

**SUPREME COURT OF NOVA SCOTIA**  
**(FAMILY DIVISION)**

**Citation:** Beaton v. MacNeil, 2011 NSSC 302

**Date:** 20110728

**Docket:** SFSNMCA65736

**Registry:** Sydney, N.S.

**Between:**

Marlene Lucille Beaton

Applicant

v.

John Oswald MacNeil

Respondent

**Judge:** The Honourable Justice Darryl W. Wilson

**Heard:** March 24-25, 2011, in Sydney, Nova Scotia

**Last Post-Trial Submissions:** April 14, 2011

**Counsel:** Darlene MacRury, Counsel for the Applicant  
Hugh McLeod, Counsel for the Respondent

**By the Court:**

[1] Marlene Beaton, the mother, applies for custody, prospective and retroactive child maintenance, spousal support, a declaration of ownership of property and a division of property based on unjust enrichment. John MacNeil, the father, replied seeking a division of property based on unjust enrichment, the conveyance of property in which he claimed a resulting trust, and the return of personal property.

**CHILD MAINTENANCE**

[2] The parties are the parents of Haley, age 22, and Cole, age 10. They resolved the issues of custody and ongoing child maintenance for Cole. The father has been paying child maintenance of \$183.00 monthly for Cole since December, 2009, pursuant to an Interim Order. This amount will continue. The mother did not pursue her claim for spousal maintenance. However, the parties could not agree on the payment of maintenance for Cole for the period July to November, 2009, or the payment of maintenance for Haley for the period July to October, 2009, when Haley ceased being a dependent child.

[3] Haley and Cole were dependent children at the time of separation in June, 2009. Mr. MacNeil did not provide any child support until December, 2009. Ms. Beaton filed her application for support in August, 2009. Mr. MacNeil's obligation to support his children does not require a court application if he is aware they need support.

[4] Ms. Beaton did not delay pursuing a child support order; she was solely responsible for meeting the children's needs from July to December, 2009; the children needed support; and Mr. MacNeil is capable of paying child support retroactive to July, 2009, which is only one month longer than an Order from the date of Ms. Beaton's application. Based on the terms of the Interim Order, Mr. MacNeil's income for child support purposes is fixed at \$22,100.00. Therefore, he shall pay retroactive child support of \$1,475.00 (\$323.00 a month from July to October, 2009 for two children and \$183.00 a month for November, 2009 for one child).

**MAIN ISSUE**

[5] The parties' competing actions for division of property accumulated during the relationship was the main issue at trial. These issues were complicated by the mother's bankruptcy, the conveyance to a Trustee in Bankruptcy of properties in

which the father claimed a resulting trust and unjust enrichment and the mother's purchase of these properties from the Trustee after her discharge from bankruptcy.

### **BACKGROUND**

[6] The parties met and began dating in the early 1980s. By 1985, they were residing together in rented accommodations. A daughter was born in 1988. They changed residences several times. In 1995, they were living in a mini home owned by Mr. MacNeil and Ms. Beaton's father. Their son was born in March, 2002. Also in March, 2002, Mr. MacNeil purchased property located at 38 King Street, Scotchtown where the family resided until the parties' separation in June, 2009. Title to the property was recorded in Ms. Beaton's name.

[7] Mr. MacNeil questioned Ms. Beaton's characterization of their relationship as a common-law relationship. The early years of their relationship were marked by periods of separation and reconciliation. An Order of the Family Court issued August 2, 1989 granting the mother custody of the infant child and ordering the father to pay child maintenance was rescinded November 29, 1989. A second Order, issued November 13, 1990, required the father to pay child maintenance of \$175.00 per month, beginning September 10, 1990 and provide coal to heat the residence occupied by the mother and child, was never rescinded. At that time, child maintenance payments were included as income of the recipient and deducted from income of the payer for income tax purposes. The parties filed income tax returns indicating different addresses and a "single" marital status until 2005. The parties were audited in 2008 and their marital status changed to common-law. Mr. MacNeil said there were times that he worked in Ontario when the coal mines were shut down and he was not residing with Ms. Beaton.

[8] Ms. Beaton said they misled Revenue Canada with their income tax filings to give the father a tax saving. She stated that she did not receive any child maintenance payments from Mr. MacNeil. According to Ms. Beaton, a common-law relationship is supported by the following facts:

(1) Mr. MacNeil designated her as a spouse for employment benefit purposes when he was working at DEVCO and named her the beneficiary of his RRSP accounts with the Investors Group;

(2) Property purchased during this time was registered in her name;

(3) Mr. MacNeil added her as a signatory to his bank accounts at the Whitney Pier Credit Union;

(4) There was no child support application or court order taken out after Cole's birth in 2002 until these proceedings were initiated in 2009.

