SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: Darlington v. Moore, 2011 NSSC 152

Date: 20110418
Docket: SFHMCA-068167
Registry: Halifax

Between:

Michelle Darlington

Applicant

v.

David Paul Moore

Respondent

Judge:	The Honourable Justice Mona M. Lynch
Heard:	March 28, 29 & 30, 2011 in Halifax, Nova Scotia
Counsel:	Peter D. Crowther, for the Applicant

By the Court:

Background:

[1] The mother and father met in 1989 and started living together in 1990. At that time the mother had a child from a previous relationship and was a student studying to become a nurse. The father was a member of the Royal Canadian Mounted Police.

[2] In 1991 the couple and the child moved to Nova Scotia when the father was transferred with the RCMP. After moving to Nova Scotia, the mother continued to work as a registered nurse and the father as a police officer.

[3] The couple became engaged to be married in 1990 and the father gave the mother an engagement ring. Another engagement ring was given to the mother by the father in 2006. They presented themselves to the public as a married couple and the mother was often referred to as Mrs. Moore in documents such as cheques and by school officials.

[4] The couple had two children, a daughter born in 1992 and a son born in 1993. In March of 1994 their daughter was diagnosed with cancer and was not expected to live. At that time the couple made a decision that the mother would leave work and be home to care for their daughter as well as their son who was less than a year old. Thankfully, the daughter made a miraculous recovery.

[5] The father registered a company under the name Sand, Surf & Sea and he was the sole shareholder, director and officer. The company purchased and fixed up a restaurant building in 1996. The mother ran the restaurant and the father worked at the restaurant when he was not working as a police officer. For the first three years the mother received a salary for running the restaurant and after that she did not.

[6] In 2000 the couple purchased a home and received a deed in both their names as joint tenants. The family moved into the home in the Fall of 2000 and the family lived there until the couple separated in 2009.

[7] In May 2003 there was a fire in the building containing the restaurant which caused extensive damage. The Government of Nova Scotia would not allow the

restaurant to be rebuilt on the same lot. The company continued to operate as a business buying and selling automobiles and properties but not as a restaurant.

[8] After the restaurant burned the mother worked at various jobs. She is currently working as a commission salesperson in a furniture store.

[9] The father has been on stress leave from the RCMP and continues to receive income from the RCMP as well as Veterans Affairs and the company.

[10] The couple separated in December 2009. The mother moved out of the matrimonial home where the father continues to live. The children live with the mother. The daughter attends university and the son is in his final year of high school.

History of the Proceeding:

[11] The mother filed an application and intake form on January 7, 2010 (the Civil Index indicates the 7th but the documents are date stamped the 6th) seeking custody, access, child maintenance and spousal maintenance under the

Maintenance and Custody Act, a division of the father's pension under the **Pensions Benefits Act** and the **Pension Benefits Standards Act, 1985** or other applicable pension legislation, constructive or resulting trust and unjust enrichment, a division and sale under the **Partition Act** and costs. At the same time she filed a Parenting Statement, a Statement of Income, a Statement of Expenses and a Statement of Property. A Notice to Disclose was created the same day requiring the father to file a Statement of Property, completed and sworn Statement of Income, completed and sworn Statement of Expenses and a completed and sworn Statement of Property on or before twenty days from receipt of the Notice to Disclose. These documents were served on the father on January 14, 2010.

[12] On February 3, 2010 the father filed a Parenting Statement, Statement of Expenses, Statement of Income and Statement of Property.

[13] The mother filed an Interim Application and affidavit on March 2, 2010 seeking interim custody, interim child maintenance and interim spousal maintenance. An Amended Interim Application was filed on March 5, 2010 by

the mother as a section of the **Maintenance and Custody Act** under which relief was claimed and was missing from the initial Interim Application.

[14] The process server was unable to serve the father. On March 31, 2010, the date that had been set for the interim hearing, an *ex parte* application for substituted service was made and a substituted service order was granted to serve the father.

[15] The father filed a response to the application and affidavit on April 21, 2010 along with an updated Parenting Statement, an updated Statement of Expenses and a supplemental Statement of Income. The father was represented by counsel.

[16] On May 4, 2010 counsel for the mother wrote a letter to counsel for the father requesting further disclosure including financial statements and corporate income tax returns for the company from 1995 - 2003; net profit and loss statements for the company for the prior three years along with a list of assets and liabilities of the company; bank accounts for the company for the prior two years; verification that the company had paid $30,000 for a real estate course for the mother; the style of cause and case number for the court case involving the

restaurant property along with the status of the litigation and documentation to verify the cost of the litigation set out in the father's affidavit; the cost and particulars of trips taken by the father in the preceding months; credit card statements for the preceding two years; account histories for the preceding twelve months on investment accounts; bank accounts for the preceding two years for a chequing account and a line of credit and inquiries about other bank accounts. There was no response to this letter.

