IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: Harrington v. Coombs, 2011 NSSC 34

Date: 2011 01 28
Docket: SFHPA-071113
Registry: Halifax

Between:

Bradley Harrington

Applicant

v.

Laurie Coombs

Respondent

Judge:	The Honourable Justice Leslie J. Dellapinna
Heard:	January 14, 2011, in Halifax, Nova Scotia
Counsel:	C. Robinson counsel for the Applicant J. Beeler, Q.C. counsel for the Respondent

By the Court:

[1] This decision results from two applicants brought before the Court. The Applicant, Bradley Harrington, applied pursuant to the ***Partition Act*** R.S.N.S. 1989, c. 333 for an order requiring the sale of a property jointly owned by the parties and the distribution of the proceeds from that sale between the parties. He also pleaded for an unequal division of the equity in the parties' property "based on equitably principles of unjust enrichment, resulting trust and/or constructive trust".

[2] The Respondent applied pursuant to the ***Maintenance and Custody Act*** R.S.N.S. 1989, c. 160 for an order relating to the care of the parties' two children, child maintenance, spousal maintenance and exclusive occupation of the family residence. She also requested a division of the Applicant's pension benefits and a division of their property "based on equitable principles of unjust enrichment".

[3] At the commencement of the hearing the Court was advised that the parties agreed that they would share joint custody of their children with the children residing the majority of the time with the Respondent but the Applicant would have generous parenting time with them as well. The Applicant agreed to pay to the Respondent the table amount of child maintenance in the sum of $1,036.00 per month based on an anticipated income of $74,280.00 per annum and he also agreed to pay 70% of the child care costs. They were unable to agree on the division of their assets.

[4] The Applicant continues to seek the sale of the family home but is prepared to give the Respondent some time to arrange the necessary financing to buy out his interest. The Respondent wants to keep the home for herself and the children and has made arrangements to assume the existing mortgage and have the Applicant's name removed from the covenants. She does not believe that he is entitled to any further share in the equity. She also seeks an order for spousal maintenance.

[5] The parties were the only witnesses at the trial although the Applicant did offer a real estate appraisal report which was not challenged by the Respondent.

BACKGROUND FACTS

[6] The parties met and began dating in December of 2001. The Applicant was (and is) a member of the Canadian Forces.

[7] Soon after the parties met the Applicant was deployed to the Persian Gulf for six months during which the parties continued their relationship via e-mail and satellite calls.

[8] In February 2003 the Applicant learned that he was being deployed to the Gulf once again. That deployment was to last five months. After being told of his deployment he was given ten days to put his affairs into order.

[9] According to the Respondent's affidavit she told the Applicant that if he wanted to move forward with their relationship she wanted some kind of commitment. She said: " I was not prepared to sit in my apartment for six months without a commitment."

[10] The Respondent said in her affidavit that the Applicant asked her to move in with him. The Respondent disputes her version of those events and said that she told him: "if I don't move into your house with you the relationship is over." - or words to that effect, to which he replied: "If you are so bound and determined to live with me, you won't mind signing a co-habitation agreement."

[11] The Respondent acknowledged that the Applicant had his own house at the time and he wanted to protect the equity he had built up in the property. She said in her first affidavit "I had no intention of making a claim for an interest in his house".

[12] The Applicant made arrangements with his lawyer to have a cohabitation agreement prepared. The Respondent accompanied the Applicant to his lawyer's office prior to his deployment where she was given a copy of the agreement.

[13] During her cross-examination the Respondent acknowledged that she was given an opportunity to read it and she did. She also acknowledged that the Applicant's lawyer offered her an opportunity to consult with her own lawyer but she declined to do so. In paragraph 20 of her initial affidavit the Respondent said "It seemed fair. I signed it" That was February 21, 2003.

[14] At approximately the same time the Respondent's current rental arrangements were coming to an end. She had been sharing rental accommodation with two others who were not prepared to continue the same arrangement. If she did not move in with the Applicant she would have had to find her own rental accommodations. At the time she worked part-time for Superior Propane earning approximately $18,000.00 a year and she was taking university courses on a part-time basis.

[15] After signing the agreement the Respondent moved into the Applicant's home where she was able to live rent free. The Applicant went to the Persian Gulf. He returned in July of that year.