(5) Any periods of separation were in the early years of their relationship and there have not been any separations between 1999 and 2009.

[9] Mr. MacNeil did not deny any of these facts asserted by Ms. Beaton.

[10] I find the parties lived in a common-law relationship for many years. While there may have been interruptions in that relationship in the 1980s and 1990s, they have lived continuously in a common-law relationship from 1999 until their separation in June, 2009. Most of the property in dispute was accumulated after 1999.

[11] The following properties and assets were acquired during their relationship:

(a) 38 King Street - Originally, this property, which was acquired in March, 2002, consisted of three lots, one of which was the site of the family home. Mr. MacNeil contracted to buy the property for \$51,000.00. The purchase price was financed with a mortgage loan of approximately \$37,000.00 and a cash payment of approximately \$19,000.00 contributed by Mr. MacNeil from RRSP funds. Title was recorded in Ms. Beaton's name only. Mr. MacNeil signed the mortgage as a guarantor. He made monthly payments on the mortgage for a time. According to Ms. Beaton, mortgage insurance paid the mortgage for approximately 7 years after Mr. MacNeil was disabled. Mrs. Beaton's interest in the property was vested with the Trustee in Bankruptcy on Ms. Beaton's Assignment in Bankruptcy and was held by the Trustee at the time of separation. Ms. Beaton made all mortgage payments after the parties' separation in June, 2009. Mrs. Beaton purchased this property from the Trustee in 2010, which was after her discharge from bankruptcy and separation from Mr. MacNeil. The property value was appraised at \$50,000.00 when Ms. Beaton made her bankruptcy assignment in 2008 and \$90,000.00 when she applied for mortgage financing in 2010.

(b) 42 King Street - This property was one of the three original lots acquired in March, 2002. Ms. Beaton transferred title to this lot to Mr. MacNeil in 2007.

Mr. MacNeil required a deed to this property in order to obtain mortgage financing to purchase and relocate a mini-home to the property. The mini-home is being rented for \$500.00 per month. Mr. MacNeil collected the rents and maintained and preserved the property without contribution from Ms. Beaton. The mortgage was paid out before the parties' separation in 2008 from money Mr. MacNeil said he received from personal injury claims. Ms. Beaton was unsure if the mortgage was paid from Mr. MacNeil's personal injury claims or proceeds from the sale of another "camping-trailer" occupied by the parties. This property was valued by Mr. MacNeil at \$42,000.00 and Ms. Beaton at \$25,000.00 in their Statements of Property.

(c) 25 Queen Street - This property was acquired in February, 2002, for \$5,000.00 from C.M.H.C. by Mr. MacNeil. Title to the property was recorded in the name of Marlene Beaton. This property is rented for \$450.00 a month. Mr. MacNeil collected the rent before and after separation. He has been responsible for the property's maintenance and preservation without contribution from Ms. Beaton. The purchase price was paid by cheque drawn on Mr. MacNeil's credit union chequing account. Ms. Beaton signed the cheque releasing the funds. Mr. MacNeil deposited \$5,500.00 into his chequing account two days prior to Ms. Beaton signing the cheque releasing the funds. Mr. MacNeil had cashed in a term deposit to obtain these funds. This property was appraised at \$14,000.00 in 2008 when Ms. Beaton filed her bankruptcy assignment. It was valued by Mr. MacNeil at \$38,000.00 and by Ms. Beaton at \$25,000.00 in their Statements of Property.

(d) West Middle River Road Property - This property is co-owned by John MacNeil and David Simms. It was purchased for \$7,000.00. They have paid the purchase price but have not yet received a deed to the property from the owners.

(e) Camping Trailer - This camping trailer was purchased in 2006 with proceeds of a loan from the Bank of Nova Scotia. Mr. MacNeil is the registered owner. The camping trailer was used by the family for camping purposes until the parties' separation in 2009. Mr. MacNeil retained possession of the camping trailer after separation and paid the outstanding loan. It was valued by Ms. Beaton at \$25,000.00 with an estimated outstanding loan of \$25,000.00 and by Mr. MacNeil at \$34,500.00, with an outstanding loan of \$34,000.00 in their Statements of Property.