[17] The interim hearing was scheduled for April 22, 2010. On that date most issues were resolved by consent and submissions were made on the issues in dispute. The interim order dated May 14, 2010 included that primary residence of the children would be with the mother; reasonable access to the father as arranged between himself and the children; child maintenance of $1,441.00 per month commencing April 1, 2010 and spousal maintenance in the amount of $900.00 a month payable to the mother commencing April 1, 2010. For the purposes of the interim order the father's income was found to be $108,000.00.

[18] A pre-trial conference was scheduled for June 18, 2010. On June 16, 2010 a Notice of Intention to Proceed in Person was filed by the father.

[19] On June 17, 2010 counsel for the mother wrote to the pre-trial judge outlining outstanding issues regarding disclosure from the father.

[20] On June 18, 2010 the pre-trial judge ordered the father to provide the disclosure requested in the letters from the mother's counsel of May 4, 2010 and June 17, 2010. The order also allowed for an appraisal of the property in which the family had resided and ordered the father to cooperate and make the property accessible for the appraisal and ordered the administrator of the RCMP pension of the father to provide information to the mother. The order was issued on July 15, 2010.

[21] On July 20, 2010 the father filed a letter to the pre-trial conference judge alleging a conflict of interest by counsel for the mother, background history, complaints about the conduct of counsel for the mother and a crisis in relation to the children's well-being.

[22] On August 26, 2010 a pre-trial conference was held. A further organizational pre-trial was set for January 17, 2011 and trial dates were set for

March 28, 29 & 30, 2011 from 10:00 a.m. to 4:30 p.m. each day. The pre-trial memorandum required that all of the documentation outlined in the order of July 15, 2010 be filed no later than October 29, 2010. Further clarification was provided regarding the appraisal.

[23] On October 29, 2010 the father filed some, but not all, of the information and documents required by the order to disclose and the pre-trial memorandum. Missing were corporate tax returns for 1995 - 1997, 1999 and 2003. There was nothing provided about assets and liabilities of the company, bank account documents were missing pages and were not provided for the 24 months ordered; there was information missing about investment accounts and regarding the litigation with the Province.

[24] Counsel for the mother wrote to the father on November 23, 2010 requesting completion of the ordered disclosure and also requesting further disclosure. No response was received from the father so another letter was sent to the father on January 4, 2011.

[25] A pre-trial conference was held on January 17, 2011 and a date of January 27, 2011 was set for a motion to deal with disclosure issues. The parties were directed to file and exchange all material on the motion one week prior to January 27, 2011. Filing deadlines were also given for the trial with the mother's affidavits from herself and any witnesses to be filed on or before February 8, 2011; affidavits from the father and any witnesses to be filed on or before March 1, 2011 and any affidavit in response from the mother to be filed by March 15, 2011. Pre-trial Memorandums were to be filed and exchanged on or before March 18, 2011 and counsel for the mother was to file the exhibit book on that same date.

[26] A Notice of Motion for Directions along with an affidavit from the mother was filed by the mother on January 20, 2011 seeking an order giving directions for disclosure. On January 26, 2011 the father filed a letter requesting disclosure from the mother.

[27] On January 27, 2011 the judge hearing the motion directed disclosure from both parties by February 11, 2011.

[28] The mother filed her affidavit on February 9, 2011 along with an updated Statement of Expenses.

[29] On February 11, 2011 a letter was filed with the court from the father providing an explanation of the medical insurance coverage for the mother and requesting an apology from the judge who heard the motion for directions. On the same day a letter was filed by counsel for the father requesting an extension of time to file material and seeking an adjournment of the trial.

[30] On March 17, 2011 a Notice of Motion for Directions was filed by the father requesting an adjournment. This Notice of Motion was heard on March 21, 2011. Counsel for the father had not yet met with the father. At that time counsel for the mother agreed to the adjournment on the condition that the father pay $5,000.00 in costs. The court directed that the father could not file anything more with the court as the filing deadlines in the pre-trial memorandum and order for disclosure had passed. The court extended the time for the mother to file her pre-hearing brief and exhibit book until the matter of the adjournment was resolved. Later on March 21, 2011 counsel for the mother filed a letter indicating that the father would not be

advancing his request for an adjournment. Counsel for the mother filed a further letter with the court on March 24, 2011.

[31] On March 28, 2011 the father filed a letter indicating that he would not be present on March 28, 2011 as he was required in the Provincial Court. The father indicated in the letter that the court had been informed of this scheduling conflict and indicated his intention to be present on Tuesday, March 30, 2011 (Tuesday was March 29; Wednesday was March 30, 2011).

[32] When court opened on Monday, March 28, 2011 counsel for the mother was asked how the mother wished to proceed. Because of the mistake in the date in the father's letter it was not clear whether he intended to be in court on Tuesday or Wednesday. Counsel for the father had written to counsel for the mother late on Friday, March 25, 2011 asking to have two experts available for cross-examination. Counsel for the mother was not aware the father would not be present on March 28, 2011.

[33] The trial commenced on March 28, 2011 and evidence was heard from the mother in the morning and the appraiser for the jointly held home in the afternoon.