[16] I do not intend to repeat all the terms of the cohabitation agreement. It does however contemplate being considered a marriage contract within the meaning of section 23 of the ***Matrimonial Property Act,*** R.S.N.S. 1989, c. 275 in the event that the parties married. The "home" to which the agreement refers was defined as the home that the Applicant owned at that time (which has since been sold) and it says "The parties desire to settle by Agreement their financial responsibilities during cohabitation and during marriage and upon their legal separation, divorce, and death."

[17] It also says that the parties intend to remain self-sufficient and independent during their cohabitation and upon their separation.

[18] The Agreement contains a waiver of spousal maintenance and provides that each was to be responsible for their own personal expenses during their cohabitation.

[19] Regarding their assets, the Agreement says the Applicant will "assume sole responsibility for all expenses related to the operation of the household" including the mortgage, taxes and utility payments, and provides that in the event of their separation each would continue to be the sole owner of :

1. Their respective motor vehicles,
2. Registered Retirement Savings Plans,
3. Employment pension and pension benefits,
4. Furniture or personal property brought into the relationship,

5. Inheritances,
6. Lottery winnings,
7. Bank accounts,
8. Securities,
9. Investments,
10. Business assets, and
11. All other assets in each of their respective names at the time of their separation, whether acquired prior to the Agreement or subsequent to the Agreement.

[20] Each of the parties were to be responsible for the debts in their own name.

[21] During the parties' cohabitation they had two children. Their first son, Ethan, was born on April 28, 2005. Their second, Andrew, was born on April 26, 2006. They are now five and four years of age respectively.

[22] In February 2005, a few months prior to the birth of their first child, the Applicant asked his superiors for a transfer to Ottawa. He sought an in-land posting so that he would not be deployed. In that way he would be available to assist the Respondent when their baby was born.

[23] His request for a transfer was approved and in May 2005, the month following their son's birth, the parties went to Ottawa to buy a new home. In August 2005 the family moved.

[24] Their relocation necessitated the sale of the Applicant's home. After selling his house in Nova Scotia the majority of the net equity was used to pay off consumer debt that the Applicant had incurred but approximately $20,000.00 was used as a down payment on the new home in Ottawa.

[25] Although the move to Ottawa required the Respondent to leave her university courses in Halifax she was able to resume her studies at Carleton University in Ottawa. She said her courses were offered on-line so that she could study at home and care for their son.

[26] After learning that they were expecting a second child the parties moved back to Nova Scotia in February 2006. In clause 43 of her first affidavit the

Respondent said: “[The Applicant] wanted to move back to Halifax to be closer to my family so that I would have a better support system.”

[27] The house in Ottawa was sold at a loss but that loss was covered by the military so that the Applicant was again able to put a $20,000.00 down payment on their current home in Dartmouth. The balance of the purchase price was covered with a mortgage. Title to the property is in the names of both parties as joint tenants.

[28] When Andrew was born the Applicant took parental leave from his employment so that he could be home with the Respondent to help her with their two young children. He remained on leave until he had to return to work on January 12, 2007.

[29] In the summer following their return to Dartmouth the Respondent resumed taking courses at St. Mary’s University in Halifax. In March of 2007 she was diagnosed with post-partum depression for which she took medication for approximately nine months. She did not work outside of the home from May 2005 until October 2008.

[30] In October 2008 the Respondent accepted her current position as a Halifax Regional Police Dispatch/911 operator for which she is now paid approximately $36,000.00 per year. It is a part-time position. She anticipates being given a full-time position sometime this year and would then earn approximately $49,500.00 per year plus overtime - which will be required.

[31] The parties separated in mid-November in 2009 when the Applicant moved from the home. After their separation the Application continued to pay the mortgage, the power and the house and car insurance. More recently he agreed to pay the table amount of child maintenance and the Respondent assumed responsibility for the household expenses.

[32] The Respondent wants to stay in the home. The children are used to living there and their regular babysitter lives just doors away. There is also room in the house for the Respondent’s parents when they visit from time to time.

[33] The Applicant is not opposed to the Respondent staying in the house so long as he receives his share of the equity.

ISSUES

[34] Counsel raised a number of issues. I narrowed them to the following:

1. Is the parties' cohabitation agreement enforceable or should it be set aside?

2. Should the parties' home be sold pursuant to the provisions of the **Partition Act**?

3. Is the Respondent entitled to a portion of the Applicant's pension?

4. Is there merit to either of the parties' claims for unjust enrichment and if so how should that be remedied?

5. Is the Respondent entitled to spousal maintenance either in periodic or lump sum form?

DISCUSSION

Is the parties' Co-habitation Agreement enforceable or should it be set aside?

