IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: Dempsey & Edwards, 2005 NSSC 181

Date: 20050627
Docket: SFHF 009178
Registry: Halifax

Between:

Lisette Dempsey

Applicant

v.

Michael Edwards

Respondent

Revised Decision:	The decision has been corrected according to the erratum issued Jul y 11, 2005.
Judge:	The Honourable Justice Douglas C. Campbell
Heard:	October 14 & 15, 2004, in Halifax, Nova Scotia
Counsel:	Kathleen Hall, for the applicant, Lisette Dempsey Russ Quinlan, for the respondent, Michael Edwards

By the Court:

[1] This action by the female partner in a common law marriage claims equitable relief by way of a declaration of constructive trust in the property which comprised their family residence and in certain shares of an insurance company both owned by the male partner.

[2] The pleadings refer only to a claim for constructive trust and not to a finding of unjust enrichment and/or an award of damages. The respondent's counsel points to this deficiency in his brief. As will be discussed below, the law developed by the cases that apply to this area has been changing over the last several years. Specifically, the cause of action in those cases where property claims are made by common law spouses is now based on the theory of "unjust enrichment". The declaration of a constructive trust is, along with damages, thought to be a judicial remedy and not a basis for liability. Technically therefore, unjust enrichment should have been pleaded as the cause of action and the particular remedy sought as between constructive trust and damages or both as alternatives should have been specified.

[3] As these concepts become better understood, the court is likely to insist on more accurate and complete pleadings. However, because the developments in the case law have been emerging over time and because counsel for the respondent was not taken by surprise by this imperfection and wisely did not argue the point vehemently, I do not consider in this case that this oversight is fatal to the applicant's case.

[4] Prior to trial, the parties had made settlement with respect to matters of custody, access and child support. Counsel will include the settled matters in the order that flows from this decision.

Background Facts:

[5] The parties met in 1993 and began to share a residence in March 1994. They separated in September 2000 after a period of 6 ½ years of cohabitation. During that period they had two children born respectively on December 17, 1995 and December 29, 1998. They were never married.

[6] The family residence had been built by the male partner in 1989 and had been the matrimonial home in his first marriage. The parties resided there during

their entire period of cohabitation. The male partner holds the legal title. It is the alleged enrichment of this asset that gives rise to the main claim by the female partner.

[7] The female partner had been gainfully employed during the beginning months of cohabitation from March 1994 until June 1995 when she went on paid medical leave due to her first pregnancy. She then received employment insurance maternity benefits until March 1996. She next became re-employed in the fall of 1997 part-time casual basis for a short period of time.

[8] In the meantime, in September 1996 the male partner, having been gainfully employed, left his work to upgrade his schooling and in the following year began a course through a technology institute which he completed in December 2000 with a technical designation. During most of that time, the family was supported from social assistance income. In January 2000, the male partner became full-time employed. By September of that year, the parties had separated.

[9] Prior to the commencement of the relationship, the male partner had acquired an insurance policy. During the relationship, through a process known to

the industry as "demutualisation", the value of the policy was converted to common shares in the company. The male partner liquidated those shares and used the money to purchase a vehicle. The female partner argues for a constructive trust interest in this asset or damages.

Alleged Direct Contribution:

[10] The parties have very opposite recollections of the direct contribution made by the female partner to the enrichment of the assets. There is no suggestion that she made a direct financial contribution to the cost of any major renovation or addition to the property. Nor is there any suggestion that she made a money contribution to the shares above noted since they arose entirely from the conversion of the value of the policy which was paid for entirely by the male partner. On the other hand, it is clear that she directed all of her income resources (when she had income) to the family budget. I find as well that the male partner responsibly provided his income to the family purposes.

[11] The projects respecting the maintenance and repair of the family residence during the years of cohabitation were relatively small both in terms of cost and likelihood of adding or preserving value to the residence. There was evidence of

indoor painting of various rooms (although there was conflicting testimony as to the extent of that work), of exterior painting (again with conflicting testimony as to its extent) and of the construction of a lawn from seed and installation of a drainage ditch.