[34] On Tuesday, March 29, 2011 the father appeared and indicated that he had not been present the day before as he was in Provincial Court on a personal Summary Offence Ticket. He was unsure when he received the Summary Offence Ticket or when the trial date was set. The father indicated that he wanted counsel and did not want to participate in the proceeding without counsel. He indicated he had no questions for the doctor who was present to give testimony. The mother concluded her case and the father was asked if he wanted the court to consider anything that he had filed. The father indicated that he wanted counsel.

[35] Counsel for the mother wanted to ask the father questions on cross-examination and the father took the stand and was sworn in. The father refused to answer any questions without counsel, despite being directed to answer by the court and being warned that he could be found in contempt. The matter of the father's contempt was put over to another date to allow the father to obtain counsel.

[36] The trial was set over until Wednesday, March 30, 2011 for submissions.

On Wednesday, March 30, 2011 the father filed a Notice of Intention to Act on One's Own. The father was provided information the court had received regarding his Summary Offence Ticket being issued on August 28, 2010 and the trial date in Provincial Court having been scheduled on October 29, 2010. A partial transcript of the Provincial Court hearing was provided to the father and counsel for the mother. The father took the stand but again refused to answer questions from the court or counsel for the mother.

[37] Counsel for the mother made an *ex parte* motion for a preservation order for assets of the company and assets of the father. The father made some submissions in relation to the preservation order and a preservation order was granted.

[38] Counsel for the mother made closing submissions and the father provided some limited submissions. The father did not return to the court after an afternoon break. The matter was adjourned for decision.

Preliminary Matters:

1. Motion for Adjournment

[39] Counsel for the father sent a letter to Scheduling and two Justices of the Supreme Court of Nova Scotia (Family Division) on February 11, 2011 indicating that she was requesting an extension of time to file material for the father and also requesting an adjournment of the trial scheduled for March 28, 29 & 30, 2011. It appears that this letter was placed in the file and not brought to anyone's attention. Counsel for the father filed a Motion for Directions on March 17, 2011 seeking an adjournment of the trial. The Motion was heard on March 21, 2011.

[40] The adjournment was not granted by the court because the matter had been scheduled since August 26, 2010; the father had not complied with the disclosure requirements directed by Justice Legere-Sers on January 27, 2011 or the filing directions in the pre-trial conference memorandum of Justice MacDonald; the mother's material had been filed; it was one week prior to the trial and counsel had not yet met with the father. Counsel for the mother indicated that they would agree to an adjournment if the father agreed to pay costs of $5,000.00. The court indicated that no further material could be filed by the father as all of the filing deadlines had passed.

[41] Counsel for the father wrote to the court and counsel for the mother on March 21, 2011 indicating that the father would not be agreeing to pay the costs, would not be further advancing the request for adjournment and had no choice but to keep the trial dates.

2. Proceeding with the Trial on March 28, 2011

[42] On March 28, 2011 the father provided a letter to the court indicating that he would not be present for the trial on March 28, 2011 as he would be in the Provincial Court. This letter was provided to counsel for the mother by the court on the morning of March 28, 2011. There was no indication in the file that the father had mentioned his Provincial Court commitment prior to the letter of March 28, 2011. There had been nothing in the affidavit filed with the father's March 17, 2011 Motion for Directions which indicated that the father was unavailable for March 28, 2011. As late as March 25, 2011 at 4:00 p.m. counsel for the father had sent a letter to opposing counsel asking that two expert witnesses be available for cross-examination. The father's letter left doubts as to whether the father would be present on March 29, March 30 or at all. The father's letter indicated his intention

to be present unless he was compelled to be in attendance at the other court. The letter did not contain a request for an adjournment.

[43] The mother was present, ready to proceed and an expert witness was scheduled to testify at 2:00 p.m. on March 28, 2011.

[44] The matter proceeded on March 28, 2011. The mother testified in the morning and the real estate appraiser testified in the afternoon. The father indicated he was finished in the Provincial Court around noon on March 28, 2011 but he failed to attend the trial that afternoon.

[45] On March 29, 2011 when the father refused to answer questions, counsel for the mother indicated a preference to continue with the trial rather than wait for the father to purge his contempt. The trial continued.

3. Evidence of the Father

[46] The father filed an affidavit in April 2010. He filed financial statements in February 2010 and again in April 2010 with the assistance of counsel. He did not comply with the first Order to Disclose dated July 15, 2010. He partially complied with the disclosure directions in the Pre-Trial Conference Memorandum from August 26, 2010. He did not respond to letters from counsel for the mother requesting disclosure. He did not comply with the filing directions in the Pre-Trial Conference Memorandum from January 17, 2011. The only disclosure ordered on January 27, 2011 which was provided by the father was a letter from Sun Life Financial regarding health insurance.

[47] The father was not present on Monday, March 28, 2011 to ask questions of the mother or the Real Estate Appraiser. The father waived cross-examination on the mother's family physician who was present on March 29, 2011. The father refused to answer any questions put to him by counsel for the mother.

