SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: Taylor v. Wanless, 2011 NSSC 25

Date: 20110131
Docket: SFHMCA 060086
Registry: Halifax

Between:

Alexandra May Taylor

Applicant

v.

Martin Gregory Wanless

Respondent

AND

Date: 20110131
Docket: Hfx No. 309039
Registry: Halifax

Between:

Chieko Hara

Applicants

v.

Alexandra May Taylor and Martin Gregory Wanless

Respondents

Judge:	The Honourable Justice Elizabeth Jollimore
Heard:	September 27 - 28, 2010
Last Submission Received:	January 7, 2011
Counsel:	Kenzie MacKinnon on behalf of Alexandra May Taylor Martin Wanless on his own behalf Eric K. Slone on behalf of Chieko Hara

By the Court:

Introduction:

[1] When Alex Taylor and Martin Wanless ended their common law relationship in the spring of 2008, their home and finances disintegrated with predictable impact on them and their children. The impact was felt beyond the immediate family: Chieko Hara, Mr. Wanless' mother, lived with the family and she had dedicated her life's savings to the home where she, her son, her grandchildren and Ms. Taylor all lived.

[2] Two separate legal actions began after the couple separated. In the Family Division, Ms. Taylor made a claim under the *Partition Act*, R.S.N.S. 1989, c. 333, asking for the partition or sale of the couple's home. In the Supreme Court, Ms. Hara claimed various relief relating to her financial contribution to the home. With the consent of all the parties, I was directed by Chief Justice Kennedy to hear Ms. Hara's claims and they were heard at the same time as the claim by Ms. Taylor against Mr. Wanless.

Circumstances giving rise to the claims

[3] When Alex Taylor and Martin Wanless began their relationship, Ms. Taylor owned her own home in Dartmouth. She began to live with Mr. Wanless in 2001, living in Mr. Wanless' apartment while they built a home in Clayton Park. Ms. Taylor says she dedicated approximately $24,586.00 of the money she received from the sale of her Dartmouth home to the cost of constructing the Clayton Park home. Mr. Wanless says he realized the cash surrender value of a London Life insurance policy and dedicated these funds - approximately $6,000.00 - to the cost of the Clayton Park home. Ms. Taylor disputes this, saying he had no funds to contribute.

[4] Ms. Taylor and Mr. Wanless had three children, all born while they lived in the Clayton Park home. As well, Mr. Wanless had a son from a previous relationship who divided his time between his mother's and his father's homes. In early 2006, Ms. Taylor and Mr. Wanless began to discuss moving into a larger home that would better accommodate their family.

[5] At the same time, Mr. Wanless' parents were divorcing and his mother, Chieko Hara, was having a very difficult time. Approaching, if not, seventy years old at that time, Ms. Hara was living in an intolerable situation with her husband and she was afraid to leave. She was persuaded to move into the Clayton Park home temporarily. While Ms. Taylor and Mr. Wanless were talking about moving to a larger home, Ms. Hara was talking about buying herself a place to live. Eventually, Ms. Taylor and Mr. Wanless persuaded Ms. Hara that she should live with them and they would look for a home with a separate suite that she could occupy and a house search began. While there was one house that they thought might be suitable, they revoked their offer after it was inspected, and decided to build a home. Ms. Taylor says she was confident that a new house could be built for $400,000.00.

[6] It was arranged that Ms. Taylor and Mr. Wanless bought the new home from the contractor in December, 2007 when its construction was largely complete.

[7] Money was needed to build the new home. Ms. Taylor's evidence was that in order to complete the new home, either the Clayton Park house "or Chieko's matrimonial home had to sell, to provide us with the necessary down payment." The lending bank initially demanded confirmation from Ms. Hara that her funds would not have to be returned to her to satisfy its concerns about an acceptable debt/equity ratio. When Ms. Hara's home sold, the bank revoked this requirement.

[8] The Clayton Park home sold in September 2007 for $282,591.13. The net proceeds from this sale were $60,505.34. At that time, according to Ms. Taylor, construction of the new home was "over budget" and this money was "a financial cushion". She said that $50,000.00 of the proceeds from the Clayton Park home was set aside for the new home and the rest was used for other expenses. Ms. Taylor says she withdrew money from her RRSP, realizing "just under $5,000.00" which was spent on the new house. She says that Mr. Wanless also withdrew money from his RRSP, and she believed this was "at least $5,000.00".

[9] Ms. Taylor and Mr. Wanless obtained a mortgage for $325,000.00 to finance the new home. Ms. Hara dedicated $150,717.77 to the purchase. This was the sum she received as her share of the proceeds from the sale of her own former matrimonial home and the interest it earned. Later, she paid another $10,103.69 for appliances and kitchen cabinets.

[10] According to Ms. Taylor, the final cost of the new home was almost $600,000.00, though there is no record of what it actually cost. Whatever its cost, it is clear that Ms. Hara contributed $160,821.46.

[11] According to Ms. Taylor, she and Mr. Wanless asked Ms. Hara if she wanted her name on the mortgage for the new home and Ms. Hara declined. Ms. Hara doesn’t recall such a conversation. Ms. Taylor says the three also discussed what would happen if Ms. Hara changed her mind and was no longer interested in being part of this plan.

[12] Title to the new home was taken in the names of Ms. Taylor and Mr. Wanless, and they were named on the mortgage.

The claims

[13] Ms. Taylor began an action against Mr. Wanless for exclusive occupation of their family residence, pursuant to section 7 of the *Maintenance and Custody Act*, R.S.N.S. 1989, c. 160, and for the partition and sale of the property, pursuant to the *Partition Act*, R.S.N.S. 1989, c. 333 in January 2009. Ms. Taylor did not plead unjust enrichment or trust claims in her action against Mr. Wanless. Mr. Wanless did not file any response.

[14] Ms. Hara began her legal action in March, 2009. In it, she claimed restitution of $155,713.77. This amount increased during the hearing as she gave evidence of further money she devoted to the new home. In the alternative, Ms. Hara sought relief that is no longer available, such as a declaration that she had an equitable interest in the new home on the basis of a constructive, resulting or implied trust or on the basis that it would result in unjust enrichment if her interest was not recognized, a preservation order, an order for the sale of the new home or an injunction. Neither Ms. Taylor nor Mr. Wanless filed a defence to Ms. Hara's statement of claim. Mr. Wanless supports his mother's claim, while Ms. Taylor opposes it.