[12] There is also conflicting testimony as to the percentage contribution made by each spouse to these projects; the male partner contending that he did almost all of it and the female partner contending the opposite.

[13] By consent, accredited appraisal reports were presented in evidence giving retrospective opinions that the property was worth $119,000 on the separation date and $106,000 on the date cohabitation commenced (an increase during cohabitation of $13,000). In addition, an appraisal prepared close to the trial date gives the value of $131,000, suggesting an increase from commencement of cohabitation to trial of $25,000.

Indirect Contributions:

[14] The female partner relies on a number of indirect contributions to the family finances both in money and money's worth to support her argument for damages based on unjust enrichment. I accept that she was the primary caretaker of the children although the male partner contributed in a secondary role. This applies to all the various aspects of raising the children and looking after their needs including meal preparation, personal hygiene, shopping, bedtime routines and medical attention, to list a few.

[15] I accept that she was involved in a major way with the housekeeping tasks including indoor and outdoor activities but I also conclude the male partner contributed as well. One child required the assistance of a psychologist and a speech therapist and I am satisfied that the female partner attended to those matters largely.

[16] In the earlier years, the male partner was the main bread winner and contributed in a responsible way to the family's domestic activities. In the latter years he was a student with the design of bettering his ability to support the family; albeit -- as it turned out to be - a separated one.

[17] When in the early years she was more free to work outside the home, the female partner was a secondary bread winner. As the childcare responsibilities increased, due in part, to the decision of the male partner to return to school, her ability to contribute financially became restricted and she contributed in other ways including the management of the finances of the family with only the minimum resources available from social assistance and child tax benefit.

The Issue:

[18] The issue is whether the applicant has made out a case for unjust enrichment and, if so, which remedy would apply and how it should be quantified.

Liability vs. Remedy:

[19] In the early caselaw, the concept of unjust enrichment was thought not to apply to Canadian Law by virtue of its formulation as part of the American Law. Originally, resulting trusts (based on a common intention to create them) and constructive trusts (based on contribution) were thought to be causes of action. In a number of cases, the Supreme Court of Canada has made it clear that the basis for liability to share assets between the parties to a common-law marriage is the legal

concept of unjust enrichment. In the well known case of *Peter v. Beblow*, (1993), 23 B.C.A.C. 81, the Supreme Court of Canada stated starting at paragraph 2:

> "In recent decades, Canadian Courts have adopted the equitable concept of unjust enrichment inter alia as the basis for remedying the injustice that occurs when one person makes a substantial contribution to the property of another person without compensation...
>
> The basic notions are simple enough. An action for unjust enrichment arises when three elements are satisfied: (1) an enrichment; (2) a corresponding deprivation and (3) the absence of a juristic reason for the enrichment. These proven, the action is established and the right to claim relief made out. At this point, a second doctrinal concern arises: the nature of the remedy.'Unjust enrichment' in equity permitted a number of remedies, depending on the circumstances. One was a payment for services rendered on the basis of quantum meruit or quantum valebant. Another equitable remedy, available traditionally where one person was possessed of legal title to property in which the other had an interest, was the constructive trust. While the first remedy to be considered was a monetary award, a Canadian jurisprudence recognized that in some case it might be insufficient. ...in other words, the remedy of constructive trust arises, where monetary damages are inadequate and where there is a link between the contribution that founds the action and the property in which the constructive trust is claimed.

[20] It has thereby been made clear that for common-law couples, a claim by one party against the assets of the other party is made out by pursuing the following steps. First, the three mentioned elements of unjust enrichment are analyzed to determine whether a claim has been made out. If all three elements exist, liability has then been established.

[21] Next, a determination is made whether damages or a monetary award will adequately redress the inequity. If that question is answered in the affirmative, an award of damages shall be made.