[48] There were issues raised about the father's credibility. He swore a Statement of Income on February 3, 2010 that he received $1,003.48 per month from Veterans Affairs Canada (VAC). The father swore a further Statement of Income on April 20, 2010 showing the amount of $1,148.48 per month. The

father's bank records which were subpoenaed by the mother show that on January 28, 2010 he received $1,591.56 from VAC and had received more than $1,500.00 a month from that source since prior to separation. The father's bank records further show that on February 3, 2010, the day he swore to the truth of his first statement of income, he received $32,562.34 from VAC. This was never disclosed by the father. Starting on March 20, 2010 the father started receiving more than $3,000.00 a month from VAC. However, on April 20, 2010 he swore he received $1,148.00 a month.

[49] There are many other things that raise concern about the father's credibility such as the partial transcript from the Provincial Court on March 28, 2010 and contradictory evidence as to whether the company stopped conducting business in 2003 or continued to buy and sell properties and automobiles.

[50] Given the concerns over the father's credibility, his lack of disclosure, his refusal to answer questions about any subject and his failure to ask any questions of the mother or her witnesses, I disregard the father's evidence and accept the uncontradicted evidence of the mother in relation to all issues.

Issues:

[51] (a) What is the appropriate parenting plan for the children?

(b) How should the jointly held home be divided?

(c) Would the father be unjustly enriched if he retained the investment accounts, RRSPs, and all of his pension? Is so, what is the appropriate remedy?

(d) What is the father's income for child and spousal maintenance?

(e) What is the appropriate amount of chid maintenance, both table and section 7, payable by the father?

(f) Is the mother entitled to spousal maintenance? If so, in what amount?

(a) What is the appropriate parenting plan for the children?

[52] As with all parenting decisions the paramount and only consideration is what is in the best interests of the children? The children are 19 years of age and almost 18 years of age. Since the parties separated in December 2009, the children have lived primarily with the mother. The 18 year-old boy lived with his father for a short time after separation, prior to the mother finding appropriate

accommodations. The boy moved in with the mother in March 2010 and has resided with her since that time. The boy visits with his father. The girl has lived with the mother since separation and does not see her father by her choice.

[53] The boy is in grade 12 and the girl is in her first year of university. It is expected that the boy will attend university in the Fall of 2011. Both children are still dependant under the definition of "dependant child" in section 2 of the **Maintenance and Custody Act.**

[54] Given the ages of the children I find it is in their best interests to leave the parenting arrangement as it currently stands. The children will remain in the primary care of the mother and will have reasonable access with the father as agreed between the parties, taking into consideration the wishes of the children.

(b) How should the jointly held home be divided?

[55] The home that the family lived in from 2000 until separation in December 2009 is in both parties' names. It was purchased in 2000. There was an agreement of purchase and sale for the lot between the company and the seller dated in February 2000 for $111,550.00. There was a later agreement of purchase and sale dated May 1, 2000 between the father and the seller which included the construction of a house in the amount of $300,000.00. The Warranty Deed dated October 11, 2000 conveyed the property to both parties as joint tenants. A further confirmatory deed dated December 22, 2000 conveyed the property to both parties.

[56] The mother has made an application under section 28 of the **Partition Act** for sale of the property and division of the proceeds. In the recent decision of **Soubliere v. MacDonald,** 2011 NSSC 98, Jollimore J. set out the law in relation to jointly held property under the **Partition Act:**

> [21] The jurisprudence which has developed under the *Partition Act* states that when parties hold title in joint names, there is a presumption that the net proceeds of the property's sale shall be divided equally. In *Anderson v. Wilson* (1986), 73 N.S.R. (2d) 1 (T.D.), after reviewing a number of decisions under the *Partition Act*, Justice Grant acknowledged that no two cases are ever identical and commented, at paragraph 24 " . . . the common thread in these cases is that there is an equal division of the net proceeds of the sale subject to certain equities." His Lordship had earlier

described the presumption at paragraph 12 as "a strong presumption". Justice Legere-Sers of this court reiterated the presumption of equal division in *Primeau v. Richards*, 2004 NSSF 86 where she wrote, at paragraph 31, "There is a presumption in a situation of joint ownership of equal sharing subject to certain equities" and in *MacDonald v. Jollymore*, 2006 NSSC 152 at paragraph 33.

[22] Mr. MacDonald bears the burden of rebutting the presumption of equal division and he argues that the presumption is rebutted because the "home was purchased solely with monies" from him. He offers no authority for this argument and I've been unable to locate any case where the presumption has been rebutted on this basis. To the contrary, in *Davis v. Munroe*, 2011 NSSC 14, Mr. Davis owned a house for approximately seventeen years before beginning his relationship with Ms. Munroe. After living together for four years, Mr. Davis and Ms. Munroe moved into this house and, in the following year, Mr. Davis made Ms. Munroe a joint owner of the property. When the couple separated and a Partition Act application was litigated, Justice Ferguson said at paragraph 35, "Mr. Davis **correctly** acknowledges Ms. Munroe's initial entitlement to fifty percent of the net equity in their home." The emphasis is mine. Justice Ferguson's comment recognizes that when parties take title jointly this creates the presumption of equal interest.