(f) 2007 Harley Davison Motorcycle - Mr. MacNeil is the registered owner and he retained possession of the motorcycle after separation. The motorcycle was purchased in 2007 by Mr. MacNeil with funds he obtained by mortgaging the property at 42 King Street. The motorcycle was valued at \$15,000.00 by Ms. Beaton and \$20,000.00 by Mr. MacNeil in their Statements of Property.

(g) 2007 Chrysler Sebring - Title to this vehicle is registered in the names of Marlene Beaton and John MacNeil. It was purchased with proceeds of a loan taken out by Mr. MacNeil. Ms. Beaton has possession of the motor vehicle but does not use it. It lays idle in her yard. She purchased her own motor vehicle after separation. Mr. MacNeil has been making the monthly payments on the loan since the date of separation. The motor vehicle was valued at \$15,000.00 by both Mr. MacNeil and Ms. Beaton in their Statements of Property. Mr. MacNeil valued the outstanding loan at \$45,000.00, while Ms. Beaton was uncertain of the amount but estimated it in the vicinity of \$50,000.00.

(h) RRSPs with Investors Group - The value of the RRSPs at separation was \$7,518.00. The RRSPs declined in value to \$7,334.00 after separation and were withdrawn by Mr. MacNeil in 2010. These funds were part of the severance package received by Mr. MacNeil when DEVCO ceased operation.

(i) Whitney Pier Credit Union Savings Account - There was a balance of \$25,033.31 in the account at the time of separation. This sum included proceeds of \$6,738.00 from a personal injury claim of Mr. MacNeil, deposited on June 22, 2009 and proceeds of \$8,000.00 from RRSP funds, deposited on April 3, 2009. According to Mr. MacNeil, the balance also included approximately \$10,000.00 in Workman's Compensation benefits he received. Mrs. Beaton withdrew \$800.00 from this account after separation and Mr. MacNeil kept the balance.

(j) Household Furnishings and Personal Property - Ms. Beaton retained the household furnishings after separation. Mr. MacNeil has requested the return of a baby barn which he built, as well as a snowblower, lawnmower, tools, tires and a hot air furnace, which he purchased and are stored in the baby barn. These items remain in Ms. Beaton's possession.

(k) Aside from their sworn Statements of Property, neither party provided evidence to support the values they attribute to the motorcycle, motor vehicle and camper. Also, Mr. MacNeil did not provide documentation to identify the camping

trailer loan or the motor vehicle loan balances at the time of separation. However, both parties acknowledged their were outstanding loans which were being paid by Mr. MacNeil.

### **BANKRUPTCY**

[12] Ms. Beaton made an Assignment in Bankruptcy on March 7, 2008. Ms. Beaton told Mr. MacNeil she would be making an Assignment in Bankruptcy and that the bankruptcy would affect the family home. Mr. MacNeil did not dissuade her from proceeding with her bankruptcy assignment. The total amount of Ms. Beaton's debt was \$42,661.00, which included credit card debt in her name, a personal student loan, a loan taken out for her daughter's university education and a bank loan used for kitchen renovations at 38 King Street.

[13] Mr. MacNeil was aware that Ms. Beaton had taken out a loan for kitchen renovations but was not aware of the extent or the nature of the other debt. According to him, Ms. Beaton said the debt would be paid within thirty (30) months. There was no discussion that the property at 25 Queen Street would be included in the Bankruptcy Assignment.

[14] When Ms. Beaton made her Assignment in Bankruptcy, she claimed a half interest in the property located at 38 King Street. The Trustee subsequently determined that Ms. Beaton was the sole owner of 38 King Street and that she was the sole owner of 25 Queen Street and both of these properties were included in her bankruptcy. According to the Trustee, when a couple are residing together and one of them makes an Assignment in Bankruptcy, the normal practice is to assume that the owner of the property is the person whose name is on the deed. Ms. Beaton was discharged from bankruptcy in January, 2009 while the parties were still residing together.

[15] The Trustee filed a Notice of Bankruptcy proceedings affecting lands dated August 4, 2009, which vested the property interest of Ms. Beaton in 38 King Street, Scotchtown and 25 Queen Street, Scotchtown, with him. The Trustee had the properties appraised. The King Street property was appraised at \$50,000.00 and the Queen Street property at \$14,000.00.