[15] Ms. Taylor's request that the new home be partitioned or sold and some of the relief sought by Ms. Hara is no longer available because the new home was sold in August 2009. When the new home was sold, the sale proceeds were depleted by payment of various amounts, noted in the table below.

Item	Amount
Proceeds from sale	452,305.79
Legal fees, disbursements and taxes	839.99
Real estate commission and taxes	20,933.50
Recording three releases	250.53
First mortgage payout	333,672.90
Secured credit line payout	56,085.98
Judgment for legal fees owed by Mr. Wanless	5,751.39
Sub-total	417,534.29
Net proceeds from sale	**34,771.50**

[16] The net proceeds from the sale amounted to $34,771.50 and this amount was placed in trust, pending the determination of the actions by Ms. Taylor and Ms. Hara.

[17] By the time of this trial, Ms. Taylor's only claim against Mr. Wanless was her claim under the *Partition Act*. She made no other claims for the division of property or allocation of debts. Mr. Wanless has never filed a claim or defence to any claim by anyone. Regardless of the paucity of pleadings, as early as the spring of 2009, Mr. Wanless sought to address issues relating to their debts and property and Ms. Taylor has responded.

Analysing Ms. Hara's claim

[18] In her statement of claim, Ms. Hara sought restitution of $155,713.77. This amount is comprised of $4,996.00 she paid for kitchen cabinets in her suite and a payment of $150,717.77 toward the new home's purchase price. As construction on the new home continued, Ms. Hara paid $5,107.69 for the appliances in her suite. In total, she put $160,821.46 into the project. She has received no money from the sale of the home.

[19] Ms. Taylor's submissions review the jurisprudence which has developed under the *Matrimonial Property Act*, R.S.N.S. 1989, c. 275 in determining whether funds from family members can be characterized as debts in the context of applications under that *Act*. However, no one has suggested that Ms. Hara loaned approximately $161,000.00 to her son and Ms. Taylor and, of course, this is not a proceeding under the *Matrimonial Property Act*.

Unjust enrichment

[20] Ms. Hara also claimed unjust enrichment. In *Pettkus v. Becker*, 1980 CanLII 22 (S.C.C.) at page 848, then-Justice Dickson, writing for the majority of the Supreme Court of Canada, outlined three requirements that must be satisfied to find that there has been unjust enrichment: "an enrichment, a corresponding deprivation and absence of any juristic reason for the enrichment". He had earlier advanced these same requirements in *Rathwell*, 1978 CanLII 3 (S.C.C.) at page 455.

Enrichment

[21] Ms. Taylor denies that she has been enriched by Ms. Hara's contribution. Ms. Taylor argues she has lost money and there can't be enrichment if she isn't in a better position now.

[22] In *Sorochan*, 1986 CanLII 23 (S.C.C.), Mary Sorochan worked for forty-two years on the farm owned by her partner, Alex Sorochan, and his brother. "Her labour directly and substantially contributed to the maintenance and preservation of the farm, preventing asset deterioration or divestment" according to Chief Justice Dickson at paragraph 25 of the Supreme Court's unanimous reasons.

[23] As *Sorochan*, 1986 CanLII 23 (S.C.C.) shows, enrichment need not be viewed as narrowly as Ms. Taylor proposes. Enrichment need not be a matter of creating wealth. Enrichment may be preventing the loss of an asset's value or the loss of the asset itself. Here, Ms. Hara contributed more than $160,000.00 to buying the new home and outfitting it with kitchen cabinets and new appliances. Ms. Hara's contribution meant that Ms. Taylor and Mr. Wanless did not need to incur the cost of borrowing those funds - if, in fact, it was possible for them to borrow $485,000.00 rather than the $325,000.00 they did borrow. As the purchase of the new home has been described, Ms. Hara's contribution was necessary. Ms. Taylor and Mr. Wanless were enriched because they had the benefit of Ms. Hara's monetary contribution. This contribution enabled them to secure funding for the new home and the monetary contribution came with the additional benefit that it was interest-free. Enrichment is established.

Deprivation

[24] Ms. Taylor acknowledges that Ms. Hara suffered a "significant deprivation as a result of her investment" in the new home. This is the second required element.

Absence of juristic reason for enrichment

[25] The third element of unjust enrichment is phrased as a requirement that there be an absence of juristic reason for the enrichment. In discussing this, Justice Dickson said, at page 849 of *Pettkus v. Becker*, 1980 CanLII 22 (S.C.C.), that where one person prejudices herself in the reasonable expectation of receiving an interest in property and the other person freely accepts the benefits conferred in circumstances where that reasonable expectation is known or ought to have been known, it would be unjust to allow the recipient of the benefit to retain the benefit. His Lordship's remarks were couched in the context of a "relationship tantamount to spousal". I do not confine them to that context.

[26] Justice Iacobucci elaborated on juristic reason analysis in *Garland v. Consumers' Gas Co.*, 2004 SCC 25, at paragraphs 44 to 46 of the reasons he wrote on behalf of the unanimous Court. He said juristic reason analysis occurs in two stages. Employing this analysis, initially Ms. Hara would have to show there was no juristic reason to deny her recovery. The established categories that can constitute juristic reason include contract, disposition of law, donative intent, and other valid common law, equitable or statutory obligations, according to Justice Iacobucci at paragraph 44 of his reasons. If there's no juristic reason to deny her recovery, then Ms. Hara has shown a *prima facie* case.

[27] The established categories reveal no juristic reason to deny Ms. Hara's recovery. There was no contract between the parties. There is no disposition of law. Ms. Hara claims her contribution was not a gift and Ms. Taylor agrees. Ms. Hara was under no obligation of any sort (common law, equitable or statutory) to dedicate her money to Mr. Wanless and Ms. Taylor.