[23] Mr. MacDonald argues that "It is perhaps logical to presume equal sharing in a joint tenancy situation where both parties have substantially contributed to the purchase of the asset, or its improvement." I disagree. The presumption of equal sharing arises from the fact that the parties elected to take title to the property as joint tenants. The presumption does not arise from how the purchase was financed or how improvements to the property were made.

[24] Mr. MacDonald has not rebutted the presumption that Ms. Soubliere is entitled to an equal sharing of the property's value. I begin there. Ms. Soubliere's entitlement is "subject to certain equities", as Justice Legere-Sers noted in *Primeau v. Richards*, 2004 NSSF 86 at paragraph 31.

In this case, the father has not rebutted the presumption of equal sharing of the property which the parties hold as joint tenants.

[57] It is not clear from the evidence whether the agreement of purchase and sale dated May 1, 2000 replaced the earlier agreement of purchase and sale. The father indicated that he used insurance premiums to pay off the mortgage on the home but failed to provide the verification that was ordered.

[58] The property was appraised and I accept the appraised value of $570,000.00.

[59] There is a line of credit in the name of the father which the mother has always understood was guaranteed by the home. Again, it is not clear that is the case but the mother agrees that the line of credit was used for family purposes up until the end of October 2009. On October 30, 2009 the line of credit balance was $49,006.77. I will offset the value of the home by that amount. After that time, the father drew large amounts of money against the line of credit including $15,614.00 on November 20, 2009 and $12,539.00 on November 27, 2009. The mother says that these amounts were not used for family purposes.

[60] The value of the house is $570,000.00 minus the line of credit in the amount of $49,007.00 and disposition costs of $32,775.00; real estate commission and HST and legal fees and HST of $1,000.00 for a net equity of $487,218.00.

[61] While the mother applied under the **Partition Act** to sell the former family home, in submissions she asked that the father be given a period of time to buy out her interest in the home. The father will have 45 days from the date of this decision to pay the mother the amount of $243,609.00 for her interest in the home. If the father does not pay that amount to the mother within 45 days, the house shall be sold and the net proceeds will be divided equally between the parties.

[62] If the father does not pay the mother within 45 days, the mother shall have exclusive possession of the home. She will also have the right to list the property without the father's consent and to accept any reasonable offers without the father's consent. If the father refuses to sign the deed conveying the property to the purchaser, the mother has the right to convey the property to the purchasers without the father's consent. The mother shall pay the father 50% of the net proceeds from the sale of the property.

(c) Would the father be unjustly enriched if he retained the investment accounts, RRSPs, and all of his pension? Is so, what is the appropriate remedy?

[63] The Supreme Court of Canada has recently clarified the law in relation to unjust enrichment in relation to property division in a common law relationship in **Kerr v. Baranow**, 2011 SCC 10.

[64] The first and second steps in the unjust enrichment analysis concern whether the father has been enriched by the mother and second, whether the mother has suffered a corresponding deprivation (**Kerr** paragraph 36). During the course of the almost 20-year relationship the parties were at all times engaged in a joint family venture. They presented themselves as a family. They had plans to be married. They had two biological children and raised the mother's child from a former relationship who was four years old when the couple commenced their relationship. The father worked throughout the relationship and the mother worked at the beginning of the relationship but stopped working as a nurse to care

for the children. From 1994 onward, her monetary contribution to the family was secondary.

[65] At the end of the relationship there were investments, RRSPs and a pension in the father's name only and RRSPs in the mother's name only. Both parties contributed to the creation of these assets and the father would be enriched if he was to retain the assets that are only in his name. The mother would suffer a corresponding deprivation if the father retained the assets in his name.

[66] The third element of an unjust enrichment claim is that the benefit and corresponding detriment must occur without a juristic reason (**Kerr** paragraph 40). Juristic reasons may be a gift, a contract, a disposition of law or other (**Kerr** paragraph 41). There is a two-step approach to the analysis of absence of juristic reason. First the plaintiff must show no juristic reason from the established categories and if they do there is a *prima facie* case that there is not a juristic reason. The defendant can then rebut the *prima facie* case. Domestic services can support a claim for unjust enrichment (**Kerr** paragraph 42).

[67] On the evidence in the present case there is no contract, gift, disposition of law or other valid juristic reason. There is also nothing in the evidence that would provide a reason for the father to retain the enrichment or to establish that it would be just to allow the father to retain the assets (**Kerr** paragraphs 114 and 115). The reasonable expectations of the parties in the present case were that they were working together as a family and there is no public policy reason to allow the enrichment. I therefore find that the father would be unjustly enriched if he was able to retain the assets that are in his name.

[68] A monetary award may be a remedy or a proprietary award. In most cases a monetary remedy is appropriate but a proprietary remedy may be required if the monetary award is inappropriate or insufficient. There must be a link or causal connection between the contributions made and the acquisition of the property (**Kerr** paragraph 50).

