

SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: Webb v. Webb, 2012 NSSC 122

Date: 20120328

Docket: SFHP078097; SFHMCA075308

Registry: Halifax

Between:

Eleanor Webb

Applicant

v.

Mary Elizabeth Webb
and Carmelita Arnet Robertson

Respondents

And:

Mary Elizabeth Webb

Applicant

v.

Carmelita Arnet Robertson

Respondent

Judge:

The Honourable Justice Moira C. Legere Sers

Heard:

February 13, 14 and 15, 2012 in Halifax, Nova Scotia

Counsel:

Lisanne Jacklin for Eleanor Webb
Deborah I. Conrad for Mary Elizabeth Webb
Kenzie MacKinnon for Carmelita Arnet Robertson

By the Court:

[1] There are two matters before the court for resolution. The parties agreed that the applications would be heard at the same time.

[2] There are three distinct parties: **Eleanor "Lee" Webb**, mother of Elizabeth Mary Webb and grandmother to the couple's child; **Elizabeth "Betsy" Webb** and her partner **Carmelita Arnet "Carm" Robertson**.

[3] The first application dated May 4, 2011 by Betsy Webb relates to relief sought pursuant to the *Maintenance and Custody Act*. The issues are custody, access, exclusive possession of the matrimonial home and division of assets as well as other relief.

[4] The second application dated January 18, 2012 by Lee Webb seeks relief pursuant to the *Partition Act* and equitable relief of unjust enrichment and *quantum meruit* for restitution of funds she invested in the property. The respondents are her daughter Mary Elizabeth Webb and her daughter's partner Carmelita Arnet Robertson.

[5] The grandmother also seeks an order of partition and sale first compensating her for her investment before dividing the remaining equity between the parties pursuant to sections 4 and 28 of the *Partition Act*.

[6] The grandmother is not seeking a return of her monthly contributions or other cash advances.

[7] Betsy Webb supports her mother's claim.

Response

[8] In response to the *Partition Act* application, Carm Robertson wants the equity to the property divided equally without regard to Lee Webb's contributions. She is willing to sell her interest to the grandmother and her partner.

[9] Carm Robertson disputes a claim of unjust enrichment or *quantum meruit* and argues that Lee Webb's contributions were by way of a gift. She does not dispute that there was a benefit to the couple. She argues that the grandmother

received a one-third interest as did all three joint owners and that was in accordance with the grandmother's reasonable expectations.

[10] In Carm Robertson's response to the *Maintenance and Custody Act* application, she seeks joint custody with primary care of the child; defined access to Betsy Webb; supervised access to the grandmother; child support; spousal support and division of property.

[11] I propose to first set out the facts in chronological order.

[12] To keep a clear distinction between the parties their respective rights and responsibilities, I will separately set out the relief.

[13] I will deal with the *Partition Act* application as it relates to the grandmother and the couple.

[14] Following that I will deal with the couple issues including custody, parenting schedules, child support, spousal support and division of the property and division of debts. The grandmother did not participate in the portion of the hearing related strictly to the couple's issues.

Chronology

[15] The couple began living common law in November 2000. After a short courtship they held a ceremony of commitment in New Hampshire and registered as a domestic partnership. They separated in March of 2011.

[16] The applicant, Betsy Webb, is 47 years old and the respondent, Carm Robertson, is 49 years old.

[17] When the parties met, Carm Robertson was a researcher on contract with a Nova Scotia Museum. Betsy Webb was a massage therapist, teaching and carrying on a private massage therapy practice. Both are self-employed.

[18] The respondent, Carm Robertson, identifies as African Nova Scotian. She advised that when planning for a child, they chose a donor who appeared to be similar to her in personality and character.

[19] Their child, Dimitri Degathea Robertson Webb (born January 25, 2003), is the biological child of Betsy Webb and the adopted child of Carm Robertson. He is currently nine years old.

[20] After the child's birth, his biological mother Betsy Webb nursed him and stayed close to home with him for approximately 35 months. She also worked on her private practice.

[21] The parties talked about owning a home when they first lived together in 2000. Carm Robertson testified that the discussion about purchasing a home "gained momentum after Betsy's father died in January 2005".

[22] She admits there were discussions with Lee Webb, the grandmother, about this plan.