[16] After her discharge from bankruptcy, Ms. Beaton contracted with the Trustee to re-purchase 38 King Street and 25 Queen Street for \$25,065.00 (the appraised values minus disposition costs) plus the outstanding mortgage. Ms. Beaton had

been making the mortgage payments after the date of her separation from Mr. MacNeil. She had reduced the purchase price of \$25,065.00 by \$5,881.72 with monthly payments to the Trustee. In May, 2010, she obtained mortgage financing of \$70,000.00 which was used to pay out the balance of the purchase price (\$19,833.00) and the balance owing on the Whitney Pier Credit Union mortgage (approximately \$25,000.00).

[17] Mr. MacNeil was not aware that 25 Queen Street had been included by the Trustee in Ms. Beaton's bankruptcy until March, 2010. The Trustee was then notified of Mr. MacNeil's trust claim respecting the properties at 25 Queen Street and 38 King Street through counsel.

[18] The Trustee's interest in the property at 38 King Street was conveyed to Mr. MacNeil by deed dated April 26, 2010. After he received notice of Mr. MacNeil's trust claim, he obtained legal advice. He is awaiting the court's decision in this proceeding before releasing a Deed to Ms. Beaton for 25 Queen Street.

[19] The property at 38 King Street was appraised at \$90,000.00 when Ms. Beaton applied for mortgage financing in 2010. The same property had been appraised at \$50,000.00 in 2008 when the property was transferred to the Trustee. Both appraisals were completed by the same person. The Trustee relied upon the original appraisal when agreeing to a price to sell both 38 King Street and 25 Queen Street to Ms. Beaton. According to the Trustee, the creditors would lose if the original appraisal was undervalued.

[20] The Trustee did not collect the rents on Queen Street because the cost of managing the property would outweigh the income benefits.

## **RESOURCES**

[21] Mr. MacNeil was employed by the Cape Breton Development Corporation for 20 years until it ceased operations in 2000. Mr. MacNeil said he received \$108,000.00 in a severance package. There was no documentation to verify this amount. However, \$64,870.00 was placed in an RRSP account with Investors Group in September, 2000. He withdrew \$6,326.00 in 2000; \$27,319.00 in 2001 and \$19,411.00 in 2002. Some of the money withdrawn was used for living expenses. At least \$19,000.00 was applied to the purchase of 38 King Street.



[22] Mr. MacNeil also received a payment of \$18,253.00 in February, 2001, which was placed in a LIRA account.

[23] In addition, DEVCO made payments totalling \$7,539.00 between February, 2001 and February, 2003, which were placed in a Registered Education Savings Plan. These funds were subsequently withdrawn and used for the benefit of his daughter, Haley's education.

[24] Mr. MacNeil was injured in a motor vehicle accident in 2000. He received a settlement of \$29,905.00 in September, 2001. He was disabled as a result of the injuries he sustained. He began receiving Canada Pension Plan disability benefits in 2003.

[25] Mr. MacNeil's income, post-DEVCO employment, was derived from RRSP withdrawals, Social Assistance Payments, Canada Pension Plan disability benefits and rents. He also received Workman's Compensation benefits of \$10,189.00 in 2008.

[26] Mr. MacNeil was also injured in motor vehicle accidents in 2004 and 2008. He received payments of \$2,115.20 in February, 2008, \$1,892.69 in November, 2008; \$6,738.00 in June, 2009; and, \$18,455.00 in November, 2009 as settlement for injuries and damages sustained as a result of these accidents. The total received was \$8,854.00 in 2008 and \$20,338.00 in 2009.

[27] The parties' income from 2000 to 2009 is compared in the following chart:

	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009
M B	\$13,613	\$18,673	\$14,553	\$17,021	\$9,450	\$10,560	\$24,813	\$16,472	\$22,499	\$21,000
J M	-	-	-	\$12,684	\$9,710	\$12,876	\$10,308	\$10,314	\$10,521	\$10,500

[28] Documentation of Mr. MacNeil's income for the years 2000, 2001 and 2002 was not provided. In 2000, he received employment income from DEVCO. In 2001 and 2002, he withdrew funds from his RRSP account since he was not eligible to receive EI benefits. In 2003, his income included Social Assistance benefits while awaiting approval of his Canada Pension disability claim and Canada Pension disability benefits. Mr. MacNeil's income does not include any money he received

for rent. Also, Mr. MacNeil's 2008 income does not include the \$10,188.00 he received as Workman's Compensation benefits since these benefits are not taxable income.