[69] Monetary awards do not have to be calculated by *quantum meruit*:

> ...the basis of the unjust enrichment is the retention of an inappropriately disproportionate amount of wealth by one party when the parties have been engaged in a joint family venture and there is a clear link between the claimant's contributions to the joint venture and the accumulation of wealth. Irrespective of

> the status of legal title to particular assets, the parties in those circumstances are realistically viewed as "creating wealth in a common enterprise that will assist in sustaining their relationship, their well-being and their family life" (McCamus, at p. 366). The wealth created during the period of cohabitation will be treated as the fruit of their domestic and financial relationship, though not necessarily by the parties in equal measure. Since the spouses are domestic and financial partners, there is no need for "duelling *quantum meruits*". In such cases, the unjust enrichment is understood to arise because the party who leaves the relationship with a disproportionate share of the wealth is denying to the claimant a reasonable share of the wealth accumulated in the course of the relationship through their joint efforts. The monetary award for unjust enrichment should be assessed by determining the proportionate contribution of the claimant to the accumulation of the wealth. (**Kerr** paragraph 81)

[70] To determine whether the parties were engaged in a joint family venture four categories need to be considered: mutual effort, economic integration, actual intent and priority of the family (**Kerr** paragraph 89).

[71] In mutual effort I must consider if the parties worked collaboratively toward common goals. Here the parties worked together; they pooled their resources. The father worked outside the home and the mother's primary focus was in raising the children. They made the joint decision that she would quit her job when their daughter was sick. The mother worked seasonally for the company and took jobs that allowed her to continue to focus on the children. They were engaged in a partnership.

[72] The next consideration in **Kerr** is economic integration. Here the parties held the family home in their joint names; they made contributions to RESPs for the children from the family funds. The father looked after the finances and the mother looked after the home. The mother stopped drawing a salary from the company when she managed the restaurant as a contribution to the family business. The overall welfare of the family was the focus, not the welfare of the individuals **(Kerr** paragraph 93).

[73] The actual intent of the parties has to be considered when they were together, not after separation. The mother used the father's surname. They referred to each other as husband and wife. They were together for approximately 20 years. They had two children. They are joint tenants of the family home. The father gave the mother two engagement rings. All of these things point to a joint family venture.

[74] The priority of the family in decision making must also be considered. Here the mother quit her job to look after the daughter when she was ill. This was a joint decision made for the benefit of the family but it was to the mother's financial detriment. The mother's career and financial stability was secondary in the family

unit. The mother relied on the success and stability of the relationship for future economic security (**Kerr** paragraph 98).

[75] In this case the father has emerged from the relationship with a disproportionate share of the assets that were accumulated through the joint efforts of the parties. The mutual efforts of the parties resulted in an accumulation of wealth. The remedy is a share of that wealth proportionate to the claimant's contribution (**Kerr** paragraph 102). In the present case the parties pooled their resources and were involved in a joint family venture. The mother contributed by working outside the home, being the primary parent for the children, working for the family business and working at jobs that allowed her flexibility to accommodate the children's needs and schedules. The relationship lasted for a month less than 20 years and the wealth accumulated through their joint efforts should be shared equally. Without the efforts of both, the assets would not have been acquired. The mother contributed with her earnings, her contribution to the family business, her work in the home and raising the children. The father contributed his earnings and looked after the finances of the family.

[76] The mother is entitled to 50% of the father's pension and other benefits from the RCMP from January 1, 1990 until December 22, 2009. The mother is entitled to 50% of the value of all RRSP and investment accounts in the father's name. The father is entitled to 50% of all RRSP accounts in the mother's name. The RESPs will be held in trust for the children.

[77] The values I have for the assets to be divided include an RRSP in the name of the father valued at $93,219.67 as of September 30, 2009. The father shall transfer $46,610.00 to the mother by spousal rollover. There is an RRSP in the name of the mother valued at $11,231.22 as of September 30, 2009. The mother shall transfer $5,616.00 to the father by spousal rollover. These transfers are to be made within 45 days of this decision. There is an open plan in the name of the father with a value of $1,664.45 as of September 30, 2009. The father will pay the amount of $832.00 to the mother within 45 days of this decision.

[78] There are RESPs to be held in trust for the children. One with Franklin Templeton Investments in the name of the father was valued at $8,381.12 as of November 27, 2009. There is a joint family RESP with Renaissance Investments

valued at $6,261.89 as of September 30, 2009. There is another RESP in the father's name valued a $33,378.64 as of September 30, 2009.

[79] The parties' Canada Pension Plan benefits accumulated between January 1, 1990 and December 22, 2009 will be divided equally.

(d) What is father's income for child and spousal maintenance?

[80] Section 19 of the **Nova Scotia Child Maintenance Guidelines** allows the court to impute income where the court considers it appropriate in the circumstances (19(1)) - where the parent is exempt from paying income tax (19(1)(b)) and where the parent has failed to provide income information when under a legal obligation to do so (19(1)(f)). Section 23 of the **Guidelines** allows me to draw an adverse inference against a parent who fails to disclose and to impute income.