[23] Carm Robertson liked Lee Webb and thought it was a good idea to have their child's grandmother nearby. She stipulated there would be rules and boundaries in the household that would honour each of their necessary spaces.

Eleanor "Lee" Webb

[24] Lee Webb is 80 years old. She was a parent to her own two biological children and two foster children. She was a kindergarten teacher.

[25] Lee Webb knew before her husband died that she wanted to move closer to Betsy Webb. Her other child lives in Israel.

[26] After her husband's death, their home was sold. Lee Webb stayed in this home until May 2006.

[27] Lee Webb wanted a home and family to live with until she died or needed to be cared for in a senior's home. She wanted to live in close proximity to her grandson.

[28] The parties agreed Lee Webb would move into a jointly owned home and stay with them and her grandson, their child, until she died or until her needs reached a level where she would be required to be placed full-time in a nursing home. This fact is not contested.

[29] During their life together, Lee Webb relied on her husband to arrange financial matters. When she came to Canada, she transferred her reliance from her deceased husband to her daughter, Betsy Webb. In her words:

... My husband was an accountant. He took care of all the finances. After he died Betsy helped me with this quite a bit. I trusted she would take care of me. I never thought any extra paperwork was necessary. It would never have occurred to me.

Purchase of the Home

[30] Carm Robertson testified they first looked for a home with a granny suite. Subsequently, they agreed to buy a home as equal owners without the granny suite.

[31] In the fall of 2005 Lee Webb entered into an oral agreement with her daughter and her partner to purchase the property now known as their home at 6329 Almon Street, Halifax, Nova Scotia.

[32] It appears that Lee Webb was not independently advised.

[33] Betsy Webb and Carm Robertson moved into the home in the fall of 2005 and Lee Webb moved in May of 2006.

[34] The purchase price of the home was \$241,000. In the mortgage application, Betsy Webb advised she had \$60,500 equity to invest and sought a mortgage of \$185,000. This equity came from her mother, Lee Webb.

[35] Betsy Webb disclosed in her mortgage application that she had total assets of \$19,000 and credit card debt at the time of \$3,126.

[36] At the time, Betsy Webb was self-employed and earning an income of \$21,891. Carm Robertson was a student with little income.

[37] Neither Lee Webb's nor Carm Robertson's name is on the mortgage. The grandmother was a resident of the United States at the time.

[38] The couple's broker informed them that Carm Robertson's credit would not positively influence the mortgage application.

[39] The broker offered to assist Carm Robertson with addressing these issues before the purchase. She declined this assistance.

[40] All the parties' names appear on the Deed as joint tenants.

[41] Carm Robertson admits she knew Lee Webb would use some of the proceeds of the sale of her home in New Hampshire to put on the down payment.

[42] Carm Robertson was also aware that the mortgage payments from the beginning would be \$1,100 per month at 4.5% over five years with a principal of \$187,000.

[43] Carm Robertson states she believed that Betsy Webb would be the main contributor to the monthly mortgage payments. She testified that she believed her role was to focus on raising their son and maintaining the home.

[44] This belief was not supported by Betsy Webb's testimony.

Gift Letter

[45] There is the gift letter dated September 11, 2005 (Exhibit 4), a standard letter required by a financial institution prior to advancing the mortgage. Two names appear on that letter: Mary Webb and Eleanor Webb.

[46] The letter confirms as between the Bank and Betsy Webb that the advance for the down payment was a financial gift from the donor and not to be repaid.

[47] When presented with this letter in court, Lee Webb did not appear to be aware of its existence. She testified that the signature was not hers. Lee Webb was not in Canada when this letter was signed.

[48] Betsy Webb subsequently acknowledged in her testimony that she forged her mother's signature.

[49] Lee Webb relied absolutely on her daughter, Betsy Webb, to do all matters necessary to purchase the house, to take care of her, to look after her investments and to make sure that she had a place to live for the remainder of her life.

[50] As it relates to an expression of intent by the grandmother, I place no weight on this gift letter.

Lump Sum Contributions

[51] Lee Webb advanced \$66,117.20 for down payment on the home and closing costs on September 23, 2005.

[52] Lee Webb advanced the anniversary payment of \$36,000 in September 2006, and paid the anniversary payment of \$35,000 on September 2007 (total \$137,117).