[35] On behalf of the Respondent the Court was urged to set aside the parties' cohabitation agreement because there have been "radical" changes in the circumstances of both parties to such a degree that the agreement should no longer apply. It was also submitted that the agreement should be set aside because it is unconscionable and because the Applicant unduly influenced the Respondent.

[36] It was the Respondent's submission that because the circumstances of the parties changed between 2003 and their separation in 2009 that their contract has become frustrated and that it would be unjust to hold the parties to the literal provisions of their agreement. She referred in particular to the birth of the parties' children and also to the fact that the parties changed homes twice since 2003.

[37] I disagree. It is not unusual for circumstances to change during the course of a relationship. Indeed, changes generally do occur. Cohabitation agreements and marriage contracts contemplate circumstances changing. It is for that reason that they usually define the rights of the parties during the course of their relationship and also in the event that their relationship changes for the worse and the parties separate. Such contracts often contemplate not only separation or divorce but also death.

[38] The existence of a cohabitation agreement could be said to provide an advantage to those couples who have them over those who don't. Couples who have such an agreement at least understand the ground rules. Before they purchase an asset or incur a debt or change employment or relocate they know from the wording of their agreement what are likely to be the consequences in the event of a separation. They have chosen the consequences for themselves.

[39] While the circumstances of the parties did change over the course of their six year and nine month period of cohabitation there was nothing about those changes in and of themselves that would render adherence to their cohabitation agreement impossible, unfair or unjust. The agreement appears to have been fair when the parties signed it - even the Respondent thought that - and nothing about their current circumstances has changed that.

[40] Arguably the most significant change in the circumstances of the parties since 2003 was the birth of their two children. Their cohabitation agreement makes no reference to custody, access or child maintenance. It was acknowledged that children were not contemplated when the agreement was signed. The omission of any reference to the children in the agreement does not, in my view, render the agreement invalid. Any such provisions are usually of limited enforceability in any event. To the parties' credit they have agreed on the terms of the care arrangements for the children as well as their financial support.

[41] Therefore, I cannot conclude that the changes in the parties' circumstances since 2003 are such that it would be unjust to hold them to their agreement.

[42] On behalf of the Respondent it was argued that the agreement is unconscionable and therefore unenforceable. The Court was referred to *Hicks v. Bird* (No. 1), (1996) 146 N.S.R. (2d.) 185 in which the Honourable Judge Dyer at paragraph 52 referred to the decision of Davison, J. in *Zimmer v. Zimmer* (1988),

90 N.S.R. (2d.) 243 (T.D.) who in turn referred to the decision of Hallett, J. (as he then was) in the unreported decision of *Crouse v. Crouse* (1201-37061 - December 20, 1988) where he said:

> "To succeed on the ground that the bargain was unconscionable, the petitioner must show that there was inequality in the position of the parties arising out of ignorance, need or duress, which left her in the power of her husband and, secondly, that the bargain she reached was substantially unfair to her."

[43] Counsel also referred to the decision of *Campbell v. Campbell*, [1990] 83 Nfld. & P.E.I.R. 340.

[44] To succeed on this ground the Respondent must satisfy the Court that there was an imbalance in the relationship between the parties which left her under the power or control of the Applicant when she signed the agreement such that the Court should not now allow the agreement to stand because the negotiation process was so flawed.

[45] The evidence does not support the Respondent's position. It was the Respondent who presented the Applicant with an ultimatum. She wanted a commitment from him. He was willing to continue dating as they had during the two previous years. However, he was prepared to allow her to move into his house but on the condition that she sign a cohabitation agreement that protected his assets from future claims. She agreed to that condition.

[46] She read the agreement and she had the chance to consult with her own lawyer. She decided not to. The Applicant had his priorities, the Respondent had hers.

[47] There is no evidence that convinces me that there was an inequality in the positions of the parties or that the Respondent was in any way "in the power" of the Applicant. The Respondent freely made her own choices.