[29] Ms. Beaton's 2003 income included \$4,527.00 in RRSPs. Otherwise, the reported income was from employment or EI benefits. The above totals do not include \$2,100.00 in child support payments reported by her as income, but never received.

[30] At the time of separation, Ms. Beaton was in receipt of E.I. disability benefits. Her income for 2009 was approximately \$20,991.00. Mr. MacNeil was receiving Canada Pension Plan disability income benefits and gross rental income, which amounted to approximately \$21,000.00 per year.

[31] Ms. Beaton cared for the children and looked after the home while the parties were together. She also worked part-time as a teller at the Bank of Nova Scotia, a secretary in a doctor's office and at the Regional Hospital. Currently, she is working at the hospital and is taking university courses, with plans of entering a licensed practical nursing program in September, 2011.

[32] Ms. Beaton had a bank account in her own name at the Bank of Nova Scotia. Her income was deposited to this account. She incurred debt in her own name. Mr. MacNeil had a savings account and a chequing account in his own name at the Whitney Pier Credit Union. Any monies he received were deposited to these accounts. In May, 2000, Mr. MacNeil gave authorization for Ms. Beaton to be added as a signator on his chequing and savings accounts. Mr. MacNeil incurred debt in his own name. Each party was responsible for specific family related expenses. Ms. Beaton was responsible for the groceries and looking after the children's needs. Mr. MacNeil paid the mortgage and other household expenditures. At times, Ms. Beaton accessed Mr. MacNeil's chequing account for family expenses. She said she also had to repay Mr. MacNeil if she purchased groceries from his account.

### **SUBMISSIONS**

[33] Counsel for Ms. Beaton submits that Mr. MacNeil has retained a disproportionate share of the assets accumulated during the parties' common-law relationship, including \$25,033.00 in a savings account, \$15,906.00 in a RRSP account, 42 King Street, a one-half interest in property located at West Middle

River valued at \$3,500.00, a Harley Davison motorcycle valued at \$30,000.00, a camping trailer with assumed loan, and a 2007 Chrysler Sebring with assumed loan, while Ms. Beaton only retained the household contents at 38 King Street.

[34] Ms. Beaton's position is that she is the owner of 38 King Street and 25 Queen Street because these properties were purchased by her at fair market value from the Trustee after the parties' separation. She submits that any interest Mr. MacNeil would have in 38 King Street and 25 Queen Street were lost through the bankruptcies as she conveyed her title to the Trustee and Mr. MacNeil did not make any claim as a creditor with respect to the properties. Ms. Beaton also claims payment of rent collected by Mr. MacNeil for 25 Queen Street from the date of separation.

[35] Counsel for Ms. Beaton submits that Mr. MacNeil has been unjustly enriched by the retention of the majority of family assets after separation. She claims that she has contributed to the acquisition of assets through her management of household finances, the childcare and household services she provided throughout the relationship, the contribution of income towards common household expenses and the obtaining of mortgage financing in her name for 38 King Street.

[36] Counsel for Ms. Beaton says that she should retain the properties at 25 Queen Street and 38 King Street, the rental income collected by Mr. MacNeil for 25 Queen Street and the household contents, while Mr. MacNeil can retain the West Middle River and 42 King Street properties, the camping trailer, the 2007 Sebring, the Harley Davison motorcycle, the savings account and the RRSP account balances and the debt associated with any of these assets.

[37] Counsel for Mr. MacNeil submits that Ms. Beaton was holding the Queen Street property in trust for Mr. MacNeil and seeks an Order directing the Trustee in Bankruptcy to convey the property to him. He further requests an Order directing the transfer of the baby barn and its' contents, including a snow blower, lawnmower, hot air furnace, tires and tool box. He agrees that Ms. Beaton should retain the household contents, except for a few personal items which were not specified. He seeks an Order directing Ms. Beaton to transfer ownership of the 2007 Sebring to him since he has been paying the loan since separation.

[38] Counsel for Mr. MacNeil disputes Ms. Beaton's unjust enrichment claim with respect to any of the assets retained by him after separation. He is agreeable to

Ms. Beaton retaining 38 King Street without contribution to him for his unjust enrichment claim.