[53] Lee Webb also advanced \$2,587.43 on September 14, 2005 to purchase appliances for the home; \$4,830 for the new roof in November 2005; windows for the workshop in the amount of \$1,381.06; an advance for electricity, foundation and dumpster in the amount of \$5,500; and \$523.17 to Betsy Webb for building an outdoor workshop.

[54] On August 6 Lee Webb advanced \$2,400 and on October 6, two payments of \$72.50 and \$485. In November she advanced a payment of \$160. In December, she paid lumber for the workshop at \$155 and in September 6, \$37.29. On September 7, she paid \$2,000 for the workshop and on March 7, she advanced a payment to Carm Robertson for work on the workshop in the amount of \$4,000.

[55] The three parties discussed converting the stand-alone garage with the home to an office for Carm Robertson in 2006. Carm Robertson agreed to do the labour. Lee Webb paid all of the cost of this renovation.

[56] This contribution resulted in accumulated payments of \$17,618.93. It is possible that Lee Webb's contribution exceeded that. In particular, I am unclear as to whether she included the deposit of a cheque for \$5,500 into Carm Robertson's account, \$4,000 being earmarked for Carm Robertson's labor.

[57] No party seriously or successfully disputed the amount and frequency of Lee Webb's contribution.

[58] The shed reconstruction was never completed. The garage/workshop is not water tight; the siding is not on; the work on the inside of the structure has not even been started.

[59] Carm Robertson does not dispute that Lee Webb made these contributions. In support of this, she advises that the monies flowed from Lee Webb through her daughter's account to the third party expenditures. She argues they were gifts to Betsy Webb and are non refundable.

[60] I find that Carm Robertson did know or ought to have known that the terms of Lee Webb's investment implicitly and explicitly required the provision to Lee Webb of a place within the family home until she died or until her care required that she be placed in a long-term care facility.

[61] In Lee Webb's affidavit attached as Tab "A" are a list of her expenditures. If one were to add into her contributions as noted in this exhibit including the loan of \$24,000 and one-third of the remortgage funds ($\$31,972.25 / 3 = \$10,657.41$), Lee Webb advanced a total for at least \$191,906 to the couple.

[62] Lee Webb asks that she be repaid this sum before determining what, if any, equity is available to all three parties.

Monthly Contributions

[63] It was also agreed that Lee Webb would also pay one-third contribution to ongoing monthly mortgage payments and household expenses. She paid \$1,100 per month from October 2005 to September 2009. She continued to contribute until 2010, a total documented contribution of \$60,500.

[64] Lee Webb understood that the two respondents would pay the remaining two-thirds of the day to day expenses associated with maintaining the home.

[65] Betsy Webb agreed to this understanding. Carm Robertson testified that she was never in a position to pay and never agreed to pay one-third.

[66] Carm Robertson admits that all the payments on the mortgage came directly from Betsy Webb and Lee Webb. She admits her financial contribution to the household was minimal if at all.

[67] While the parties agreed that Lee Webb would pay one-third of the monthly expenses, on the evidence before me her payments exceeded one-third of the expenses.

[68] Upon refinancing, the monthly bills were the mortgage (\$850); taxes (\$321); insurance (\$62.67); water (\$33.22); power (\$118.17); wood (\$158.11); chimney cleaning (\$12.13); internet (\$100.22) and six dinners a week for four weeks (\$240).

[69] Lee Webb continued to pay \$1,100 a month until it was reduced to \$600 per month until the end of October 2010 when she moved out of the home and stopped paying.

[70] Excluding food, the monthly expenses in the household as related by Lee Webb and uncontested by either party were \$1,655.52 per month. After her payment, excluding food, this left \$555.52 per month to be shared between Betsy Webb and Carm Robertson.

[71] Lee Webb is not seeking reimbursement of these monthly contributions.

The \$24,000 Loan dated March 24, 2007

[72] This loan is documented and signed by all parties on March 24, 2007.

[73] The three parties came to a separate agreement regarding an interest-free loan advanced by Lee Webb to Betsy Webb and Carm Robertson. Carm Robertson remembers asking for a loan; Lee Webb remembers offering a loan upon learning of the couples' debt problems.

[74] Of the \$24,000, \$4,000 was advanced to pay Carm Robertson for her labour and the balance to pay the couple's bills.