[28] At the second stage of the analysis, Ms. Hara's *prima facie* case is rebuttable where Ms. Taylor can show there's some other reason to deny Ms. Hara recovery. According to Justice Iacobucci's reasons, this is a *de facto* burden of proof placed on Ms. Taylor. At this stage it's for Ms. Taylor to show why she should retain the enrichment. Justice Iacobucci directed, at paragraph 46, that in considering Ms. Taylor's attempt to rebut, I should have regard to the reasonable expectations of the parties, and public policy considerations.

[29] Ms. Taylor argues there is a juristic reason why she should retain the benefit of the enrichment: Ms. Hara was making an investment - and into the word "investment", Ms. Taylor imports all the risk and uncertainty that would accompany the purchase of a highly speculative stock.

[30] I disagree that labelling Ms. Hara's contribution as an "investment" is a juristic reason that makes it just for Ms. Taylor to retain the benefit of Ms. Hara's contribution. This characterization isn't an accurate reflection of the parties' reasonable expectations which I am to consider. Ms. Hara's expectation was that she was contributing to the purchase of a home which would be her home for the rest of her life. Her son and Ms. Taylor shared this expectation. Ms. Hara's part of the house was designed on one level so she could remain there if she became infirm. Ms. Taylor said that she, Mr. Wanless and Ms. Hara discussed what would happen if Ms. Hara "backed out of the project" and that it was made clear to Ms. Hara that Ms. Taylor and Mr.

Wanless didn't "have the financial capacity to guarantee the return of her funds. However, we had no reason to expect that we could not recover our contributions to our new home." I take these comments to mean that if, perhaps, Ms. Hara wanted to leave the new home, Ms. Taylor and Mr. Wanless would not be able to buy our her interest, but that if the house was to be sold, all parties would recover their contributions.

[31] The reasonable expectations of the parties were that Ms. Hara was to have some interest in the new home.

[32] There is a relevant public policy consideration here and it relates to the protection of the elderly who may be vulnerable for any number of reasons. In a family, an elderly family member who is dependent on other family members for care, assistance or housing may be in a poor position to demand legal protection and may be reluctant to recognize the need for protection. I do not believe that Alex Taylor or Martin Wanless has exploited or wants to exploit Chieko Hara. They provided short-term housing assistance to Ms. Hara at a very difficult time in her divorce. Later, they offered to assist Ms. Hara with her long-term housing. It is easily understandable that Ms. Hara wouldn't demand documentation to ensure the security of her position but would rely on the same altruistic instincts that motivated Ms. Taylor and Mr. Wanless' initial offer, to respect her contribution.

Defences

[33] At paragraph 11 of her reasons in *Wilson v. Fotsch*, 2010 BCCA 226, Justice Huddart (with whom Justice Bennett concurred) provided the basic outline for analysis in unjust enrichment cases. Having determined that there is no juristic reason for the enrichment and no reason to deny Ms. Hara recovery, I must consider any defence that exists. Possible defences noted by Justice Huddart at paragraphs 40 to 44 of her reasons include change of position, estoppel, laches and acquiescence, statutory defences and equitable considerations.

[34] Ms. Taylor has offered no defence to the unjust enrichment claim.

[35] Ms. Hara has proven her claim for unjust enrichment.

Choice of remedy

[36] Having found that unjust enrichment has been established, I would typically be required to determine whether a monetary award is sufficient or if a proprietary interest in the property is warranted. Here, I am spared that analysis: the new home was sold and all that remains are funds held in a trust account.

Quantification of remedy

[37] In *Peter v. Beblow*, [1993] 1 S.C.R. 980, Justice McLachlin, as she then was, wrote the reasons for the majority of the Supreme Court. At paragraph 31 of these reasons she noted that when determining the extent to which a constructive trust is created, the predominant issue is whether one looks at the value of the contribution made by the claimant (called the "value received approach") or the value created by the contribution (called the "value survived" approach).

[38] Justice Huddart distinguishes the approaches at paragraphs 59 to 61 of her reasons in *Wilson v. Fotsch*, 2010 BCCA 226. As she describes it, when the value received approach is used, the award should be equal to the benefit received and there's no assessment of a claimant's proportionate share in an asset or of the increase in an asset's value. When the value survived approach is used, it isn't necessary to determine the exact value of the benefit received by the defendant, rather the "key features" are identifying the value available for apportionment and the parties' proportionate contributions to that value.

[39] I conclude that I should adopt the value survived approach to quantify Ms. Hara's remedy. This requires me to identify the value available for apportionment and the parties' proportionate contributions to the value.

The value available for apportionment

[40] When the house sold, $34,771.50 remained once the sales costs and encumbrances were paid. Recall the chart from paragraph 15:

Item	Amount
Proceeds from sale	452,305.79
Legal fees, disbursements and taxes	839.99
Real estate commission and taxes	20,933.50
Recording three releases	250.53
First mortgage payout	333,672.90
Secured credit line payout	56,085.98
Judgment for legal fees owed by Mr. Wanless	5,751.39
Sub-total	417,534.29
Net proceeds from sale	**34,771.50**

[41] However, the net proceeds from the new home's sale aren't the value available for apportionment because some amounts which were not spent on the new home have been deducted from the sale proceeds. The clearest example of this is the payment of a $5,751.39 judgment registered against Mr. Wanless and paying the $83.51 cost of registering the release of that judgment. This judgment resulted from Mr. Wanless' failure to pay the legal fees he

incurred after he and Ms. Taylor separated. Ms. Taylor agrees that these expenses don't relate to the new home's construction cost.

[42] Ms. Hara claims that the net proceeds from the sale of the home have been further depleted by other amounts that don't represent the cost of constructing the new home and these, too, should not have been deducted from the new home's sale proceeds. The other amounts which Ms. Hara challenges are:

1. expenses which were incurred on Ms. Taylor and Mr. Wanless' joint credit line that didn't relate to the new home's construction;

2. interest charges incurred on the joint credit line during the time that Ms. Taylor and Mr. Wanless were not servicing the joint credit line; and

3. interest and other charges incurred on Ms. Taylor and Mr. Wanless' mortgage during the time the mortgage was not being paid.

I will deal with each of these amounts in turn.