## **ANALYSIS**

### **Issue 1**

[39] *Has Mr. MacNeil proven a resulting trust and/or unjust enrichment based constructive trust claim with respect to 25 Queen Street?*

In *Nicholson v. Whyte (2005)*, 236 N.S.R. (2d) 76, Williams, J., reviewed the law concerning resulting trust at paragraph 7:

**7 The law relating to resulting trusts was summarized in *Hamilton v. Hamilton*, [1996] O.J. No. 2634, (1996) CarswellOnt. 2421 (Ont. C.A.) where the court stated at paragraph 39:**

**39 A presumption of a resulting trust arises in favour of persons who contribute financially to the purchase of property but do not take title in their own name, and do not intend to give a gift of the entire beneficial interest in the property to the registered or recorded title holder. Equity presumes that the non-titled party does not intend a gift when he contributes to the purchase price of a property. The non-titled party is treated as the equitable holder of the beneficial interest; the extent of his or her beneficial interest is proportionate to the financial contribution made to acquire the property. The presumption of a resulting trust is rebuttable on a showing by the title-holder that the non-titled party intended the title-holder to have the property for his or her own benefit. The presumption of a resulting trust is also rebuttable on a showing that the transfer to the titled party was not gratuitous. See Oosterhoff and Gillese, Text, Commentary and Cases on Trusts, 4th ed. (1992) and Hovius, Family Law: Cases Notes and Materials, 3rd ed. (1992).**

[40] In the recent Supreme Court of Canada case of *Kerr v. Baranow (2011)*, S.C.C. 10 at paragraph 15, Cromwell J. states:

**15 While traditional resulting trust principles may well have a role to play in the resolution of property disputes between unmarried domestic partners, the time has come to acknowledge that there is no continuing role for the common intention resulting trust.**

[41] Mr. MacNeil's resulting trust claim respecting 25 Queen Street is not based on the common intent of the parties. It is better characterized as a money purchase

resulting trust, which is not barred by **Kerr v. Baranow**, (*supra*). He contracted to purchase the property. He provided the money to purchase the property. There was no consideration given by Ms. Beaton. Mr. MacNeil's authorization for Ms. Beaton to sign cheques on his chequing account was a convenience which allowed her to pay family expenses and was not intended as a gift. There is no evidence that she deposited her own funds to this account. She was not aware the property was placed in her name. When she made her Assignment in Bankruptcy, she did not believe she owned the property. Mr. MacNeil kept all the rents and looked after maintaining the property after acquisition without contribution from Ms. Beaton.

[42] Mr. MacNeil has established a resulting trust with respect to the Queen Street property and Ms. Beaton has not rebutted the presumption of a resulting trust.

[43] Mr. MacNeil also sought a constructive trust remedy respecting 25 Queen Street on the basis of unjust enrichment. An action for unjust enrichment must establish, (1) an enrichment, (2) a corresponding deprivation, and (3) an absence of juristic reasons for the enrichment before the right to claim relief is made out. Mr. MacNeil contributed the full purchase price of \$5,000.00 towards the acquisition of 25 Queen Street, which was registered solely in the name of Ms. Beaton. A enrichment and corresponding deprivation has been established. None of the established categories for proving juristic reasons such as a gift or pursuant to a legal obligation have been made out. Also, Ms. Beaton has not shown a different juristic reason for the enrichment should be recognized having regard to the parties' reasonable expectations and public policy considerations. The retention of the benefit received by Ms. Beaton is unjust. The appropriate remedy is a proprietary award on the entire property since a monetary award would not be sufficient and Mr. MacNeil has established a nexus between his contribution and the acquisition, preservation, maintenance and improvement of the property.

## **Issue 2**

[44] Mr. MacNeil said he recorded the title to 25 Queen Street in Ms. Beaton's name to protect the property from any potential liens the Canada Revenue Agency may record against the property. This raises the issue of creditor proofing and its' effects on resulting trust claims. Robert A. Klotz, in his book, *Bankruptcy, Insolvency and Family Law, 2nd Ed.*, (Toronto: Carswell, May 2001, *supplemented*) had the following to say:

**Can the resulting trust doctrine apply when property is intentionally placed in one spouse's name for the purpose of avoiding or defeating the creditors of the other spouse? Different approaches are employed to address this question. Some cases conclude that creditor proofing presumes a gift of the full beneficial interest of the other spouse, which is inconsistent with the reservation of a beneficial interest. Others permit the utilization of a presumption of resulting trust if this doctrine can be applied without the claim of having to raise his or her own illegal purpose. Finally, some cases adopt the *locus poenitentiae* doctrine, namely that an illegal purpose does not preclude resort to the resulting trust doctrine provided that such purpose has not been carried into effect.**

Mr. Klotz identifies numerous case authorities for each of these approaches. I agree with those authorities which apply the *locus poenitentiae* doctrine.