[75] The document sets out their agreed terms on this \$24,000 interest free loan:

Payment as much as possible to the mortgage principle September 2009. The remainder to be deducted in monthly instalments reducing by \$100 the communal payments Eleanor Lee Webb need pay for household payments starting after the

mortgage is paid off in full in (September 2010?) Any amount remaining after her death will be deducted from Mary E. Webb's inheritance.

Record of payments

[76] All parties agree there was a clear understanding that this money was to be repaid. They also agree this loan is not related to the investment in the property. Lee Webb testified it was her expectation they would pay her back by making the next anniversary payment on the mortgage.

[77] Lee Webb believed the couple would pay extra payments on the mortgage to accelerate the payment of the mortgage in full and they would pay Lee Webb in part by giving her a \$100 deduction on her one-third monthly expenses until the loan was paid in full. They would not start paying back the loan until the mortgage was paid in full.

[78] Lee Webb never received the deduction and the mortgage was never paid in full. She has not received any payment on this loan.

Betsy Webb's Contributions to the Home and Household

[79] Betsy Webb contributed financially to their joint enterprise to a greater degree than did Carm Robertson.

Betsy Webb deposited \$23,000 from the proceeds of sale of her previous home, into the joint account with her partner Carm Robertson.

In 2004 Betsy Webb sold her personal stock, received \$10,138.83, and deposited this into their joint account.

In 2005 she received two cheques as a result of her inheritance from her father, one in March of 2005 for \$8,951.44 and one in July 2004 for \$9,000.

In June of 2005 she also received \$9,800 from Lee Webb, in addition to other sums emailed to their joint account.

This contribution by Betsy Webb to the couple results in a total payment of \$60,890.27.

[80] Again, this is not disputed.

Carm Robertson's Contributions

[81] Carm Robertson admits she did not contribute financially to the home or household. She describes her contribution as fulfilling the role of primary parent.

[82] This evidence as to Carm Robertson's role is in dispute by Betsy Webb. This was not a relevant issue to the claim by Lee Webb.

Remortgage September 2009

[83] In spite of this ongoing influx of lumps sums, the couple's debt situation worsened. The home was remortgaged for an additional \$31,972.25 in September 2009. The couple received \$26,761.55, which they used to pay off their debts. The balance of \$4,441.67 was paid to the couple directly.

[84] The debts that were paid were not those incurred by Lee Webb. She received no benefit from the refinancing.

[85] Clearly, this couple was living off Lee Webb's good will, naivete, contributions and capital investments.

The Living Circumstances Unravel

[86] The relationship difficulties began shortly after the child's birth. Betsy Webb claimed her partner was drinking heavily until she stopped in 2005. For a period of two years the relationship improved.

[87] Irreconcilable differences also arose between Carm Robertson and Lee Webb.

[88] Very quickly after Lee Webb moved in, it became clear there were significant personality difficulties in the household.

[89] This was a three-level home. Lee Webb was allotted a bedroom and bathroom in the basement together with a small kitchenette. There was a shared washer and dryer, storage room as well as a family room. The couple and their child used the upstairs for bedrooms and bath.

[90] Lee Webb thought she was to have full use of the main level containing the kitchen, dining room, sunroom and formal living room.

[91] Upon entering into the home, significant restrictions were put on Lee Webb's ability to enjoy the use of the home.

[92] The dining room was set aside for Carm Robertson's office. The pictures of this room indicate it was in a state of disarray (from Reply Affidavit of Mary Elizabeth Webb sworn January 22, 2012 at Exhibit 6, Vol.II, Tab FF).

[93] While the couple had access to much of the basement, Lee Webb's access to large portions of the home became restricted.

[94] Initially Lee Webb babysat and was permitted to put her grandson to bed; eventually she was restricted from playing with her grandson or putting him to bed. She was prohibited from entering the 3rd floor of the home to put laundry away.

[95] There were a number of altercations, some involving the police.

[96] At one point in the winter of 2006 or 2007, Lee Webb was invited into the dining room by her grandson. As she entered the dining room, Carm Robertson began to scream at her. Lee Webb retreated to the basement. Carm Robertson began hitting the fireplace with an iron poker, yelling and blocking Lee Webb's way up the stairs. Lee Webb indicated she had no other exit.

[97] Betsy Webb confirms Carm Robertson became enraged and smashed the poker against the wood stove. Betsy Webb testified that their child witnessed the incident; Carm Robertson testified that the child was sleeping.