Non-construction expenses on the joint credit line

[43] On February 1, 2008, Ms. Taylor and Mr. Wanless obtained a personal line of credit from the CIBC for $74,000.00. This was secured against the new home so, regardless of its use, it was fully repaid when the home was sold. Ms. Taylor says that when the credit line was opened, $17,500.00 from this credit line was immediately used to repay $17,500.00 that Mr. Wanless had spent on his personal credit line. Mr. Wanless says that a maximum of $10,000.00 of this amount was the cost of the stereo and home theatre for the new home. (I'll return to these purchases later.) The remainder of his credit line purchases were for family needs, such as gas, children's items and possibly a family vacation he said. So, $7,500.00 of the expenses on the joint credit line weren't for construction purposes.

[44] At various other times Ms. Taylor or Mr. Wanless used the joint line of credit for other expenditures that weren't related to the new home's construction. Unexplained withdrawals and consumer purchases account for approximately $1,200.00 in withdrawals from the joint line of credit. At one point, Ms. Taylor withdrew $2,536.50 from the joint credit line for her own purposes. Ms. Taylor agrees that these amounts should be subtracted from the credit line's ultimate payout since they didn't relate to the cost of constructing the home.

[45] Lastly, some purchases which were financed by the joint credit line were for the new home: the home theatre (50" plasma television, the receiver and an extended service warranty), the washer and the dryer. More accurately, the home theatre was financed with Mr. Wanless' credit line and it, in turn, was paid with the joint credit line. The significance of these purchases is that while they were initially for the new home, when Ms. Taylor moved from the home, she removed them. So, these purchases did not add to the value of the new home. The home theatre

cost approximately $3,900.00 inclusive of HST. The washer and the dryer cost approximately $2,486.00 inclusive of HST. Since these items didn't remain in the home, Ms. Hara argues their cost should be deducted. Ms. Taylor acknowledges that she has these items and argues that the amount to be deducted should be the value of these items when she removed them.

[46] I reject Ms. Taylor's argument. The depreciation of the value of the items Ms. Taylor retained has no impact of the amount owed for their purchase on the joint credit line. Because Ms. Taylor removed these items, their cost should be deducted from the credit line.

Interest on the joint line of credit

[47] Ms. Taylor and Mr. Wanless separated in 2008. Payments on the joint credit line stopped at that point when its balance was $53,844.74. The joint credit line was retired when the new home was sold and, on that date, the closing balance had grown by $2,241.24 to $56,085.98. Around the time the couple separated, Ms. Taylor altered the terms of the joint credit line so no withdrawals could be made, only payments. Payments weren't being made, even on interest, and the balance grew. This additional expense is the cost to Mr. Wanless and Ms. Taylor of borrowing on the credit line. It is their cost of contributing to the home by way of borrowing.

[48] The table below illustrates my calculations regarding the joint credit line. I have started with the amount paid to retire the joint credit line. From it, I have deducted those amounts which I find do not relate to building or outfitting the new home. The resulting sum is the amount from the joint credit line which was dedicated to the new home. This amount is properly deducted from the new home's sale proceeds to determine the amount available for apportionment.

Item	Amount
Closing balance on joint credit line	56,085.98
Amounts from Mr. Wanless' credit line that don't relate to the new home	(7,500.00)
Unexplained withdrawals	(1,200.00)
Ms. Taylor's withdrawal	(2,536.50)
Cost of home theatre, washer and dryer retained by Ms. Taylor	(6,386.00)
Post-separation increase in joint credit line balance	(2,241.24)
Portion of the credit line which relates to the new home	**36,222.24**

Interest and other charges on the mortgage

[49] When the new home was sold, $333,672.90 was spent to retire the mortgage on the home. The initial amount of the mortgage was $325,000.00. Ms. Taylor agreed that the additional amount was a combination of interest arrears, mortgage pre-payment penalties and legal fees. The legal fees would relate to the aborted foreclosure proceedings. I find that the amount repaid to the lender in excess of the amount borrowed does not relate to the new home's construction. It

ought not be deducted from the sale proceeds in determining the amount available to be apportioned between the parties.

[50] As a result of this analysis, I conclude that the amount available to be apportioned between the parties is $69,143.04. I calculated this amount by adjusting the net proceeds from the sale so that the only deductions from the initial proceeds were those amounts which were dedicated to the new home. My calculations are shown in the table below.

Item	Amount
Proceeds from sale	452,305.79
Legal fees, disbursements and taxes	839.99
Real estate commission and taxes	20,933.50
Recording two releases (paragraph 41)	167.02
Secured credit line payout (paragraph 43-48)	36,222.24
First mortgage payout (paragraph 49)	325,000.00
Sub-total	383,162.75
Net proceeds from sale	**69,143.04**

The parties' proportionate contributions to the value

[51] As Justice Huddart said, at paragraph 63 of her reasons in *Wilson v. Fotsch*, 2010 BCCA 226, "Once the value available for apportionment has been ascertained, the second step is to analyze the parties' respective contributions to determine the share to which the plaintiff is entitled."

[52] Ms. Hara contributed $160,821.46 which came from the proceeds from the sale of her former matrimonial home, the proceeds from the sale of some jewellery, money given to her by her daughter and son-in-law and a bank loan. I consider the loaned funds which Ms. Hara used to buy her appliances and cabinets because this loan was not repaid from the sale proceeds. It remains an expense out of Ms. Hara's pocket.

[53] Mr. Wanless and Ms. Taylor contributed funds from the sale of the Clayton Park home and money which they withdrew from their RRSPs. In terms of the proceeds from the sale of the Clayton Park home, Ms. Taylor recalls being at the bank and having a conversation with a bank teller about the balance in an account. As Ms. Taylor explains it, when the teller commented to the effect that $50,000.00 was a lot of money to have in an account and asked if she wanted it "somewhere", Ms. Taylor responded that a house was being built and the money wouldn't be there long. Based on this, I credit Mr. Wanless and Ms. Taylor with contributing $50,000.00 to the purchase of the new house. Ms. Taylor testified that she and Mr. Wanless also contributed about $5,000.00 each from RRSP withdrawals. This is consistent with the RRSP statement provided to me by Mr. Wanless.