[81] The most recent income information from the father is a T-4 slip from December of 2009. In 2009, the father earned $82,245.82. Since we do not have a current pay stub or a T-4 slip from 2010, I have to look at the bank account of the

father to determine if he is earning more money now than in 2009. As some deductions such as CPP and EI are deducted early in the year but may reach the maximum during the year, I will compare deposits into the father's accounts for the same month in each of the three years for which I have bank records. In January 2009 and February 2009 the father's total net income deposited into his account was $3,830.15. In January 2010 it was $4,112.62 and in February 2010 it was $3,944.85. In January 2011 it was $4,023.34 and in February 2011 it was $4,031.64. Using averages of only these figures the father's net income in 2009 would have been approximately $45,961.00 in 2009; $48,345.00 in 2010 and $48,330.00 in 2011. This would translate into an increase of approximately 5.2% over his 2009 income. I will use $86,523.00 as the father's income from the RCMP in 2010 and 2011.

[82] The evidence before me is that the income from VAC is not taxable. To determine the father's income I have to determine the amount of before tax income it would take to generate $39,476.00 a year ($3,289.65 x 12). In February 2010 the father received a lump sum from VAC in the amount of $32,562.34.

[83] The Childview software calculations submitted by counsel for the mother gross up this income to $86,128.00 a year using a tax and benefits rate of 54%. The income from VAC would not have any deductions for benefits such as pension or health insurance. The father would pay the maximum Employment Insurance and Canada Pension premiums on his RCMP income. I will use 50% as the marginal tax rate and $78,952.00 for the grossed up income necessary to earn $39,476.00 after tax. The father's income from VAC is imputed to be $78,952.00.

[84] At the disclosure hearing the father said that he had a tenant but he did not provide the lease and rental income information that was directed. The father's answers to whether the company was still carrying on business were not consistent. There was more than $100,000.00 charged to the line of credit in January 2011. There is evidence that the father was selling automobiles and that the company had two properties registered in its name. Because of the failure to disclose by the father, it is difficult to determine what income should be imputed to him for rental income and income from the company. Counsel for the mother asks that I impute $24,000.00 a year for income from both of these sources. I find that $24,000.00

is a reasonable amount of income to impute to the father for rental income and income from the company.

[85] I therefore find that the father's income from all sources for 2010 and 2011 is $189,475.00 made up of $86,523.00 from the RCMP; $78,952.00 from the VAC and $24,000.00 imputed income for rental income and income from the company.

(e) What is the appropriate amount of chid maintenance, both table and section 7 payable by the father?

[86] Both children have lived with the mother since March 2010. The daughter has lived with the mother since December 2009. The Interim Order of May 14, 2010 required the father to pay child maintenance for the two children commencing April 1, 2010 in the amount of $1,441.00 a month based on income of $108,000.00.

[87] Although the daughter is over the age of majority, she is still dependant and living with her mother. I find under Section 3(2) of the **Guidelines** that it is not

inappropriate in the circumstances for the table amount of child maintenance to be paid for the daughter.

[88] The mother seeks child maintenance starting in January 2010. The mother asks that the child maintenance in the Interim Order be adjusted based on the actual income of the father.

[89] It is often the case that interim orders are made on the basis of limited information. The interim order is designed to get through to the final hearing.

[90] In **D.B.S. v. S.R.G; L.J.W. v. T.A.R; Henry v. Henry** and **Hiemstra v. Hiemstra,** 2006 SCC 37, the Supreme Court of Canada set out the factors to consider when determining if retroactive support should be ordered. In this case there was no delay in seeking child maintenance; the application was made on January 6, 2010 and the parties separated on December 22, 2009. There was blameworthy conduct on the part of the father as he failed to provide complete income information and he understated the amount of income he received from VAC. The children are still in need of support and would benefit from a retroactive award. While there will be hardship to the father in paying retroactive

maintenance, he was clearly not fulfilling his responsibility to support his children. The father could not have reasonably believed that he was meeting his children's maintenance obligations. The effective date of notice was in January 2010.

[91] I will order child maintenance payable starting January 2010. In January and February 2010, the father should have been paying $1,489.00 a month for the daughter based on income of $189,475.00. The mother's 2010 income was $29,309.00 and she should have paid $262.00 per month to the father while the son resided with him. No child maintenance was paid and therefore the father owes the mother $2,454.00 for those two months. In March 2010 both children were living with the mother and the father should have paid $2,355.00. No maintenance was paid in March 2010 and the father owes the mother $2,355.00 for March 2010.

[92] Commencing in April 2010, the father paid child maintenance in the amount of $1,441.00 a month. He should have paid $2,355.00 a month for a difference of $914.00 a month. The father owes the mother $11,882.00 for the 13 months starting April 1, 2010. The total retroactive child maintenance owing to the mother from the father is $16,691.00. That amount is payable within 45 days of the date of this decision.

[93] Starting May 1, 2011 and continuing on the first day of each month thereafter the father will pay the table amount of $2,355.00 for the two children.

[94] There are currently section 7 university expenses for the daughter and there will likely be university expenses for the son starting in September 2011. The parents are to use the maximum amount they can from the RESPs which are held in trust for the children for tuition, books, university dues and other reasonable university expenses. The parents are to proportionately share any university costs not covered by the RESPs and any other section 7 expenses. The father will pay 87% and the mother will pay 13% of the expense.