[98] After this incident, the couple went to counselling.

[99] In the spring of 2009, Carm Robertson and Lee Webb became embroiled in another altercation: a physical exchange between the two, causing Betsy Webb to call 911. As a result of the physical altercation between 80-year-old Lee Webb and Carm Robertson, Lee Webb landed on her back on the stair landing with Carm Robertson holding her lapels above her. Lee Webb's version is that she was grabbed by the neck.

[100] The police arrived with a social worker. The parties did not want to press charges and the matter was dropped.

[101] Subsequently, child protection visited the home and made a determination, according to Betsy Webb, that it was safe for Carm Robertson to continue to care for their child.

[102] Again, the couple went into counselling from spring 2009 through the winter 2010.

[103] In 2010, their relationship deteriorated further until in June 2010 Betsy Webb advised Carm Robertson that she would be seeking a separation.

[104] In June 2010, Carm Robertson put a lock on her closet door and installed a lock on her office door (the dining room).

[105] For a period of time, Carm Robertson slept in the child's bed or in the couple's bed with the child in between the couple.

[106] In February 2011, Carm Robertson rented an apartment in Halifax. She took their child there for two nights per week. However, on the other five nights she returns to the couple's home to stay with the child.

[107] Sadly as a result of this living situation since 2010, the child of this couple has remained quite literally and figuratively in the middle of his parents' ongoing conflict.

[108] The testimony of Lee Webb and Betsy Webb confirms that just prior to Lee Webb deciding to leave the home permanently, she was largely restricted to the basement. Carm Robertson asked her to use the back door rather than the front door. Essentially Lee Webb was restricted from a portion of the main floor and absolutely from the upper floor level where her grandson resided.

[109] Lee Webb found the stress living in the household too great. She applied to live in Northwood Centre, changing her residence to the Centre on October 1, 2010.

[110] At that point, up until the end of October, she contributed her one-third share for the mortgage expenses. She testified she has not done so since.

[111] In explaining her belief that she is entitled to a one-third equity and bears no responsibility for paying back to Lee Webb the investment when the agreement unravelled, Carm Robertson argued as follows:

5. ... Betsy told me that we would be equal owners of the home. She also told me because of my low income and because I had not filed some previous income tax returns, the mortgage company had recommended that she be the sole mortgagor. Betsy told me that her mother would be making the down payment for the purchase of the house, because she was coming to live with us. Neither Betsy nor Lee ever said anything about the down payment being a loan from Lee or an investment by Lee, and there was no suggestion it affected our equal interest in the house. I was assured by Betsy that we could cover the monthly mortgage costs from her income. Betsy later told me that Lee would be making a large money transfer to her, in addition to the initial down payment, to bring down the balance of the mortgage and to lower our monthly mortgage payment. Neither Betsy nor Lee suggested that this payment affected my ownership share in our home. It was important to me that I was an equal owner of the house, and I trusted Betsy to ensure my interests were protected. It has only been recently that Betsy and Lee claimed that I did not have a share of the equity in our home equal to theirs.

6. I did not know the details of the direct payments Lee made to Betsy from August 2005 to April 2007, until I read Lee's affidavit. I have only recently learned that Betsy had such a low income at that time, e.g., only earning \$14,008 in professional income in 2007. I also had no idea that she would only be working part-time. There was no suggestion made to me by either Betsy or Lee that Lee was lending money to Betsy and me, or that Betsy and I would have to repay Lee for her payments to Betsy except for the \$24,000 Lee lent Betsy and me in March 2007. Nor did anyone ever suggest that, even though all the payments on the mortgage came from Betsy and Lee, that I was not an equal equity owner of the house. In the case of the \$24,000 loan from Lee, Betsy and I agreed to pay her back and we are still bound by that commitment.

Credit Card Debt

[112] Aside from the obvious fact that this couple were living off Lee Webb's investment income and capital, this couple financed their lifestyle through a series of credit card debts and transactions.

[113] Betsy Webb testified about her efforts to try to create a budget with her partner and their lack of success in reaching an accord on this.

[114] Carm Robertson suggests that she had no knowledge of this. However, in her affidavit filed January 12, 2012 at page 27 (Exhibit 11) she testified she was aware her partner continually complained about their lack of finances. She knew that Betsy Webb was concerned about their falling further into debt and needing to find a way of climbing out of their debt.