Source of funds	Amount of funds
Ms. Taylor / Mr. Wanless RRSP withdrawal proceeds	10,000.00
Proceeds from sale of Clayton Park home	50,000.00
Ms. Hara's matrimonial home sale proceeds and other funds	160,821.46
Total contribution	**220,821.46**

[54] Based on these contributions, Ms. Taylor and Mr. Wanless contributed approximately twenty-seven percent of the money to the new home's acquisition, while Ms. Hara contributed seventy-three percent.

Sub-total

[55] In paragraphs 40 to 50, I have calculated the amount available for apportionment between the parties. This is the amount that should have been available on the sale of the home if only costs relating to the sale were deducted. The amount available is $69,143.04. I have determined the proportionate contributions as seventy-three percent by Ms. Hara and twenty-seven percent by Ms. Taylor and Mr. Wanless. My analysis isn't complete, because I haven't considered the issue of set off, but at this juncture in my analysis, I calculate Ms. Hara is due $50,474.42: she is due seventy-three percent of the amount available for apportionment.

Set off

[56] At this point in the analysis, if both parties in an unjust enrichment action have made formal legal claims against each other, their claims may be set off, one against the other. In some family cases, as in this, no counter-claim or set off is claimed formally. Regardless, it is appropriate to consider this issue. Set off may be legal or equitable.

[57] In *Holt v. Telford*, [1987] 2 S.C.R. 193, at paragraphs 14 and 21, Justice Wilson, who authored the Court's unanimous decision, explained that legal set off requires the fulfilment of two conditions: that both obligations be debts and that both debts be mutual cross obligations. This does not apply to the instant case.

[58] At paragraph 27 in *Holt v. Telford*, [1987] 2 S.C.R. 193, Justice Wilson wrote that "[e]quitable set off is available where there is a claim for a money sum". In *Wilson v. Fotsch*, 2010 BCCA 226 at paragraphs 70 - 73, Justice Huddart describes equitable set off as "more difficult in application" before listing the requirements for an equitable set off claim. She concluded, at paragraph 75, that equitable set off "more accurately describes (and justifies) the off-setting of mutual enrichments in family cases." She said that this makes sense in the context of families because there are no legal debts between the parties, but it would be inequitable not to permit the defendant to reduce the amount owed to the plaintiff "as a result of the enrichment by any corresponding gain to the plaintiff as a result of the relationship". Her Ladyship's reasons invite me to consider whether Ms. Hara has been unjustly enriched, and identify, at paragraphs 81 to 85, examples of contributions I should consider.

[59] The examples and rationale offered by Justice Huddart encourage me, at paragraph 81, to consider "only those contributions that allowed the other party to acquire, increase, or maintain the value of an asset". I am cautioned not to off set contributions that I included when quantifying Ms. Hara's claim. At the stage of quantifying Ms. Hara's claim, I considered some of the financial contributions made by Ms. Taylor and Mr. Wanless in purchasing the new home. I did not consider their payment of property taxes or the utilities associated with Ms. Hara's suite. I was not given any evidence about them. Acknowledging Justice Huddart's concern that I only consider contributions that allow the acquisition, increase or maintenance of an asset's value, payment of Ms. Hara's utilities are not a relevant consideration. However, payment of the property taxes is a relevant consideration: if property taxes were not paid, the new home could be lost to a tax sale.

[60] The new home was occupied from December, 2007 until it was sold in August 2009. While Ms. Hara's failure to contribute to property taxes was mentioned in Ms. Hara's cross-examination, as I've said, I was not given any evidence of the amount of the property taxes paid on the home while the parties lived there. All parties had the benefit of the payment of the property taxes. I ascribe to Ms. Hara seventy-three percent of the amount paid in property taxes from December 2007 to August 2009 as a set off against the sub-total I calculated in paragraph 55. Ms. Taylor will need to provide documentation to show the property taxes paid during this period to Mr. Wanless and to Ms. Hara. I direct her to do so within thirty days of my decision.

Pre-judgment interest

[61] This is a monetary award and Justice Huddart says, at paragraph 93 of *Wilson v. Fotsch*, 2010 BCCA 226 that pre-judgment interest should run from the date when the duty to make restitution arose. This date is August 14, 2009 when the new home was sold. Pursuant to section 2(1) of the *Interest on Judgments Act*, R.S.N.S. 1989, c. 233, I fix pre-judgment interest at the rate of five percent.

The claims between Ms. Taylor and Mr. Wanless

[62] Neither Ms. Taylor nor Mr. Wanless made any claim against the other beyond Ms. Taylor's claim relating to the new home. At an organizational pre-trial conference on March 30, 2009, Mr. Wanless expressed an interest in resolving a number of matters relating to property and debts. He did not articulate what relief he sought with regard to the property and debts. Particulars were not requested by Ms. Taylor who acquiesced in dealing with these issues. The specific property and debts which concerned him were listed in the memorandum arising from the March 2009 pre-trial conference where the parties were instructed that they "will need to address these issues in their affidavits." These matters were re-iterated in a memorandum that was prepared following an organizational pre-trial conference on March 12, 2010. Mr. Wanless did not attend that conference, though he was aware of it and was sent a copy of the resulting memorandum. Mr. Wanless has represented himself in proceedings involving his wife following a 2008 interim application.

[63] The particular debts identified in the pre-trial conference memorandum are listed below:

> the joint mortgage;
> the joint credit line;
> the joint overdraft;
> a Small Claims Court judgment owed to Halifax Transfer;
> a President's Choice MasterCard credit card debt;
> a Hudson's Bay Company credit card debt;
> a Sears credit card debt for the purchase of appliances;
> income taxes;
> the loan encumbering the family's van;
> property taxes;
> expenses for child care;
> expenses for social club;
> Aliant Mobility; and
> a debt owed to Chieko Hara for Ikea purchases.

The specific assets are the contents of the new home and the family's van. In the affidavits and brief he filed for the trial, Mr. Wanless raised the issue of an Amex Capital One credit card and a CitiFinancial credit card.

[64] Some of the debts were owed by the parties jointly and some were solely owed by one or the other. Similarly, some of the property was owned jointly and some was owned individually by one or the other. It's necessary to deal with items (assets or debts) individually or in groups of related categories.

