vehicle, and kept the proceeds.

[13] In his evidence the respondent described work that he did as maintenance for the residential home, including work on the eaves, fascia, deck, and so on. The respondent says he did the work himself, or with friends, and that he paid for all materials.

[14] The applicant agreed that the respondent did some, very limited, work on the home, and that he purchased some materials. However, according to her, he would insist that she pay him back for any expenses that he made for the benefit of the home.

[15] The respondent described that upon arriving from work each evening, he immediately went out to work on the Property for the entire evening. He described this as evidence of his commitment to, and efforts towards the maintenance of, the Property. The respondent testified that he had many great plans for this Property. He felt that it could have been developed into an entertainment property for families, but these plans were not supported by the applicant.

[16] The applicant described these events in very different terms. She recalled that she would, at times, leave the home at suppertime, for her second employment as a waitress. The respondent might be home, or might be outside on the Property; either way, the applicant had no idea what he would be doing. Despite the fact that the respondent was home, the applicant would need to hire a babysitter to care for the children during these evenings. She would also have to pay for this babysitter.

[17] In 2011, the parties decided to refinance the Property, in order to finance repairs to the horse arena. It was at that time, that the respondent co-signed the mortgage and was added to the deed as a joint owner. However, the payment of bills continued as before, with the applicant paying practically all direct bills associated with the Property.

[18] The respondent testified that the applicant often struggled to maintain all the payments. He testified that in 2013, she "stopped paying bills". At that point, the respondent discovered that the insurance payments were in arrears; he was very upset about this. He paid off the outstanding balance. He then discussed the possibility of splitting the home and liability portions of the insurance with the applicant, who agreed; but, he says, she did not follow through.

[19] The respondent then discovered that the mortgage was in arrears, and also paid that balance ($3,200). He next discovered that the taxes were in arrears when a Notice of Tax Sale was received.

[20] The respondent described his great displeasure at the fact that the applicant had allowed these payments to fall into arrears.

[21] The above-noted occasions were the only ones where the respondent made payments on these bills, throughout his residence at the Property.

[22] In 2013 the parties separated. However, neither party was prepared to leave the Property. They both continued to live there, albeit separately.

[23] In April 2014, the applicant attended the local RCMP detachment and reported an assault perpetrated by the respondent on her, having occurred (she claimed) in December 2013. As a result, the respondent was removed from the

Property and was placed on an undertaking, not to return. He has since obtained alternate accommodations.

[24] The respondent had the applicant charged with assault as well, in September 2014. It is notable that both charges resulted in trials, and that both the applicant and the respondent were acquitted of the charges.

[25] I also note there is an existing interim order providing the respondent with continued access to the Property. The respondent testified that this was done to allow him to continue to maintain the Property, as well as to provide a recreational space during access with his children. This is not a desirable long term situation; the parties agree that the interim Order should terminate once this decision is made.

[26] The Property was put on the market in 2013; it continues to be offered for sale. Since that time there has only been one offer to purchase this Property, that being during the summer of 2014. The offer to purchase was $370,000; the parties counteroffered $385,000, which was accepted. Following an inspection, however, the purchaser was displeased and sought to either decrease the purchase price or terminate the agreement. The applicant testified that she was prepared to discuss

this possibility, but the respondent was not. This sale fell through and there have been no other offers on the Property.

[27] The application before the court is made pursuant to the *Partition Act* R.S.N.S. 1989, c. 333 (the "*Act*") . The applicant advised the court that she is now able to refinance the mortgage on the Property, with the assistance of her new partner. She therefore seeks that the Property be "sold" to her, and that the respondent be removed from title and from the mortgage. She further asks this court to order that she be the sole beneficiary of the equity (or "net proceeds of the sale") of the Property.

Analysis

[28] The *Act* provides as follows:

> 4 All persons holding land as joint tenants, co-parceners or tenants in common, may be compelled to have such land partitioned, or to have the same sold and the proceeds of the sale distributed among the persons entitled, in the manner provided in this Act.
>
> 5 Any one or more of the persons so holding land may bring an action in the Trial Division of the Supreme Court for a partition of the same, or for a sale thereof, and a distribution of the proceeds among the persons entitled.
>
> 28 (1) Where
>
> the land, or any part thereof, cannot be divided without prejudice to the parties entitled; or

> any party is, by reason of infancy, insanity or absence from the Province, prevented from accepting such land, or part thereof, incapable of division under this Act,
>
> the court or a judge may order that such land shall be sold after such notice and in such manner as the Court or judge directs, and that the net proceeds of such sale shall be divided among the parties entitled.