[22] In the case of *L.P. v. R.M.*, unreported as case number 99-000152, Williams, J. of this court expands on the four part test authored by Hovius and Youdan in the **Law of Family Property** (1991) which was accepted by the minority concurring decision in *Peter v. Beblow*, *supra*. That expanded test of establishing damages as an appropriate remedy is as follows:

> (1) Is the plaintive's entitlement relatively small compared to the value of the property
>
> (2) Is the defendant able to satisfy the plaintiff's claim without a sale of the property in question?
>
> (3) Does the plaintiff have a special attachment to the property?
>
> (4) What hardship would be caused to the defendant if the plaintiff received a title interest?
>
> (5) Is there any reason why monetary damages would be inappropriate?

[23] If the answer to the first two questions is in the affirmative and the final three questions are answered in the negative, damages would be awarded. The majority in *Peter v. Beblow*, *supra* indicates that damages would be measured by the value of the services rendered. At paragraph 21 the Supreme Court of Canada states:

> "Two remedies are possible: an award of money on the basis of value of services rendered, i.e. quantum meriut; and...constructive trust."

[24] If damages are awarded, that is the end of the matter. If damages are not an appropriate award the court must next consider declaring an interest in the property by virtue of a constructive trust. For that to occur, there must have been a direct or indirect contribution by the non-titled partner that can be linked to the asset and its enrichment. In the early cases, there was a requirement that the contribution to the property must be both substantial and direct. See for example, *Rawluk v. Rawluk* [1990] 1 S.C.R. 70. The Supreme Court of Canada made it very clear in the case of *Peter v. BeBlow*, *supra,* that an indirect financial contribution such as homemaking and child care can be sufficient to justify the constructive trust. Indeed, in that case those were the only types of contributions.

[25] Beginning at paragraph 28, the Supreme Court of Canada speaks of two approaches to valuing the constructive trust: the value of services which the claimant has rendered (the “value received” approach) and the amount by which the property has been improved (the “value survived” approach). For constructive trust, the majority accepts the latter approach. However the opposite is the case for damage awards. At paragraph 29, the majority states:

> “...for a monetary award, the value received approach is appropriate; the value conferred on the property is irrelevant.”

[26] The final step, in cases where a constructive trust cannot be imposed is to determine whether a resulting trust is available. In common-law spousal cases, a resulting trust is rarely made out. The finding is based purely on there being an expressed or implied common intention that property is held on a resulting trust.

Analysis:

[27] There was a combination of direct and indirect contributions made by the female partner in this common-law relationship to the assets owned by the male

partner. These contributions impacted the family residence owned by the male partner.

[28] The other assets were insignificant in value except for certain shares in an insurance policy. Those shares were acquired when the cash value of the insurance policy was converted by the insurance company to common shares. The insurance policy was owned prior to the relationship. I have very little evidence as to what, if any, portion of the value arose during the period of cohabitation. It is clear that the female partner made no direct financial contribution to the acquisition, management or maintenance of that asset. Even if the indirect contributions to the family such as homemaking and child care assisted the male partner with regard to his financial freedom, those contributions could not be said to be connected to the common shares. Most of their value was acquired before the cohabitation and the pattern of being able to afford the premiums had been well established before any contributions by the female partner were made to the family. I therefore conclude that the common shares in the insurance company were not enriched by the contributions made and that there was no corresponding deprivation and that accordingly there was no unjust enrichment with respect to that asset.

[29] The decision in *Peter v. Beblow, supra*, acknowledges that indirect contributions such as homemaking and child care can be said to be linked to the family residence. This is so by virtue of the fact that this frees money that would otherwise pay for those services to be available to pay down the mortgage and other debts, thereby increasing the net value of the asset. I do not, however, interpret that conclusion to mean that such indirect contributions can give rise to damages or a constructive trust interest in the various other assets (such as in this case the common shares) to which there is no link.

[30] The services did not affect the value of the subject shares and therefore the asset was not enriched nor was the non-titled spouse correspondingly deprived and therefore the test for unjust enrichment is not met.