Mortgage and joint line of credit

[65] Mr. Wanless asks that interest, service charges and legal fees incurred because Ms. Taylor defaulted on the mortgage and joint credit line "be accounted for and returned to" him.

[66] The mortgage and credit line were both joint debts. Both parties defaulted in meeting their obligations on these debts. As early as August 2008, Mr. Wanless proclaimed that he could not afford to pay these debts. Ms. Taylor continued to pay the mortgage until May 2009. I have only partial records relating to the credit line, so it isn't possible to determine the history of that debt. Mr. Wanless said that he would provide a detailed account statement so it would be possible to piece together the history of this account. He did not provide the detailed statement.

[67] The mortgage and credit line were debts that were incurred jointly. In the months before the new home was sold, neither party was servicing the debts. Mr. Wanless has offered no reason why he should be relieved from that legal obligation or why Ms. Taylor should have been solely responsible for servicing them. These debts have been equally divided between these two parties by virtue of the new home's sale. This division is appropriate.

Assorted debts

[68] A significant number of the debts which were identified at the organizational pre-trial conference were the subject of no evidence, either in the parties' affidavits or in the testimony. In the absence of any evidence with regard to them, I am dismissing claims with regard to income taxes, child care, social club expenses and property taxes.

[69] I cannot be confident that I have no information about an Aliant mobility debt. In an affidavit he filed in August 2008, Mr. Wanless identified a "string of family and financial crises between August, 2005 and December, 2007". One item in this list was "[w]e had cell phone charges of over $3,000.00 for the period of September to December". However, nothing more was offered about this, so I don't know if this single mention relates to the debt that concerned Mr. Wanless. I don't know the year in which the cell phone charges were incurred, who incurred the charges, who had the cell phone account, whether it was ever paid, who paid it, when it was paid or if it remains outstanding. I have no idea of the amount of the debt. I know that the couple's daughter, Autumn, was born in October 2006. Prior to her birth, the couple knew she had health problems: she was born with a heart condition which required open heart surgery. The cell phone charges may relate to September to December 2006 when I would expect the couple would be spending considerable time at the hospital and maintaining contact with distant family members about Autumn's health. This is speculation. I have no evidence which allows me to make any determination about this debt.

[70] Mr. Wanless identified an Amex Capital One credit card and a CitiFinancial credit card as credit cards for which Ms. Taylor made unilateral applications. He says Mr. Taylor carried balances on these cards at separation and she didn’t disclose these on her Statement of Property. Beyond these comments, he articulates no specific claims with regard to these accounts. The Amex Capital One credit card was provided to Ms. Taylor by her employer. She obtained the CitiFinancial credit card so she could collect loyalty points at a store where she purchased the children's clothing. The CitiFinancial credit card was closed prior to filing her Statement of Property. There is no evidence which identifies any sort of claim with regard to these accounts.

Ikea debt

[71] There were limited references to the Ikea debt in the evidence I heard. Mr. Wanless says that Ms. Taylor is in possession of items purchased by his mother which cost his mother $365.34 and that his mother has not been reimbursed for these purchases. Ms. Hara has not sought reimbursement of this amount. She has no claimed it as part of her contribution to the new home. Mr. Wanless says "I ask that this amount be returned to Chieko Hara." Ms. Hara is represented by counsel and gave evidence of allowing Ms. Taylor to charge the purchase of a shower stall on her credit card. While the shower stall cost $1,134.40, Ms. Hara was only repaid $1,000.00. As well, Ms. Hara says that she loaned Ms. Taylor $73.84 to purchase a family membership to the Discovery Centre. Ms. Taylor believed this purchase was a gift from Ms. Hara.

[72] Mr. Wanless alleges these are loans from Ms. Hara. Ms. Hara has not claimed relief from Ms. Taylor with regard to these items. There is no claim advanced with regard to them in her Notice of Action or Statement of Claim or in her submissions. Mr. Wanless has no standing to claim relief on his own or on his mother's behalf. I dismiss these claim by Mr. Wanless.

Small Claims Court judgment owed to Halifax Transfer

[73] When Ms. Taylor and Mr. Wanless moved, they hired Halifax Transfer. They were sued in Small Claims Court for moving and storage fees. Halifax Transfer was successful and a judgment was registered against them. Ms. Taylor provided copies of her online paystub summaries for the period from January 2008 to December 2008 and from January 2009 to May 2009. During the former period, a sheriff's office garnishee caused $3,476.62 to be deducted from her earnings, and in the latter period, the garnishee caused $1,997.00 to be deducted. A total of $5,473.62 owed by the former spouses was withheld from Ms. Taylor's earnings.

[74] The judgment was jointly owed and no evidence has been offered to prove why it ought not be equally shared by the former spouses.

Joint bank accounts and account overdraft

[75] Mr. Wanless asserts that in some joint accounts (a joint chequing account and a CIBC Premium Growth account), there were positive balances of $71.72 and $14.13, respectively. Ms. Taylor says that there was "an outstanding remaining balance of $157.39, in addition to the $71.72 that was required to close out the account". She says she paid both. Mr. Wanless has provided a copy of the closing statements for each of these accounts. Both show terminal withdrawals in the amounts he says Ms. Taylor took. She admits she closed the accounts. I accept that Ms. Taylor closed the accounts and withdrew the modest funds in the accounts.

[76] In another joint account, the PC Financial joint chequing account, Mr. Wanless asserts that he paid to retire an overdraft of $886.71. More accurately, it appears that PC Financial exercised its right of offset and withdrew these funds from Mr. Wanless' personal account. Regardless of how it happened, repayment of this joint debt came from Mr. Wanless.

Martin Wanless' credit card debts: PC Financial MasterCard, Hudson's Bay, Sears

[77] Mr. Wanless says that he was left to carry credit card debts owed to PC Financial MasterCard, Hudson's Bay and Sears. These credit cards were in his sole name and there was no evidence that Ms. Taylor had or used his credit card or a supplemental card on any of these accounts. Mr. Wanless doesn't suggest that Ms. Taylor incurred expenses on these credit accounts. Mr. Wanless says that debts on these credit cards were "associated with purchases for the home build and household expenses accumulated while awaiting approval for the personal line of credit that we agreed would be placed on the line of credit" but he didn't identify any specific purchases made on these credit cards that related to the family.