[48] Finally it was argued that the agreement is unenforceable because of "undue influence". Again the Respondent referred to *Campbell v. Campbell* (*supra*) where at paragraph 33 Justice Barry stated:

> "Undue influence has been defined as "some unfair and improper conduct, some coercion from outside, some over reaching, some form of cheating, and generally though not always some personal advantage obtained by (the guilty party)"....
>
> Any improper use by one contracting party of any form of oppression, coercion, compulsion or abuse of power or authority for the purchase (sic) of obtaining the consent of the other party may result in avoidance of the resulting contract on the ground of undue influence."

[49] In the Respondent's brief it is said:

> "the respondent was in the desperate position of either looking for a new apartment on short notice or hastily signing an agreement in order to move in with the applicant. She chose the latter. The respondent submits that the pressure of the situation prevented her from exercising independent judgement when entering into the agreement."

[50] Any pressure that the Respondent may have felt at the time was self-imposed. As I said earlier, it was she who presented the Applicant with the ultimatum, not the other way around. She chose the timing of her ultimatum knowing full well that the Applicant was being deployed the following week. There was no evidence of improper conduct on the part of the Applicant or of coercion, compulsion, abuse of power or any form of cheating.

[51] It was also argued that the Respondent gained nothing from the agreement. That is not the case. The Respondent gained very inexpensive housing - particularly in the first five months of the parties' cohabitation. Because she only had to contribute to her personal expenses she benefited, at least indirectly, from the Applicant's greater contribution to the household expenses. Their living arrangement enabled the Respondent to work only part-time (and for a time, not at all) and to continue her studies.

[52] The Respondent has not convinced me that there is any ground to set aside the cohabitation agreement. It shall therefore be enforced subject to the comments that follow.

Should the parties' home be sold pursuant to the provisions of the Partition Act?

[53] The Partition Act provides in part 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.
>
> ...
>
> 17 If the defendant fails to appear or to deliver a defence, or if, after a trial, it appears that partition should be made, the Court or a judge shall make an order for the partition of the land, which shall specify the persons entitled to share in the partition ordered and the share to which each is respectively entitled.
>
> ...
>
> 28 (1) Where
>
> (a) the land, or any part thereof, cannot be divided without prejudice to the parties entitled; or
>
> (b) 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.

[54] I am satisfied that this is an appropriate case for the sale of the parties' property located in Dartmouth (Cole Harbour), but before the property is listed for sale the Respondent will be given a reasonable opportunity to arrange financing, should she so wish, in order that she may retain sole title to the property. Further details are provided later in this decision.

Is the Respondent entitled to a portion of the Applicant's pension? and
Is there merit to either of the parties' claims for unjust enrichment and if so how should that be remedied?

[55] The question of whether the Respondent is entitled to any portion of the Applicant's pension benefits appears to be answered by the terms of the parties' cohabitation agreement which provides that in the event of a separation the parties would each continue to be the sole owner of their respective employment pensions and pension benefits whether acquired prior to or subsequent to the agreement. I find therefore that she is not entitled to any portion of the Applicant's pension or pension benefits.

[56] If the cohabitation agreement did not exist or if I had it set aside I would look first to the provisions of the ***Pension Benefits Division Act***, S.C. 1992, c. 46, Sch. II which provide in part as follows:

> 2. In this Act,
> "agreement" means any agreement referred to in subparagraph 4(2)(b)(ii);
>
> ...
>
> "common-law partner" means a person who establishes that the person is cohabiting with a member of a pension plan in relationship of a conjugal nature, having so cohabited for a period of at least one year;
>
> "court order" means an order referred to in paragraph 4 (2)(a) or subparagraph 4(2)(b)(I);
>
> "member", in relationship to a pension plan, means a person who is or may be entitled to a pension benefit under that pension plan by reason of
>
> > (a) the person ceasing or having ceased to be employed, to hold an office, to be a member of the Senate or House of Commons or to serve in the Canadian Forces or the Royal Canadian Mounted Police, or
> >
> > (b) any other prescribed circumstances;
>
> ...
>
> "pension plan" means
> > (a) a superannuation or pension plan provided by....
> >
> > (ii) the ***Canadian Forces Superannuation Act***
>
> ...
>
> 4. (1) A member of a pension plan or a spouse, former spouse or former common-law partner of a member may, in the circumstances described in subsection (2), apply to the Minister to divide the members pension benefits between the member and the spouse, former spouse or former common-law partner.