[31] If indirect services could be linked to assets beyond those used on a day to day basis by the family, it would be possible for a common-law spouse to achieve a larger award than that which is available if she was legally married. This is so because, pursuant to the *Matrimonial Property Act*, S.N.S., 1980, c. 9, non-matrimonial assets such as business assets are excluded from prima facie division. There is no distinction between matrimonial assets and non-matrimonial assets in

the law of unjust enrichment. To extend a contribution by a common-law spouse such as child care and home care to assets which, in a legal marriage, would be non-matrimonial assets, would be to allow that contribution to create greater rights than would apply under the *Matrimonial Property Act, supra.*.

[32] The evidence with respect to direct contributions to the family residence by the female partner was sparse, conflicting with the evidence of the male partner and imprecise as to value. She testified that she painted rooms in the house as well as exterior painting and that she assisted in the spreading of top soil and seeding the lawn along with making a drainage ditch. No contractors were called to testify as to the value of these services or of the impact they would have on the value of the home. There was no evidence as to the number of hours spent or the going hourly rate for services such as these. There was no corroboration as to the extent of the work. I am left with the impression that even if the female partner's accounting of the extent of the work were accurate, this would not represent a substantial enrichment. However, I must conclude that there was a minor enrichment at least from the point of view of preserving the home and its value when added to the other items of day to day maintenance that were performed.

[33] The indirect contributions of homemaking and child care were made.

[34] It is to be noted that it would be most unusual for a claimant not to have made a contribution by way of child care (if there are children), housekeeping and other domestic chores. It does not follow automatically that the making of such a contribution is enough for unjust enrichment to apply.

[35] In *Walsh v. Bona* [2003] 32 R.F.L (5^{th}) 81, the Supreme Court of Canada determined that the *Matrimonial Property Act*, *supra* in its definition of spouse (which fails to include common-law spouses) does not violate the common-law spouse's Charter rights. The decision seemed to be based largely on the right of spouses to make choices by which their property rights would be regulated in the event of a breakdown.

[36] The Supreme Court of Canada states at page 111 as follows:

> "Where the legislation has the effect of dramatically altering the legal obligations of partners, as between themselves, choice must be paramount. The decision to marry or not is intensely personal and engages a complex interplay of social, political, religious, and financial considerations by the individual. While it remains true that unmarried spouses have suffered from historical disadvantage and stereotyping, it simultaneously cannot be ignored that many persons in

> circumstances similar to those of the parties,...have chosen to avoid the institution of marriage and the legal consequences that flow from it."

[37] And at page 115:

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

[38] Clearly, the Supreme Court of Canada envisages in *Walsh v. Bona, supra* that for common-law relationships, there should be no presumption of equal sharing of assets as contemplated by the *Matrimonial Property Act*, *supra* in respect of married people. It follows that common-law couples will look to other remedies, one of which is the set of remedies that comes from a successful unjust enrichment claim.

[39] If it is true that an unjust enrichment claim will not automatically be successful by virtue of cohabitation itself, the question arises as to how the titled spouse would protect his assets from a successful unjust enrichment claim (short of following the unsavory task of negotiating a cohabitation agreement). Clearly, in a

situation where one spouse holds title to the residence, there will, generally speaking, be a contribution from the other in the form of domestic chores. When there are children, it will also be inevitable that the non-titled spouse will contribute to the child care. For the unjust enrichment claim to be successfully defended, must the titled spouse insist on performing all of the household and child care responsibilities? I think not. Must he or she refuse any financial contribution to the running of the household? I think not. Must he or she refuse any contribution to the maintenance, expansion or preservation of the house? I think not. Must he or she pay market value for the services rendered and then charge room and board to offset? I think not.

[40] For the claim to be successful, the enrichment must be substantial and sufficiently connected to the asset that it has earned the right to a remedy.