[78] I was provided with information about each of these debts: a demand letter of September 15, 2009 for the President's Choice Financial MasterCard; a May 5, 2008 statement for the Hudson's Bay credit card; and a July 10, 2009 demand letter for the Sears credit card. Only the Hudson's Bay credit card relates to the date of separation. The demand letters provide no indication of what portion of the debt pre-dates the separation and in no instance is there any documentation to show what actual expenses were incurred on these credit cards.

[79] Ms. Taylor disputes the use of these credit cards for family purposes.

[80] Between the former spouses, I have no evidence that proves on a balance of probabilities that these credit cards were used for family purposes. I have no proof of what the outstanding balances were at the time the relationship ended. I have no explanation why, if as Mr. Wanless says, he and Ms. Taylor agreed these debts could be repaid with the joint line of credit, that was not done. There is insufficient evidence for me to compel Ms. Taylor to contribute to repayment of these debts.

Martin Wanless' claim for household items and personal belongings

[81] Mr. Wanless provided a list of fifty-seven items which he said are his personal property and household items. He said he obtained these items before and during his relationship with Ms. Taylor or that the items were purchased with funds from the severance package he received when his employment at the Sheraton Hotel ended in August 2005. The items range from candles and bottles of liquor to a computer (monitor, tower, printer and accessories) and a buffet.

[82] Information such as when items were acquired, how they were acquired, how their purchase was financed and whether the other party ensured the item wasn't devalued or lost, is just some of the information relevant to a claim for possession by either Mr. Wanless or Ms. Taylor. None of this evidence was adduced.

[83] Given the nature of the evidence, I must review the claims about household contents in detail.

[84] There was little indication which of the listed items was acquired prior to the parties' relationship. Items which either party brought to the relationship continue to belong to the owner, unless the other party asserts a claim against the item and adduces evidence which proves on a balance of probabilities, that the owner holds the item in trust or if the non-owner advances a successful unjust enrichment claim. For the most part, I can't determine which items pre-dated the relationship from the nature of the items. Mr. Wanless described crystal bowls as "wedding" crystal. This suggests they were acquired before this relationship, since Ms. Taylor and Mr. Wanless never married each other. Otherwise, the nature of the items listed doesn't allow me to know whether Mr. Wanless owned them before this relationship began. As for the wedding bowls, Ms. Taylor makes no claim for these bowls. She says that if she has them, she will return them. I order her to do so within three weeks of this decision.

[85] While Mr. Wanless says that he used funds from his 2005 severance package to buy some of the items he claims, he has offered evidence of only one instance when he did this. He said that he used his severance funds to buy bunk beds. He purchased the beds when the family lived in the Clayton Park home. Ms. Taylor says the beds were broken by the movers when the family moved to the new home. She then had the beds repaired and purchased a double bunk extension for the bottom bed. Ms. Taylor says these beds are and have always been the boys' beds. While Mr. Wanless initially purchased the beds, it was Ms. Taylor's actions that preserved them. So, each party has a claim to the beds. They are used by the children and I find it is appropriate that the bunk beds remain with Ms. Taylor for the boys' use.

[86] Mr. Wanless claims that he was given beer steins when he worked at Casino Nova Scotia and he had a second set of "chalices". Ms. Taylor makes no claim against these and says that if she has them, she will return them. I order her to do so within three weeks of this decision.

[87] Mr. Wanless claims a number of items belong to his son, Caleb. Caleb is the child of Mr. Wanless' marriage. He asks that these items (a quesadilla maker, X-box games, a water backpack and Caleb's "favourite children's books") be returned to Caleb. Ms. Taylor is prepared to return the quesadilla maker to Caleb and I order she do this. She believed Mr. Wanless had taken the X-box games. She has no need for X-box games she says. She also says she'd encouraged Mr. Wanless to take some of the children's books and has taken books to him. I order that if Ms. Taylor has any X-box games in her possession, she deliver them to Mr. Wanless within three weeks of this decision. With regard to the books, Mr. Wanless shall provide Ms. Taylor with a list of Caleb's favourite childhood books within three weeks of this decision. Any of those books in Ms. Taylor's possession shall be delivered to Mr. Wanless within six weeks of my decision.

[88] Ms. Taylor doesn't believe she has certain of the listed items (the illustrated edition of Dan Brown's "The Da Vinci Code", the Sony Handycam mini DVDs, sea grass and ceramic planters and PC software and games). She has not contested ownership of these items. If she finds any of these items in her possession, I order her to return them to Mr. Wanless immediately.

[89] Mr. Wanless says that he purchased a red Radio Flyer walker as a gift for Autumn. I'm told that Autumn uses this "often". Since it was given to Autumn, it belongs to her. She uses it often, so it should be with her and I order this remain with Ms. Taylor.

[90] When Ms. Taylor was awarded interim exclusive occupation of the family residence in August 2008, Mr. Wanless was allowed time to collect and remove items over a period from August 28 to August 31, 2008. He removed some items at this time.

[91] Mr. Wanless says that in early April 2009 he was at the new home to clear his belongings from the garage so the house could be viewed by potential purchasers. He says the garage was "stuffed" with garbage, recycling and his belongings. When he completed clearing out his

things, Mr. Wanless "confirmed that anything left remaining could be disposed of by a junk remover." Mr. Wanless arranged for the removal and told both Ms. Taylor and his mother when the collection would be done. He says he told his mother what items were to be removed. Ms. Taylor and Ms. Hara equally divided the cost of the service. Approximately one week later, according to Mr. Wanless, his mother let him know that she had arranged for the Salvation Army to collect items she was donating. Mr. Wanless agreed to include a snowblower in this donation.

[92] Ms. Taylor assumed that any items Mr. Wanless left for the garbage removal service or the Salvation Army were items he did not want. This assumption was reasonable in light of the fact that when he completed cleaning out his things, he confirmed that remaining items could be disposed of by a garbage collection service. In some cases, Ms. Taylor kept items which Mr. Wanless had left to be collected by the garbage removal service or the Salvation Army. In other cases, she doesn't know what has happened to items Mr. Wanless seeks. Some of these items were given away or sold. Ms. Taylor is under no obligation to make any amends to Mr. Wanless for these items.