> (2) The circumstances in which an application may be made are:
>
> > (a) where a court in Canada of competent jurisdiction, in proceedings in relation to divorce, annulment of marriage or separation, makes an order that provides for the pension benefits to be divided between the member and the spouse, former spouse or former common-law partner; or
> >
> > (b) where the member and the spouse, former spouse or former common-law partner are living separate and apart, having lived separate and apart for a period of at least one year and, either before or after they commenced to live separate and apart,
> >
> > (i) a court in Canada of competent jurisdiction makes an order that provides for the pension benefits to be divided between them, or
> >
> > (ii) the member and the spouse, former spouse or former common-law partner have entered into a written agreement that provides for the pension benefits to be divided between them.

[57] Whereas the parties do not have an agreement which provides for the pension benefits to be divided between them the Respondent requires an order of a court in Canada of competent jurisdiction that provides that the pension benefits are to be divided between them.

[58] I am satisfied that the Respondent was the common-law partner of the Applicant for the purposes of the ***Act***. Also, the Supreme Court of Nova Scotia (Family Division) has jurisdiction to deal with applications of this nature for a division of pension benefits between common-law partners. However, the ***Pension Benefits Division Act*** like the ***Pension Benefits Act***, R.S.N.S. 1989, c 340 provides no more than a mechanism for the division of pension benefits. The Statute does not deal with entitlement. As I said in *Brownie v. Hoganson* 2005 NSSC 314 at paragraph 18:

> "When the parties are spouses (as opposed to common-law partners) the Court is to determine entitlement guided by the principles contained in the ***Matrimonial Property Act***, R.S.N.S. 1989, c. 275.... When the parties are common-law partners the

> ***Matrimonial Property Act*** has no application and the non-member partner must therefore look elsewhere to establish entitlement."

See also *Morash v. Morash*, 2004 NSCA 20.

[59] In the Supreme Court of Canada decision *Walsh v. Bona* 2002 SCC 83, 32 R.F.L. (5th) 81 Bastarache, J. wrote, beginning at paragraph 46:

> 46 [The Matrimonial Property Act] created a regime of "deferred sharing", replacing the regime of absolute separate property. The new legislative scheme deems married persons to have agreed to an economic partnership wherein both pecuniary and non-pecuniary contributions to the marriage partnership are considered to be of equal worth. The *MPA* provides *inter alia* that property acquired by each spouse before and during the marriage constitutes a pool of assets, which may be divided, regardless of title, in equal shares upon marriage breakdown, divorce or death of either spouse."
>
> ...

[60] That compares to the situation of common-law partners described by Bastarache, J. at paragraphs 49 and 50:

> 49 "Unmarried cohabitants, on the other hand, maintain their respective proprietary rights and interests throughout the duration of their relationship and at its end. These couples are free to marry, enter into domestic contracts, to own property jointly. In short, if they so choose, they are able to access all the benefits extended to married couples under the *MPA*.
>
> ...
>
> The general principle is that, without taking some unequivocal consentual action, these cohabiting persons maintain the right to deal with any and all of their property as they see fit.
>
> 50 The *MPA*, then, can be viewed as creating a shared property regime that is tailored to persons who have taken a mutual positive step to invoke it. Conversely, it excluded from its ambit those persons who have not taken such a step. This requirement of consensus, be it through marriage or registration of a domestic partnership, enhances rather than diminishes respect for the

> autonomy and self-determination of unmarried cohabitants and their ability to live in relationships of their own design....
>
> ...

[61] And then at paragraph 54 Bastarache said as follows:

> I cannot accept that the decision to live together, without more, is sufficient to indicate a positive intention to contribute to and share in each other's assets and liabilities. It may very well be true that some, if not many, unmarried cohabitants have agreed as between themselves to live as economic partners for the duration of their relationship. Indeed, the factual circumstances of the parties' relationship bear this out. It does not necessarily follow, however, that these same persons would agree to restrict their ability to deal with their own property during their relationship or to share in all of the other's assets and liabilities following the end of the relationship."

[62] Bastarache, J. went on to say that couples who have not made arrangements regarding their property at the outset of their relationship may address any inequities that may arise at the time of their separation through the application of common law principles such as constructive trust.

[63] On behalf of the Respondent it was argued that in the event that the agreement is set aside she is entitled to a division of the Applicant's pension benefits based on unjust enrichment.