[115] Carm Robertson acknowledged that throughout the last five years of the relationship, they had many discussions about the lack of finances and their serious debt problem. Betsy Webb testified she asked her partner to go back to work.

[116] Carm Robertson testified that she could not understand why they were having this financial difficulty, notwithstanding that she was not earning or contributing to the financial welfare of their family.

[117] Carm Robertson acknowledged that in their relationship Betsy Webb handled the finances. She advised:

We opened joint saving and chequing accounts at Credit Union Atlantic and, after closing my CIBC account, I deposited all my income into that account. I counted on Betsy handling all the bills. Betsy and I, and Betsy and Lee had separate conversations about the three of us buying a house together.

[118] Betsy Webb testified that as the pressure to pay debts increased and as a new offer came to them regarding a low interest credit card, they used one card to pay off the balance on the other. They used advances and transfers to maintain themselves on a daily basis (Exhibit 7).

[119] There is no evidence to dispute that the money advanced through the cards went either toward sustaining Betsy Webb's business income which was (other than Lee Webb's investments) sustaining the couple or for the most part sustaining the family, including for example household groceries at Atlantic Superstore, YMCA payments, etc.

[120] Carm Robertson did not contest these were put toward their household finances.

[121] The outstanding balance of those loans as of separation continues to be the responsibility of both parties as they are matrimonial debts. This includes Mastercard, MBNA, Canadian Tire, and Credit Union Atlantic ("CUA").

[122] These debts as they existed when the relationship ultimately dissolved must be satisfied out of any equity owed to the couple. They are not the responsibility of Lee Webb and ought not to reduce her entitlement.

[123] A review of these credit transactions demonstrates why the couple may, in the end, have no equity in the property

Canadian Tire Line of Credit

[124] The Canadian Tire line of credit had a starting balance on April 2004 of \$3,157 (rounded). This escalated in September 2004 to \$9,540. By November 2005 the balance was nil.

MBNA Mastercard

[125] In April of 2004 the couple also had an MBNA Mastercard with a balance of \$7,278 (rounded) with a limit of \$7,500. This limit was increased on March 2005 to \$9,200; on September 5 to \$10,200; and on September 2006 to \$11,300. In April of 2006 it decreased to \$2,500 until April of 2008 when it increased to \$5,000.

[126] From April 4 to December of 2010 the amount of transfers and advances that are discernable in the evidence provided equalled \$24,087.27.

Canadian Tire Mastercard

[127] On October 24, the Canadian Tire Mastercard, with a limit of \$5,000, was used to support the expenditures in the household. The limit was increased in February 2006 to \$8,500; in April of 2007 to \$9,500; in July of 2008 to \$10,500; in December of 2009 to \$13,500 and to August 2010 to \$16,000. As of October 2004

the balance was \$2,335 (rounded) but as of December 2010 it was \$3,153 (rounded).

[128] While I do not have the transactions in this account, it appears that \$4,639 advances or disbursements were incurred including the purchase of the appliances in \$3,714. I am satisfied that Lee Webb advanced the money to pay for the appliances.

MBNA Line of Credit

[129] In March 2006, Betsy Webb, on behalf of the couple, opened an MBNA line of credit. Between April 4, 2006 and December 2009 advances and transfers were made in the amount of \$22,696. As of 2009, the end balance was \$1.38. However, in June of 2010 another advance was taken out for \$3,500. Apparently this account is now closed.

CUA Mastercard

[130] Finally, in May 2008 the couple used the CUA Mastercard with a \$4,000 limit. The transfer in evidence for the period of time reported was \$7,383 and with a statement balance year end 2010 of \$3,642.46.

The Canada Revenue Agency Taxes

[131] The current indebtedness for Betsy Webb is \$9,403.63. However, Betsy Webb made certain claims dependent on her partner filing her income tax. Carm Robertson has not kept her returns current. This resulted in a reassessment.

[132] Carm Robertson also has a tax debt in the amount of \$2,243.

[133] Carm Robertson also shows a debt of \$293 for a credit card she holds.

The Law /The *Partition Act* /Unjust Enrichment

[134] When parties hold title to property in joint names, there is a presumption that the proceeds of sale shall be divided equally, **Anderson v. Wilson** (1986), 73 N.S.R. (2d) 1 (T.D.); **Primeau v. Jollimore**, 2006 NSSC 152 at para 33; **Soubliere v. MacDonald**, 2011 NSSC 98 (N.S.S.C.).