[93] Mr. Wanless seeks compensation for some items that Ms. Taylor retained from the new home: a large screen tv, a receiver and service package, a washer and dryer. The $3,900.00 cost of the television, receiver and service package was initially paid by Mr. Wanless and transferred to the joint credit line which was paid when the house was sold. Ms. Taylor paid the $2,486.00 cost of the washer and dryer on her own credit card. The amounts I've shown are inclusive of HST. The expense of these purchases was transferred to the joint line of credit.

[94] Mr. Wanless argues that I should attribute the purchase price of these items to Ms. Taylor, though the items were all at least two years old when Ms. Taylor removed them from the new home. I recognize that Ms. Taylor has retained these items and they have some value. I do not accept that their value is the same as it was when they were purchased. In the absence of any evidence, any value I place on them is arbitrary but my choice is between being arbitrary and placing no value on these items. I value the large screen tv, receiver and service package, washer and dryer at one-half of their initial purchase price. I use their cost, exclusive of HST. I value them at $2,825.00.

Van and van loan

[95] The couple purchased a van prior to their separation. Like the mortgage and joint credit line, Mr. Wanless proclaimed himself unable to contribute to this debt in August 2008. Ms. Taylor was left to service this loan and the other debts which Mr. Wanless didn’t pay. On occasion, she fell into arrears on this debt. Mr. Wanless wants to be "bought out on the van based on the value in April 2008 and have [his] name removed from the loan or sell the van and settle the loan with the bank." Without commenting on the validity of this claim, Mr. Wanless has not provided me with information about the value of the van in April 2008. He provided me with information about the prices sought in September 2010 for different vans made by the same manufacturer though not for the same year, make or model as their van. These sale listings came

from internet websites. From Mr. Wanless I have no evidence that would assist me in resolving this claim.

[96] Ms. Taylor took the van to a dealership for an appraisal and provided a motor vehicle appraisal record which valued the van at $12,500.00. She also provided a loan history which showed the amount owed on the van's loan to be $26,221.63. The van loan history shows the amount owing on the van was $38,317.30 in April 2008. The van had been purchased for $39,400.00. The evidence provided to me indicates that at no point has the van had a value which exceeded the amount owed on it.

[97] Ms. Taylor wants to retain the van and to maintain the loan encumbering it. I order that the van be hers and that she indemnify Mr. Wanless from all liability regarding the loan which encumbers it.

Resolving the claims between Mr. Wanless and Ms. Taylor

[98] In the table below, I've identified those amounts of cash or the value of assets which one or the other former spouse retained and the debts which one or the other has paid.

	Ms. Taylor	**Mr. Wanless**
Joint chequing account	71.72	
CIBC Premium Growth account	14.13	
Withdrawal from joint credit line	2,536.50	
Large screen tv, receiver, service package, washer and dryer	2,825.00	
Van	12,500.00	
Amount retained	**17,947.35**	
PC Financial joint chequing account overdraft paid		(886.71)
Halifax Transfer judgment paid	(5,473.62)	
Van loan	(26,221.63)	
Net position	(13,747.90)	(886.71)

[99] While Ms. Taylor kept some tiny amounts which she withdrew from joint bank accounts, the greater amount that she withdrew from the joint credit line, the large screen tv, receiver and service package, the washer and dryer and the van, she solely repaid the Halifax Transfer judgment and she will pay the debt relating to the van. Overall, she is in a negative position where the liabilities exceed the assets by $13,747.90. Meanwhile, Mr. Wanless has paid a debt of $886.71. Aside from the debt owed to Ms. Hara, the former spouses' net position is one of owing $14,634.61. To equally divide these assets and debts between them requires each to retain debt of $7,317.30. There's been no evidence at all which suggests that there is any reason not to allocate these assets and debts equally, so I order Mr. Wanless to pay Ms. Taylor $6,430.60.

Summary of relief ordered

[100] Ms. Taylor and Mr. Wanless were unjustly enriched by Ms. Hara's contribution to their new home. Reviewing the circumstances of the unjust enrichment, I have calculated the amount available for apportionment to be $69,143.04. I have determined the proportionate contributions as seventy-three percent by Ms. Hara and twenty-seven percent by Ms. Taylor and Mr. Wanless which means she would be due $50,747.42. At paragraph 60, I ascribed to Ms. Hara seventry-three percent of the amount paid in property taxes from December 2007 to August 2009 as a set off against this amount. Ms. Taylor will need to provide documentation to show the property taxes paid during this period to Mr. Wanless and to Ms. Hara. I direct her to do so within thirty days of my decision. If she does not, then Ms. Hara will be due the entire amount. If Ms. Taylor provides the information, seventy-three percent of the taxes paid during the period from December 2007 to August 2009 will be deducted from $50,747.42 due to Ms. Hara. This monetary award is subject to pre-judgment interest of five percent from August 14, 2009.

[101] I dismiss the claims with regard to income taxes, child care, social club expenses, Aliant mobility and property taxes. There are no claims made out with regard to the Amex Capital One credit card and a CitiFinancial credit card. I dismiss Mr. Wanless' claims with regard to the Hudson's Bay credit card, the PC Financial MasterCard and Sears credit card. Ms. Taylor shall retain the household contents, van and the account withdrawals she has made. She shall repay the van loan and indemnify Mr. Wanless for it. Within three weeks of this decision, Ms. Taylor shall return the wedding bowls, the Casino Nova Scotia beer steins and "chalices" to Mr. Wanless. If Ms. Taylor finds she has the illustrated edition of Dan Brown's "The Da Vinci Code", the Sony Handycam mini DVDs, sea grass and ceramic planters and PC software and games, she will return them to Mr. Wanless immediately. If she has them, Ms. Taylor is to return the quesadilla maker, X-box games and water backpack to Caleb within three weeks of this decision. Within that same time frame, Mr. Wanless shall provide Ms. Taylor with a list of Caleb's favourite childhood books. Any of those books in Ms. Taylor's possession shall be delivered to Mr. Wanless within six weeks of my decision.

_____

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

Halifax, Nova Scotia