[41] In the case of *Peter v. Beblow, supra*, the contributions of child care and domestic engineering were unusually substantial. The titled spouse in that case travelled away from home during the work week and often was not able to come home on the weekend. Equally important was the fact that in addition to her own children from a previous marriage, the non-titled spouse was responsible for the

children of the titled spouse from a previous marriage. This means that in addition to meeting that portion of the responsibility that should properly rest with her, she took on most of the responsibility that should rest with him. The court took into account the fact that the female partner was receiving free room and board in exchange for the effort but simply held that the contribution that she made more than offset that compensation.

[42] In assessing the contribution of the non-titled spouse to the assets of the titled spouse, there must be an offsetting analysis of the contribution of the other spouses. As an example of this, see *Marsh v. Snow,* 2004 N.S.C.A. 155. Account must also be taken of the extent to which the efforts were of benefit to the contributing spouse or were made out of her duty toward her children.

[43] The direction from the Supreme Court that contributions to house care or child care can constitute the enrichment and corresponding deprivation can be problematic for trial judges. Inevitably, each side testifies at great length about their perception of the magnitude and percentage division of a myriad of domestic activities such as meal preparation, laundry work, housecleaning, vacuuming, painting, gardening, grocery shopping, medical and dental appointments for the

children, school homework and the list goes on. Invariably, each side has an opposite perception of the extent of the contribution. Rarely is there any corroborating evidence and in the end the exercise is not particularly helpful for the court. Even if the evidence could be reliably obtained, the court faces the almost impossible task of measuring these contributions. For example, is ninety percent of the vacuuming worth more, less or the same as seventy percent of the laundry work? Is financial planning worth more or less than grocery shopping? In the end, it is my opinion that the Supreme Court of Canada's directive does not mean that trial judges should to through that painful exercise and, based on that evidence, make an informed opinion as to whether or not there has been an unjust enrichment.

[44] While child care and homemaking will sometimes found an unjust enrichment claim, that will more often not be the case. Most couples, married or not, come to a division of labour (which may change from time to time) that they consider to be pragmatic, fair and equal. Sometimes that means that both parties take an equally heavy commitment to bread winning and an equal sharing of domestic engineering. Sometimes one party takes the greater load in bread winning

and the other makes a greater commitment at home. There must be clear and specific evidence that that norm does not apply on the particular facts of the case.

[45] After more than two decades of dividing assets between parties to a legal marriage by virtue of the presumption of equal sharing of matrimonial assets pursuant to the *Matrimonial Property Act, supra*, it is sometimes difficult to avoid resorting to that philosophy when approaching a division of assets case in a common-law relationship. However, the court must not lose sight of the fact that the latter division is based on a completely different legal framework. There, the assets are being divided because (and only when) there has been an enrichment of the asset, a corresponding deprivation and no juristic reason for doing so. Whether a value added approach or a value surviving approach is used, the measure of the award, whether as damages or as a constructive trust, must relate to the extent of the enrichment. One problem I find with the value added approach is that the true market value of the services rendered may vastly exceed the enrichment. Further, it should not necessarily be presumed that these services would have been paid for if they had not been available from the contributing spouse. It may well simply be that the titled spouse would have provided the services.

[46] When the contribution is a direct enrichment of an asset such as a contribution to the down payment of the purchase price, paying for a renovation that adds value, paying lump sums toward the mortgage or other measurable enrichments of the assets, the finding will be easily made. When those direct contributions are of a small magnitude, the finding against unjust enrichment will be equally easy. When the contributions are of a must less measurable nature because they are indirect and when the parties mutually benefit from those contributions, they will need to be very substantial and to have very clearly enriched the titled spouse in order for the finding to be made.

[47] In the present case, the direct improvements to the home were not substantial enough to constitute an enrichment. While I had no reliable evidence as to the value added, it could not have been more than a few days' wages at some rate that would not have produced a substantial figure.