[95] The father will keep the children covered on his medical and dental insurance through his employment or otherwise.

(f) Is the mother entitled to spousal maintenance? If so, in what amount?

[96] Section 4 of the **Maintenance and Custody Act** sets out factors for the court to consider in deciding whether a spouse is entitled to spousal maintenance. The mother was primarily responsible for the home and the children and the father was primarily responsible for the finances and income earning. As set out above the parties functioned in a joint family venture. The children continue to live with the mother. The mother quit her employment as a nurse to look after the daughter when the daughter was ill. The mother never returned to employment as a nurse because of her responsibilities to the family, the children. She worked for a time in the family business. The mother has medical conditions that limit the type and amount of work she can do. The doctor's report indicates that the mother has ongoing issues with chronic back pain and irritable bowel syndrome. The mother has not worked as a nurse for over 16 years. It is not reasonable to think that she could obtain employment again as a nurse without retraining and qualification. The mother is working as a salesperson and earning to her capacity. The mother's efforts in the home allowed the father to further his employment and develop his company. The father is living in the former family home and the mother has rented accommodations. The mother's standard of living is not as high as it was when the couple were together. The father has the ability to pay spousal maintenance and still meet his own needs.

[97] The mother is entitled to spousal maintenance.

[98] The mother is seeking retroactive spousal maintenance from January 2010 and an adjustment of the amount of spousal maintenance paid since April 2010 based on the father's income. In **Kerr v. Baranow,** 2011 SCC 10, the court reinstated the trial judge's order making a spousal support order start on the date the applicant began the proceeding rather than the date of the trial. The court found that similar factors should be considered in making a retroactive order for spousal maintenance as those in making an order for retroactive child maintenance with differences based on the nature of spousal maintenance. Concerns about notice, delay and misconduct carry more weight in relation to spousal maintenance **(Kerr** paragraph 208). Here, however, there was no delay. The father was aware and had effective notice that the mother was seeking spousal maintenance less than a month after the separation. Had the father provided proper and truthful disclosure, the proper amount of spousal maintenance would have commenced in April 2010. For the same reasons as set out above the father engaged in blameworthy conduct. The delay from January to April is partially attributable to the inability to serve the father with notice of the interim hearing. The mother

diligently pursued her claim for spousal maintenance. The mother should be compensated by awarding the correct amount of spousal maintenance.

[99] Under the **Spousal Support Advisory Guidelines** the range of spousal maintenance is between $4,211.00 a month and $2,913.00 a month. This was a 20-year relationship. The father will be paying child maintenance for the children.

[100] The father will pay spousal maintenance in the amount of $3,000.00 a month commencing January 1, 2010 and continuing each month thereafter.

[101] The father did not pay spousal maintenance for the months of January, February or March 2010. The father will pay $9,000.00 to the mother for those months. Starting in April 2010, the father paid spousal maintenance in the amount of $900.00 a month for a difference of $2,100.00 a month for 13 months or $27,300.00. The amount of $36,300.00 in retroactive spousal maintenance shall be paid by the father to the mother within 45 days of the date of this decision.

Conclusion

[102] The children will remain in the primary care of the mother and will have reasonable access with the father as agreed between the parties taking into consideration the wishes of the children.

[103] The net proceeds of the family home will be shared equally between the parties. The father will have 45 days from the date of this decision to pay the mother the amount of $243,609.00 for her interest in the home. If the father does not pay that amount to the mother within 45 days the house shall be sold and the net proceeds will be divided equally between the parties.

[104] The mother is entitled to 50% of the father's pension and other benefits from the RCMP from January 1, 1990 until December 22, 2009. The mother is entitled to 50% of the value of all RRSP and investment accounts in the father's name. The father is entitled to 50% of all RRSP accounts in the mother's name. The RESPs will be held in trust for the children. The parties' Canada Pension Plan benefits accumulated between January 1, 1990 and December 22, 2009 will be divided equally.

[105] The father's income from all sources for 2010 and 2011 is $189,475.00 made up of $86,523.00 from the RCMP; $78,952.00 from the VAC and $24,000.00 imputed income for rental income and income from the company.

[106] The total retroactive child maintenance owing to the mother from the father is $16,691.00. That amount is payable within 45 days of the date of this decision.

[107] Starting May 1, 2011 and continuing on the first day of each month thereafter the father will pay the table amount of $2,355.00 for the two children.

[108] The parents are to proportionately share any university costs not covered by the RESPs and any other section 7 expenses. The father will pay 87% and the mother will pay 13% of the expense.

[109] The father will keep the children covered on his medical and dental insurance through his employment or otherwise.

[110] The father will pay spousal maintenance in the amount of $3,000.00 a month commencing January 1, 2010 and continuing each month thereafter. The amount

of $36,300.00 in retroactive spousal maintenance shall be paid by the father to the mother within 45 days of the date of this decision.

[111] Either party may set the matter down for one hour to be heard on the matter of costs. The party applying for costs shall file their Brief two weeks prior to the costs hearing and the responding party shall file their Brief one week prior to the costs hearing.

J.