[135] In **Kerr v. Baranow**, 2011 SCC 10, at paragraph 36, the Court speaks to three principle elements of unjust enrichment:

C. The Elements of an Unjust Enrichment Claim

(1) Enrichment and Corresponding Deprivation

36 The first and second steps in the unjust enrichment analysis concern first, whether the defendant has been enriched by the plaintiff and second, whether the plaintiff has suffered a corresponding deprivation.

37 The Court has taken a straightforward economic approach to the first two elements -- enrichment and corresponding deprivation. Accordingly, other considerations, such as moral and policy questions, are appropriately dealt with at the juristic reason stage of the analysis: see *Peter*, at p. 990, referring to *Pettkus*, *Sorochan v. Sorochan*, [1986] 2 S.C.R. 38, and *Peel*, affirmed in *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629, at para. 31.

38 For the first requirement -- enrichment -- the plaintiff must show that he or she gave something to the defendant which the defendant received and retained. The benefit need not be retained permanently, but there must be a benefit which has enriched the defendant and which can be restored to the plaintiff in specie or by money. Moreover, the benefit must be tangible. It may be positive or negative, the latter in the sense that the benefit conferred on the defendant spares him or her an expense he or she would have had to undertake (*Peel*, at pp. 788 and 790; *Garland*, at paras. 31 and 37).

39 Turning to the second element -- a corresponding deprivation -- the plaintiff's loss is material only if the defendant has gained a benefit or been enriched (*Peel*, at pp. 789-90). That is why the second requirement obligates the plaintiff to establish not simply that the defendant has been enriched, but also that the enrichment corresponds to a deprivation which the plaintiff has suffered (*Pettkus*, at p. 852; *Rathwell*, at p. 455).

(2) *Absence of Juristic Reason*

40 The third element of an unjust enrichment claim is that the benefit and corresponding detriment must have occurred without a juristic reason. To put it simply, this means that there is no reason in law or justice for the defendant's retention of the benefit conferred by the plaintiff, making its retention "unjust" in the circumstances of the case: see *Pettkus*, at p. 848; *Rathwell*, at p. 456;

Sorochan, at p. 44; *Peter*, at p. 987; *Peel*, at pp. 784 and 788; *Garland*, at para. 30.

41 Juristic reasons to deny recovery may be the intention to make a gift (referred to as a "donative intent"), a contract, or a disposition of law (*Peter*, at pp.990-91; *Garland*, at para. 44; *Rathwell*, at p. 455). The latter category generally includes circumstances where the enrichment of the defendant at the plaintiff's expense is required by law, such as where a valid statute denies recovery (P.D. Maddaugh, and J. D. McCamus, *The Law of Restitution* (1990), at p. 46; *Reference re Goods and Services Tax*, [1992] 2 S.C.R. 445; *Mack v. Canada (Attorney General)* (2002), 60 O.R. (3d) 737 (C.A.)). However, just as the Court has resisted a purely categorical approach to unjust enrichment claims, it has also refused to limit juristic reasons to a closed list. This third stage of the unjust enrichment analysis provides for due consideration of the autonomy of the parties, including factors such as "the legitimate expectation of the parties, the right of parties to order their affairs by contract (*Peel*, at p. 803).

42 A critical early question in domestic claims was whether the provision of domestic services could support a claim for unjust enrichment. After some doubts, the matter was conclusively resolved in *Peter*, where the Court held that they could. A spouse or domestic partner generally has no duty, at common law, equity, or by statute, to perform work or services for the other. It follows, on a straightforward economic approach, that there is no reason to distinguish domestic services from other contributions (*Peter*, at pp. 991 and 993; *Sorochan*, at p. 46). They constitute an enrichment because such services are of great value to the family and to the other spouse; any other conclusion devalues contributions, mostly by women, to the family economy (*Peter*, at p. 993). The unpaid provision of services (including domestic services) or labour may also constitute a deprivation because the full-time devotion of one's labour and earnings without compensation may readily be viewed as such. The Court rejected the view that such services could not found an unjust enrichment claim because they are performed out of "natural love and affection". (*Peter*, at pp. 989-95, per McLachlin J., and pp. 1012-16, per Cory J.).

...