[64] Counsel for both parties seem to agree on the law of unjust enrichment and both have referred me to a number of cases. A concise summary of the law is found in the Court of Appeal's decision in *Snow v. March*, 2004 NSCA 155 in paragraphs 8 and 9:

> "8 The law of unjust enrichment and the related remedy of constructive trust, as applied to marital and marriage-like relationships, has been developed in a series of cases including *Rathwell v. Rathwell*, [1978] 2 S.C.R. 436 (S.C.C.), *Beckert v. Pettkus*, [1980] 2 S.C.R. 834 (S.C.C.), *Sorochan v. Sorochan*, [1986] 2 S.C.R. 38 (S.C.C.) and *Rawluk v. Rawluk*, [1990] 1 S.C.R. 70 (S.C.C.). In *Peter v. Beblow*, [1993] 1 S.C.R. 980 (S.C.C.), in concurring opinions, the majority by McLachlin, J. (as she then was) and the minority by Cory, J., the Court summarized

> the test for unjust enrichment and constructive trust (per MacLachlin, J.) at p. 987:
>
> The basic notions are simple enough. An action for unjust enrichment arises when three elements are satisfied: (1) an enrichment; (2) a corresponding deprivation; and (3) the absence of a juristic reason for the enrichment...
>
> 9 The establishment of unjust enrichment can give rise to a monetary judgment or a recognition of an interest in property through the vehicle of constructive trust. A constructive trust generally "...arises, where monetary damages are inadequate and where there is a link between the contribution that founds the action and the property in which the constructive trust is claimed.." (per McLachlin, J., *Peter v. Beblow*, above, at p. 988)."

[65] On behalf of the Respondent it was submitted that the Respondent indirectly contributed to the Applicant's pension by abandoning her schooling and work when the Applicant unilaterally decided to move the family to Ottawa and because she "sacrificed her education to raise the two children". It was also argued that her performance of household responsibilities of cooking and cleaning without remuneration resulted in the Applicant being enriched.

[66] I do not agree with the Respondent's argument. The parties' living arrangement provided the Respondent with a home to which she contributed less than the Applicant. Any housekeeping chores that she performed such as cooking and cleaning were offset by the benefit that she received in occupying the home with most of the couples' expenses paid by the Applicant. The Applicant was the primary income earner during the entire period of the parties' cohabitation and was the sole income earner (excluding E.I., Child Tax Benefit and Universal Child Care Benefits) from May 2005 until October 2008.

[67] As for the parties' move to Ottawa, that was made with the Respondent's consent. She accompanied the Applicant to Ottawa to locate a new home prior to their eventual transfer. The move was requested and was designed to benefit the Respondent by insulating the Applicant from any further overseas deployments. That was done so that he could assist the Respondent with the care of their first child.

[68] It is not entirely accurate to say that the Respondent abandoned her schooling and her work because of the parties' move to Ottawa. Prior to their move to Ottawa she was working at the Dartmouth Boys and Girls Club in a part-time position that she had held only since the Spring of 2004. She left that job when their first child was born in April of 2005. The parties did not move to Ottawa until August 2005. By that time she was still receiving maternity benefits through Employment Insurance. Before those benefits expired she discovered, in September 2005, that she was expecting their second child. In paragraph 43 of her initial affidavit she said "...I could not return to work between the two pregnancies."

[69] When the Respondent had the parties' second child the Applicant went on parental leave for as long as he could so as to be available to assist the Respondent with the care of their children. Eventually he had to return to work after which the family benefited from his financial contribution.

[70] Approximately 11 months after their second child was born the Respondent was diagnosed with post-partum depression and because of that did not return to work outside of the home until October 2008. Until then the Applicant was the family's only employment income earner.

[71] Regarding her education, although by May 2006 the parties had two children, their care did not prevent the Respondent from continuing with her studies. In her affidavit she said: "[The Applicant] chose to take parental leave so that I could attempt to complete my degree." She then took one class at St. Mary's University in the summer of 2006 and beginning in September 2006 she began going to university full-time for the first time since the parties met. After completing the fall semester she "dropped out" in December because, according to her affidavit, she couldn't afford to continue. She did not indicate if she gave any consideration to returning to school part-time. A few months later she was diagnosed with depression.

[72] I do not accept that the Applicant was enriched to any degree or that the Respondent suffered a deprivation. To the extent that the Applicant benefited from the Respondent's contribution to the relationship, that benefit was offset by the Applicant's contribution. Consequently, I cannot find any other reason for why the Respondent should be entitled to share in the Applicant's pension benefits.