[45] The nature of the dispute between Mr. MacNeil and Canada Revenue Agency in 2002, when Mr. MacNeil acquired the property, is not clear. There is no evidence of actual fraud committed or any judgment entered against Mr. MacNeil. There is evidence that both Mr. MacNeil and Ms. Beaton filed incorrect Income Tax Returns with respect to child support payments. The evidence of Ms. Beaton is that she, or the parties, were audited in 2008 and their marital status adjusted. Since there is no evidence of any outstanding claim by the Canada Revenue Agency against Mr. MacNeil, any fraud that may have occurred has been corrected. Also, Ms. Beaton should not be allowed to deny Mr. MacNeil's resulting trust claim based on creditor proofing where she participated in the deceit of the CRA. Mr. MacNeil's resulting trust claim is not connected to the incorrect Income Tax Returns filed by Ms. Beaton and himself.

### **Issue 3**

[46] ***What is the effect of the court's finding that Mr. MacNeil held a resulting trust over 25 Queen Street on Ms. Beaton's acquisition of the property from the Trustee?***

Section 67(1)(a) of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 provides:

#### **Property of bankrupt**

**67 (1) The property of a bankrupt divisible among his creditors shall not comprise**

**(a) property held by the bankrupt in trust for any other person;**

[47] Since the court determined that Ms. Beaton was holding 25 Queen Street in trust for Mr. MacNeil, it is not divisible among her creditors.

[48] Section 81(4) of the *Bankruptcy and Insolvency Act, supra*, provides:

**Require proof of claim**

**81(4) The trustee may send notice in the prescribed manner to any person to prove his or her claim to or in property under this section, and, unless that person files with the trustee a proof of claim, in the prescribed form, within 15 days after the sending of the notice, the trustee may then, with the leave of the court, sell or dispose of the property free of any right, title or interest of that person.**

Although Mr. MacNeil notified the Trustee of his interest in 25 Queen Street in 2010, this process has not been initiated.

[49] The difficulty here is that Mr. MacNeil's interest in 25 Queen Street was not considered when Ms. Beaton and the Trustee arrived at a purchase price for the full equity in the property. The Trustee is only able to convey 25 Queen Street subject to Mr. MacNeil's trust entitlement.

[50] Since the court has determined that Mr. MacNeil held a trust interest in all of 25 Queen Street, Ms. Beaton's purchase of the property would have to be reviewed to determine if the purchase should be rescinded and the money returned to her. Also, since Mr. MacNeil's trust claim had not yet been adjudicated, the Trustee may accept or disallow his claim in whole or in part and if disallowed Mr. MacNeil would be able to appeal that decision to the bankruptcy court.

[51] Sections 183(1) and 185(2) of the *Bankruptcy and Insolvency Act, supra*, provides that every judge of the superior court has bankruptcy jurisdiction and, therefore, can grant leave for the husband to advance his trust claim in matrimonial litigation. It is too late for the court to grant leave as contemplated by Section 81(4) of the *Bankruptcy and Solvency Act, supra*. It does not make sense to prolong this process with further court hearings. The Trustee was aware of Mr. MacNeil's trust claim. He obtained legal advice. He appeared as a witness in the matrimonial proceeding. He is waiting the court's decision before taking further action. Unless there is something that was not brought to my attention, I am satisfied that the Trustee is holding 25 Queen Street encumbered by Mr. MacNeil's resulting trust

interest. Therefore, Ms. Beaton's purchase of this property is frustrated. I direct the Trustee to convey 25 Queen Street to Mr. MacNeil and return the purchase price paid by Ms. Beaton to her.

### **38 KING STREET**

[52] Mr. MacNeil did not pursue his unjust enrichment claim with respect to 38 King Street. He was content with Ms. Beaton retaining ownership of this property since his name has been removed from the original mortgage. By not pursuing his unjust enrichment claim, he gave up a claim based on a direct monetary contribution of \$19,000.00 towards the property's acquisition, monthly payments which reduced the mortgage principle from \$37,000.00 to approximately \$25,000.00 at the time of separation and his share of any increase in the market value of the property, estimated at \$40,000.00 based on an appraisal of \$90,000.00 at the time of Ms. Beaton's mortgage in 2010 and the original purchase price of \$50,000.00. Ms. Beaton was able to use the equity in this property to pay out an existing mortgage, her bankruptcy debt and purchase a camping trailer and still have equity remaining in the property.