[29] Clearly the status quo is unacceptable. The parties are no longer in a common-law relationship and it would be inappropriate for this Property to continue to be jointly owned.

[30] The parties agree that partition would not be appropriate, for the same reasons as described by the court in *Roach v. MacNeil* 2014 NSSC 112. I agree. This leaves the option of the sale of the Property, as per ss. 5 and 28 of the *Act*.

[31] The Property has been for sale since 2013. Absent one accepted offer which subsequently failed, no offers have been made on the Property. This is a property with some unusual features, affecting the number of people who might be interested in such a property.

[32] I find that the *Act* permits the relief sought by the applicant, inasmuch as the Property would be "sold" to her. The respondent agrees that this is an appropriate solution, assuming the applicant can obtain sufficient financing. However, the respondent strongly disputes that the applicant should become the sole beneficiary of the "proceeds of the sale", i.e. equity, in the Property.

[33] As matters stand, the parties are joint tenants on title. It is correctly acknowledged by the parties this raises a presumption that the parties should share equally in the equity in the home (see *Primeau v. Richards* 2004 NSSF 86; *MacDonald v. Jollymore* 2006 NSSC 152). As noted by the Court in *Soubliere v. MacDonald* 2011 NSSC 98:

> The presumption of equal sharing arises from the fact that the parties elected to take title to the property as joint tenants. The presumption does not arise from how the purchase was financed or how improvements to the property were made. (p. 23)

[34] This presumption is, however, "subject to certain equities", and can be rebutted. The onus lies upon the applicant here, to show why the presumption should be rebutted, and why she and the respondent should not share equally in the proceeds.

[35] The applicant submits that the respondent should not receive any share of the equity of this Property, given that (in her submission) he did not materially contribute to the Property. The respondent, on the other hand, submits that he did materially contribute, and that he is a joint owner; for both of those reasons he should be provided his share of the equity of this Property.

[36] Interestingly, the respondent also disagrees with an equal division of the equity in the Property. He believes that his share should be in an amount greater

than 50 percent. During submissions, he suggested that he be granted two thirds of the equity.

[37] There is precedent for an unequal division of proceeds following a *Partition Act* sale. In *Finanders v. Finanders* 2005 NSSC 145, the parties held land as joint tenants. They had purchased it by contributing equally to the price. A seasonal dwelling was built by one party (defendant), with the other party (plaintiff) contributing labour and materials. Costs such as taxes and insurance were shared. A dispute arose and one party sought sale of the land and a determination of the share of each party.

[38] The court agreed that a sale was appropriate. In determining the share to which each was entitled, the court considered the facts of each party's involvement and their contribution to the property. Firstly, each party had contributed one-half of the original cost. The plaintiff was not entitled to any credit for the labour he had contributed, as it was done on a volunteer basis without an expectation of compensation. Since 1996, the property had been occupied exclusively by the Defendant, and he had paid the property taxes. This offset any possible claim for occupation rent by the plaintiff. Having regard to all the circumstances of the case, the court determined that the property should be sold and that the net proceeds should be divided 75 percent to the defendant and 25 percent to the plaintiff.

[39] Of course, the *Finanders* case did not deal with common-law spouses, but rather two brothers who happened to jointly own a cottage property.

[40] I have also reviewed the cases of *Muise v. Fox* 2013 NSSC 349; and *Roach v. McNeil* 2014 NSSC 112, which were provided to me by the applicant's counsel.

[41] The caselaw I have reviewed leads me to the conclusion that a *Partition Act* application, in the family law context, requires a recognition of certain realities. When people live together as spouses, they direct their energies and financial means in different ways, all of which is valued, but difficult to measure. In *Soubliere v. MacDonald* 2011 NSSC 98 the court stated:

> [25] Mr. McDonald seeks credit for a number of expenditures or contributions made prior to the parties' separation and his exclusive use of the home. He asks that I credit him for the down payment, the payments he made on the mortgage and taxes prior to the couple's separation and for the work he did on the home while the couple lived together.
>
> [26] Mr. McDonald offers no authority for the claim that pre-separation payments and contributions should be considered in the context of determining the equities of an equal division. I've been unable to locate any case where such a claim is allowed…
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> …
>
> [30] In *Anderson v. Wilson* (1986) 73 N.S.R. (2d) 1 (T.D.), the parties built their own home, contracting out the electrical, plumbing and drywall work. At paragraph 10, Justice Grant described the situation as one where " A great deal of work was done by [Mr. Wilson] and [Ms. Anderson] did interior painting, the ceramic tiling, helped put in insulation, make curtains and generally contributed as much as she could." Justice Grant did "not consider it to be a situation where one measures the contribution of one against the other in such a relationship" according to paragraph 13. He also said that "[A]s is frequently the case in a marital relationship, one may be directing his or her energy in one direction and the other directly an equal amount of energy and time in another aspect of their

> relationship." As in this case, in *Anderson v. Wilson* (1986) 73 N.S.R. (2d) 1 (T.D.), one party took care of the household, enabling the other to work on the house. Following Justice Grant's example, I decline to weigh each party's contribution. Each contributed as he or she was able.