[73] Therefore, even if the parties had not signed the cohabitation agreement I would find in favour of the Applicant on this issue. I order that he retain sole ownership of his pension and pension benefits.

CONCLUSION - PROPERTY DIVISION

[74] The only reliable evidence of the value of the parties' home located at 206 Donegal Drive in Cole Harbour, Nova Scotia is an Appraisal of Real Property report prepared by Mr. Philson J. Kempton of Kempton Appraisals Limited. The Respondent offered no evidence to suggest that his report was not accurate and the Respondent did not ask to cross-examine Mr. Kempton. According to Mr. Kempton the property had a market value as of May 3, 2010 of $257,000.00.

[75] If the Respondent wishes to buy out the Applicant's interest in the property she must pay to him $24,611.25. I've calculated that payment as follows:

Value of property	$257,000.00
Less:	
Notional disposition costs:	
Real estate commission at 5%	12,850.00
HST at 15%	1,927.50
Legal fees and disbursements relating to its sale	1,000.00
Existing mortgage	192,000.00
NET EQUITY	$ 49,222.50
÷ 2	$ 24,611.25

[76] Although the Applicant originally sought an unequal division of the net equity in his favour to take into account the $20,000.00 equity that was transferred from the house that he owned in 2003 to the house in Ottawa and eventually to the house in Cole Harbour, he is now satisfied that he has received that money back through the refinancing of the mortgage which took place in 2009. In 2009 $33,584.00 was added to the mortgage and used to pay off a line of credit in the Applicant's name of approximately $20,000.00 and a Sears account of approximately $9,000.00. The Sears account was incurred for the purchase of major appliances that remain in the parties' home. The Applicant will not be getting any of those appliances. Of the line of credit approximately $3,000.00 was

used to construct fencing around the parties' home and therefore forms part of the property. The remaining $17,000.00 was the Applicant's responsibility.

[77] There was also testimony that in October 2009 the Respondent's car loan was increased from $7,800.00 to $15,000.00 in order to provide the parties with money to purchase new windows and to fix the front step. The money was not used for that purpose. It is unclear what became of most of the money but the Applicant acknowledged that he took $3,000.00 of it. He therefore has been fully compensated for the $20,000.00 down payment that he put into the home.

[78] The Respondent gave evidence that she has received a mortgage approval to take over the existing mortgage. It remains to be seen whether she will obtain approval for a mortgage that would also allow her sufficient funds to buy out the Applicant's interest. Therefore the Respondent will have six weeks from the date of this decision to obtain the necessary financing (if she so wishes) and if so to buy out the Applicant's interest. Should she fail to pay him $24,611.25 within six weeks of the date of this decision then the house will at that time be listed for sale and the parties will cooperate with each other in order to effect the sale of the property as soon as is reasonably possible.

[79] The Court will retain jurisdiction over any disputes that may occur as a result of the listing and sale of the property. Any net equity realized from the sale of the property will be divided equally between the parties. The Respondent will be responsible for any reasonable expenses associated with the house (including mortgage payments) pending its sale unless ordered otherwise. It is recognized that in the event of a sale the parties will incur a mortgage penalty of approximately $10,000.00.

Spousal Maintenance

[80] The Respondent requested lump sum spousal maintenance pursuant to the provisions of the ***Maintenance and Custody Act***. The Respondent did not hide the fact that she seeks that lump sum in order to facilitate her buy out of the Applicant's interest in their house.

[81] At first blush it might appear that the issue of spousal maintenance is resolved by the wording of the parties' cohabitation agreement which includes a mutual release of any claim either might have for spousal maintenance or support

regardless of any changes in their circumstances after the date that the agreement was signed. However, a pre-existing agreement between the parties does not oust the jurisdiction of the Court to make an order for spousal maintenance. (See *Miglin v. Miglin*, 2003 SCC 24). Also, section 52 of the ***Maintenance and Custody Act***, which provides as follows, suggests that any maintenance agreement entered by the parties will not necessarily be enforced by the Court:

> 52 (1) A judge may, with the consent of either party, register in the court an agreement entered into between the parties respecting maintenance or respecting care and custody or access and visiting privileges or any amendment made to that agreement.
>
> (2) Before registering an agreement pursuant to subsection (1), a judge may inquire into the merits of the agreement and, after giving the parties an opportunity to be heard, may vary its terms as he deems fit.
>
> (3) An agreement, including amendments registered pursuant to this Section, shall for all purposes have the effect of an order for maintenance or respecting care and custody or access and visiting privileges made under this Act.