### **Issue 4**

[53] *Has Ms. Beaton established a claim for unjust enrichment with respect to the property retained by Mr. MacNeil?*

The provision of household and childcare services is recognized as constituting an enrichment of the other spouse. Mr. MacNeil was enriched by Ms. Beaton's spousal services such as housework, her childcare services for the parties' two children, her contribution of income towards household expenses and childcare expenses, her borrowing of money for their daughter's education and the facilitating of mortgage financing for the purchase of 38 King Street.

[54] The value of these benefits are set off by the value of reduced or no shelter costs, which were paid by Mr. MacNeil, the retention of the household contents and the ownership of 38 King Street.

[55] Mr. MacNeil was able to acquire a number of assets, including rental properties on Queen Street and King Street, savings account, RRSP account, motorcycle, camping trailer, and motor vehicle during their cohabitation. There was no cohabitation or separation agreement or declaration of domestic partnership executed by the parties. A close examination reveals that Mr. MacNeil acquired



these properties from employment benefits on work termination, settlements of personal injury or damage claims and borrowed funds and not the result of any enrichment provided by Ms. Beaton's contribution of spousal services, childcare services or sharing the cost of household and childcare expenses.

[56] The camping trailer and the 2007 Sebring were encumbered by debt and their net value nil or minimal. Mr. MacNeil assumed responsibility for paying the loans associated with the camping trailer, estimated at \$25,000.00 to \$34,000.00 and the 2007 Chrysler Sebring, estimated at \$45,000.00 to \$50,000.00 at separation. The motorcycle was purchased with borrowed money when 42 King Street was mortgaged and this loan was paid out with settlement funds from personal injury claims.

[57] The RRSP funds were acquired by Mr. MacNeil from severance money received on his termination from employment with DEVCO without contribution by Ms. Beaton. The savings account balance of approximately \$25,000.00 included approximately \$8,000.00 in RRSP money; approximately \$7,000.00 in settlement funds from personal injury claims and approximately \$10,000.00 in Workman's Compensation benefits paid in 2010. Mr. MacNeil's authorization which permitted Ms. Beaton to access funds from his savings account was intended as a convenience and not a gift. Aside from removing \$800.00 from the savings account after separation, there was no evidence that Ms. Beaton deposited money to this account or withdrew funds from this account without Mr. MacNeil's approval.

[58] Mr. MacNeil was able to save the Workman's Compensation benefits and purchase a one-half interest in property in Middle River while the parties were cohabiting. It is possible Ms. Beaton's contribution of income towards and provision of household and childcare expenses contributed to Mr. MacNeil's acquisition of these assets. However, Ms. Beaton has not been deprived. She was able to retain for her own use the household contents and ownership of 38 King Street, which was appraised at \$90,000.00 encumbered only by a mortgage of \$25,000.00. Ms. Beaton has not established an unjust enrichment claim with respect to these assets.

[59] Mr. MacNeil has also established that he built the baby barn, without contribution from Ms. Beaton and purchased the items stored therein, including a snowblower, lawnmower, furnace, tires and tools. These items are owned by him

and he is entitled to a declaration of ownership and an order directing Ms. Beaton to return these items to him.

**CONCLUSION**

[60] The court makes the following determinations with respect to the property issues in dispute:

(1) Ms. Beaton is entitled to a declaration that she is the owner of 38 King Street.

(2) Mr. MacNeil is entitled to a declaration that Ms. Beaton was holding 25 Queen Street in trust for him and the Trustee in Bankruptcy's title to 25 Queen Street is encumbered by Mr. MacNeil's resulting trust interest. The Trustee is to convey 25 Queen Street to Mr. MacNeil and return the money Ms. Beaton paid to purchase 25 Queen Street to her. Mr. MacNeil is to retain the rental income for 25 Queen Street and is responsible for all municipal taxes and water rates associated with the property.

(3) Ms. Beaton has not established an unjust enrichment claim respecting the remaining assets being held by Mr. MacNeil.

(4) Ms. Beaton is to transfer possession of, and her interest in, the 2007 Chrysler Sebring to Mr. MacNeil and sign the necessary documentation to effect such a transfer.

(5) Ms. Beaton is to transfer possession of the baby barn, snowblower, lawnmower, furnace, tires and tools to Mr. MacNeil.

[61] Given the unique nature of the proceedings and the mixed results, each party shall be responsible for their own costs.