[42] In my view, however, the analysis does not end there. While it is true that a *Partition Act* application, in the case of jointly held real property, presumes a 50-50 division, so does a *Matrimonial Property Act* division. Both presumptions are rebuttable. In the case of the *MPA* division, the law provides a list of considerations for the court in making an unequal division (section 13). Courts will award an unequal division in cases where the circumstances merit (for example, *Boulet v. Rushton* [2014] NSSC 75).

[43] I acknowledge that there are no such legislated considerations in the case of a *Partition Act* division. Having said that, I do not understand the common law to completely prohibit considerations of each person's contributions, simply because parties held joint property as common-law spouses (see *Caines v. Caines* [2013] N.J. No. 442; *Guiomar v. Prevost* [2009] B.C.J. No. 479).

[44] I distinguish the reasoning in both *Anderson* and *Soubliere*. In those cases, the court concluded that each party had contributed "as he or she was able". As a result, a detailed weighing of each party's contribution would not have been appropriate. In the case before me, I am unconvinced that the respondent contributed "as he was able".

[45] The respondent, despite having an income over three times that of the applicant, did not contribute to the mortgage, the taxes, the utility payments, or the insurance (with the exception of the few occasions I noted above). I also find, based on the evidence before me, that he did not contribute any significant childcare, or care of the household, in lieu of any such payments.

[46] Certain aspects of the respondent's evidence were not credible. The respondent testified, for example, that "when the children came, he felt their priorities should shift towards the children", and that the applicant did not share that view. This is not a credible statement, when one considers that the applicant was mainly responsible for child care. The respondent provided very little child care, by his own evidence, when his children were younger. Their birth does not appear to have changed his lifestyle in any significant way. When the applicant was not present, often a babysitter was required, even if the respondent was home or otherwise on the Property.

[47] Frankly, I find that the respondent's evidence is remarkable for its keen lack of generosity toward the applicant during their relationship, and after their breakup. During this hearing, the respondent expressed no difficulty or discomfort with the fact that the applicant was essentially responsible for the bills of their day-to-day

living, despite her low income (and his high income). In the respondent's view, this was their agreement, and therefore it was/is acceptable.

[48] In his evidence, the respondent quite casually described the applicant's struggles in meeting all of these bills; according to him, this was a significant failing on her part. He described his anger and dismay when bills were not paid by the applicant, and described his payment of those bills as a generous act on his part. He does not appear, even in retrospect, to accept any suggestion that this arrangement was unfair or inappropriate. He insists that his contributions were generous.

[49] Notably, after separation, the respondent surreptitiously took the vehicle the applicant was driving, thereby leaving her stranded. This strikes me, to say the least, as remarkably unkind. This action left the applicant without a vehicle; she being the mother of two small children.

[50] In light of all of the circumstances, I do not accept the respondent's evidence that he was generous with his time and money during the parties' relationship.

[51] Having said that, I do accept that the respondent did work on this Property, and thereby contributed to its maintenance. I do not share the respondent's belief that his contribution was overly substantial.

[52] Certain aspects, frankly, were of negligible value, except perhaps as entertainment for the respondent (the cutting and maintenance of four wheeler trails, for example). Others, such as cutting grass and plowing snow, were certainly helpful, but they represent a small portion of general maintenance needed on any property. They are more than offset by the fact that the respondent was living rent-free.

[53] The respondent's maintenance and financing of the vehicles, including a number of farm vehicles, was a contribution. However, this contribution is somewhat limited by the fact that the respondent clearly considered these vehicles his property. Since separation, the respondent took all vehicles from the Property and has sold them, and kept all proceeds for himself. I accept the applicant's evidence that she was required to obtain permission from the respondent to make use of these vehicles. In my view this follows logically from such a clear demonstration that these vehicles were his.

[54] I also accept that money was spent by the respondent on this Property. It is impossible to know how much, given that very little was produced in the form of receipts. I also note the applicant's testimony that she would be required to repay the respondent for any money he spent on the Property; again, very little evidence was produced in support of this. Even if this were true, the respondent would still

have contributed by making the original payments. My conclusion with respect to this evidence is that, either way, the respondent did spend some money on this Property, and should receive some credit for that.