[82] Section 4 of the ***Act*** lists factors the Court is to consider when determining whether to order spousal maintenance. It provides as follows:

> 4 In determining whether to order a person to pay maintenance to that person's spouse or common-law partner and the amount of any maintenance to be paid, the court shall consider
>
> (a) the division of function in their relationship;
>
> (b) the express or tacit agreement of the spouses or common-law partners that one will maintain the other;
>
> (c) the terms of a marriage contract or separation agreement between the spouses or common-law partners;
>
> (d) custodial arrangements made with respect to the children of the relationship;

> (e) the obligations of each spouse or common-law partner towards any children;
>
> (f) the physical or mental disability of either spouse or common-law partner;
>
> (g) the inability of a spouse or common-law partner to obtain gainful employment;
>
> (h) the contribution of a spouse or common-law partner to the education or career potential of the other;
>
> (i) the reasonable needs of the spouse or common-law partner with a right to maintenance;
>
> (j) the reasonable needs of the spouse or common-law partner obliged to pay maintenance;
>
> (k) the separate property of each spouse or common-law partner;
>
> (l) the ability to pay of the spouse or common-law partner who is obliged to pay maintenance having regard to that spouse's or common-law partner's obligation to pay child maintenance in accordance with the Guidelines;
>
> (m) the ability of the spouse or common-law partner with the right to maintenance to contribute to his own maintenance.

[83] During all of their relationship the Applicant was the primary income earner and he paid for the majority of the expenses. That is not to say that the Respondent did not contribute. She did.

[84] The parties both participated in the care of the children although the circumstances of the Respondent were such that she was home with them more than the Applicant.

[85] There was never any agreement that one party was going to maintain the other. In fact their Agreement made it clear that their intent was to keep their affairs separate. For convenience sake they had joint bank accounts and joint debts

but those joint debts appear to have been paid in large part if not entirely by the Applicant.

[86] Although the parties did not have a "marriage contract" as defined by the ***Matrimonial Property Act*** or a separation agreement, both parties understood their cohabitation agreement to be a legal document outlining their responsibilities to each other during their cohabitation and in the event of their separation. That agreement included a spousal maintenance waiver.

[87] The parties agreed on the custodial arrangements with respect to their children which sees them in the care of their mother slightly more than half of the time. The Applicant has agreed to pay the full table amount as well as his share of the childcare expenses.

[88] Neither party has a physical or mental disability and both are employed. The Respondent anticipates and hopes to be working full-time sometime during the course of this calendar year.

[89] While the Applicant did not contribute directly to the Respondent's education or career potential their living arrangement did make it possible for her to continue her studies for a time. The Respondent did not contribute to the Applicant's education or career.

[90] I have considered the Statements of Income and Expenses presented by both parties. I have also considered what I believe to be the reasonable needs of each as well as the needs of the children and how that is being addressed by the financial contribution by both parties. I note that after taking into account the parties' employment incomes, the Child Tax Benefit and the Universal Child Care Benefit received by the Respondent and the income tax consequences to both parties, that the Respondent's net income after child support actually exceeds that of the Applicant. When I factor in both of their compulsory deductions including their contributions to their respective medical plans and pension plans the gap between the two widens even further. The difference in their net disposable incomes is justified by the care arrangements for the children. Still, having considered all the factors listed in section 4 I have concluded that the Respondent is not entitled to periodic spousal maintenance and in any even the Applicant has limited means to contribute any if she was. I say this mindful of the three conceptual basis for

spousal maintenance entitlement suggested by the Supreme Court in *Moge v. Moge*, [1992] 3 S.C.R. 813 and *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420.

[91] As for lump sum maintenance the only specific and immediate need that the Respondent has for a lump sum award is the lump sum needed to cover the money that she owes the Applicant by virtue of this decision. It is not appropriate in my view to use spousal maintenance as a means to accomplish an asset division to which the Respondent is not otherwise entitled.

[92] I therefore conclude that even if I was to ignore the provisions of the parties' cohabitation agreement this is not an appropriate case to order spousal maintenance to the Respondent either in periodic or lump sum form. Her application for spousal maintenance is dismissed.

[93] I ask that counsel for the Applicant prepare the necessary order.

J.