[48] If the contributions in the early years remained unchanged for the entire six and a half years, I would have concluded that the indirect contributions as a homemaker and child care giver did not constitute an enrichment. This is so because they would have been offset by the contributions (including bread

winning) made by the male partner and by the free shelter costs and at the times when the female partner was not working, various other costs, provided by the male partner. However, for the latter years of the marriage, these efforts permitted the male partner to withdraw his bread winning contribution (thereby making their respective contributions unequal) and attend to an education program that resulted in his having significantly improved occupational credentials. The female partner contributed by good financial management of their social assistance income and took on a large role with respect to child care and household management that freed the male partner to perform his studies. Through those efforts by the female partner, the male partner was able to preserve his ownership of the residence and keep his creditors at bay. In that sense, there was a substantial enrichment and a corresponding deprivation and, of course there is no juristic reason for it.

[49] In terms of remedy, I am satisfied that an award of damages is appropriate and that a declaration of a constructive trust is therefore not necessary and will not be granted. In respect of the five questions adopted by Justice Williams, above noted, to determine whether damages are appropriate, I would respond by saying that the plaintiff’s entitlement is relatively small compared to the value of the property, that the defendant is able to satisfy the claim without a sale, that the

claimant has no special attachment to the property (and indeed she is not seeking the property itself), that there would be a hardship to the defendant if a title interest is received because he would then lose control of the ownership and that there is no reason why monetary damages would be inappropriate. Indeed, the claimant seeks a cash payment rather than a property interest. That is most efficiently achieved through a damage award.

[50] Although not pleaded, the female partner has argued for a remedy based on resulting trust which in turn depends upon a finding that there is an express or implied intention that the asset is held at least partly in trust for the claimant. She argues that the parties discussed marriage, that they made a will which expressly confirms that it is made in contemplation of marriage and that they intended to be a family in every sense of the word. She argues that this shows an intention to share.

[51] The fact, however, is that the parties did not marry nor did they make wedding plans. Even if they had intended a marriage, it does not follow that they intended at that point in time to share assets by way of a resulting trust.

[52] The provision in the will with respect to contemplation of marriage would have been made to avoid the legal outcome that a will is void in the event that they should marry. Accordingly, those facts do not create a resulting trust.

[53] To quantify the damages, I am being urged to look to the evidence by way of appraisals that suggest that the property went up in value by $13,000.00 during the period of cohabitation and by $25,000.00 as of the trial date. From an equity point of view, given the pay down of the mortgage, the change was somewhat larger. The claimant argues for an award of $25,000.00. The applicant contends that there was no unjust enrichment and that there should be no award.

[54] As mentioned above, the Supreme Court of Canada has concluded that damages should be assessed using the value added approach; that is to measure the value of the services rendered. There is very little, if any, evidence before me as to the value of the direct work related to the property or of the domestic and child rearing services. On the other hand, damages here are analogous to general damages in other civil cases, the basis for which is often discretionary and involves, necessarily, a somewhat arbitrary approach.

[55] In my opinion, the approach of placing a market value on the services and the contribution has to result in an amount of damages that is consistent with the extent of the enrichment of the asset. It seems illogical to me that damages designed to address an unjust enrichment of an asset could exceed the value of that enrichment. During the period of cohabitation, the value of the residence increased by $13,000.00 which is roughly two percent per year. I can take judicial notice of the fact that real estate tends to increase in value by the force of the market place over time. While I have no evidence as to what portion of that increased value came from market force alone, it is highly probable that a significant portion of that increase was market based. The real value of the enrichment in this case was the ability of the male partner to increase the equity by mortgage pay down and to afford other maintenance and ownership costs which he was assisted in meeting by virtue of the female partner's contribution.

[56] This was a short relationship and the period during which I found to have involved the substantial contribution was even shorter. On the other hand, the services were of value for the reasons given above. I would award damages in the amount of $5,000.00.

[57] If either of the parties wishes to address the court on the matter of costs, that party shall within 30 days of the date of this decision advise me of that fact and a date will be arranged. If neither party has contacted me within that time frame, there will be no costs. If the parties reach agreement on costs, that agreement will be included in the order.

J.