[55] The fact that the respondent co-signed the refinancing in 2011 is of value, as his credit was thereby risked. In the submission of the respondent, and I agree, his involvement did allow the applicant to continue her lifestyle and her business at this Property.

[56] I do not accept that the respondent maintained the home on the Property to any significant extent. The applicant states that he did not. This is corroborated by the photographs taken by the home inspector in 2014. They show a property in significant need of repair.

[57] The respondent paid practically nothing in living expenses during the entire period that he resided with the applicant. I recognize that this is not unusual. Very often, one party to a relationship takes on the lions' share of the financial responsibilities, while the other party takes on other responsibilities: child care, care of the home, or care of other responsibilities. Both parties' contributions are valuable and necessary for the functioning of the family.

[58] However, that is not the situation in the case at bar. The applicant took on the bulk of the expenses, but also took on other responsibilities, such as child care. The respondent's contributions, while acknowledged, in my view are not comparable. Again, I consider the context of the respondent's income being over three times the applicant's income.

[59] It is my conclusion that, given all of the circumstances, the applicant has displaced the presumption of an equal division of the equity in this Property. Such a division, in my view, would not be an equitable result in this particular case, and would result in an unjust enrichment to the respondent (*Kerr v. Baranow* [2011] S.C.J. No. 10).

[60] I must now determine what division would be appropriate.

[61] There is no appraisal of the Property before me. However, I accept that there is evidence which allows me to make a determination, for the purposes of this application, as to the value of the Property.

[62] This Property has been on the market since 2013. The listing price appears to originally have been $395,000. One offer was obtained in May 2014 of $370,000; a counter offer was accepted in the amount of $385,000; however, following inspection of the Property, the buyer sought to reduce the price or

discontinue the sale. These numbers appear to give us a quite reasonable assessment as to value.

[63] The applicant submits that the Property is worth somewhere between $370,000 - $385,000. The respondent states that the Property should be valued at the upper range of $385,000. I see no reason that the upper or lower range should be chosen. I have split the difference and find it is reasonable to value the Property in the amount of $377,500.

[64] The parties agreed, as a fact, that the present amount of the mortgage stands at $254,124.

[65] In relation to the deduction for real estate agent commission, it has long been held that real estate commissions are factored into calculations of division of property. I see no reason to deviate from that practice here. I will deduct 5 percent plus HST from the value of $377,500, for a deduction of $21,706.

[66] I will also allow the legal fees of $1,000.

[67] I therefore find that the equity in the property, for the purposes of this application, is in the amount of $100,670.

[68] As previously noted, the applicant submits that she should be awarded the entire equity in the Property, with no set off to be paid to the respondent. The respondent disagrees, and suggests that an award to his benefit of two thirds of the equity would be appropriate, given his contributions. I disagree with both submissions.

[69] It must be acknowledged that this decision cannot possibly be made with mathematical precision. My goal is not to assess each dollar or hour spent, but rather to assess the situation globally in order to find an equitable division. Having regard to all the circumstances as I have already described, I find that it is appropriate that the respondent receive 30 percent of the remaining equity. This would result in a payment to the respondent of $30,200.

[70] The respondent raised during his submissions, (and without notice to the applicant) the issue of occupation rent. Following the physical separation of the parties in April 2014, the applicant has continued to live at the Property, and has continued to pay the bills associated with the Property. In my view, any possible claim for occupation rent is completely offset by the fact that mortgage and property tax payments continued to be made exclusively by the applicant post-separation.

Conclusion

[71] I thereby order as follows:

1. The Property will be "sold" to the applicant, Terri Olivia Braithwaite; this presumes that the applicant can refinance the Property to permit the respondent being removed from any and all mortgage, debt or obligation in respect of the Property; this order is conditional upon this provision being met;

2. The applicant shall pay to the respondent the sum of $30,200;

3. The respondent shall sign any and all documentation as is required to effect transfer of the title to the applicant;

4. Until the applicant successfully arranges for refinancing as referred to in #2 hereinabove, the Property shall remain for sale with a realtor;

5. Upon the other provisions of this Order being complied with, the interim Order (allowing access by the respondent to the Property) shall be vacated.

[72] I should note that the respondent, during submissions, mentioned that he sought the return of certain items of personal property. I do not know what those

items are, nor do I know the background of those items. I decline to make any order at this time in relation to personal property.

[73] Applicant's counsel shall prepare the order.

Boudreau, J.