60 At least one other basis for an unjust enrichment claim is easy to identify. It consists of cases in which the contributions of both parties over time have resulted in an accumulation of wealth. The unjust enrichment occurs following the breakdown of their relationship when one party retains a disproportionate share of the assets which are the product of their joint efforts. The required link between the contributions and a specific property may not exist, making it inappropriate to confer a proprietary remedy. However, there may clearly be a

link between the joint efforts of the parties and the accumulation of wealth; in other words, a link between the "value received" and the "value surviving", as McLachlin J. put it in *Peter*, at pp. 1000-1001. Thus, where there is a relationship that can be described as a "joint family venture", and the joint efforts of the parties are linked to the accumulation of wealth, the unjust enrichment should be thought of as leaving one Party with a disproportionate share of the jointly earned assets.

[136] There is no dispute between the couple that they received a benefit.

[137] This has resulted in a corresponding deprivation to Lee Webb.

[138] From 2005 until 2011 Lee Webb invested more than she claims as a remedy, i.e., more than \$191,906. There were significant lump sums and continuing periodic sums.

[139] A review of the couple's joint incomes leaves me in no doubt that in addition, Lee Webb essentially carried the couple by maintaining the mortgage and funding significant repairs meant to enhance the asset.

[140] Lee Webb clearly gave other sums as gifts to her daughter Betsy Webb and Carm Robertson benefited directly and indirectly. Lee Webb's financial investments (periodic and lump sums) essentially housed the couple with little or no contribution from Carm Robertson.

[141] Whatever agreement existed between Betsy Webb and Carm Robertson regarding their roles in the relationship, it was of no benefit to Lee Webb.

[142] Lee Webb has not asked for repayment of her generosity for these additional sums.

Juristic Reason

[143] No one has argued that a contract existed. Carm Robertson argues that these investments were intended to be a gift. Carm Robertson also argues that these were gifts to Betsy Webb, not her, and ought not to reduce her one-third interest in the home.

[144] However, the evidence supports a conclusion that the money clearly benefited the couple, that money flowed in and out of the couple's account and that Carm Robertson knew the source of the funds and the reason for the investments.

[145] I am conscious of the need to treat separately the issue of equal division of the equity in the home as between the couple from Lee Webb's claim against her daughter and Carm Robertson.

[146] There is no dispute that between the partners, Betsy Webb and Carm Robertson, as it relates to a division of property under the *Matrimonial Property Act*, that the couple ought to receive an equal division of the equity. Carm Robertson and Betsy Webb will share what equity, if any, is left after their debts have been paid.

[147] Lee Webb is seeking the repayment of her debt before an equal division takes place. She is seeking one-third of the remaining equity as she contributed in more than equal shares to the monthly maintenance of the home and property.

[148] With her investments into the purchase and capital expenditures, Lee Webb had a legitimate expectation that she would receive a benefit, a safe and secure home with family members, quiet yet not exclusive enjoyment, security for her life until she required more significant care.

[149] This was an expectation, an understanding and an agreement that all parties acted upon; Lee Webb to her detriment and the couple to their benefit.

[150] The agreement broke down almost immediately. Despite her significant contribution, what Lee Webb ultimately received was a sad reflection of her hopes and legitimate expectations.

[151] Lee Webb was restricted in her living space, involved in altercations that placed her in a vulnerable position and placed in an untenable living circumstance.

[152] Lee Webb continued to live in this environment until she could live there no longer.

[153] The couple continued to borrow money, reducing the equity available on the loan by remortgaging the assets and extending their credit beyond their capacity to maintain their lifestyle expectations.

[154] Carm Robertson denies knowledge of the details of the transactions or the extent of her contribution. I have no evidence that would suggest that Carm Robertson is suffering from any intellectual impairment. On the contrary, the evidence supports she is an educated adult with a variety of life experiences.

[155] It is not credible to suggest given their debts, their circumstances, her lack of financial contribution and what appears to be frequent discussions about debts that Carm Robertson could not know the source of the investments, what their responsibility was regarding maintaining the home and the couple's state of debt.

[156] If I am in error in this conclusion and she truly did not know, then this is willful blindness to their living circumstances.

[157] Carm Robertson argues Lee Webb should not receive any compensation from her investments. She argues that if Lee Webb receives one-third equity before the investment that is what would accord with her reasonable expectations. According to her, all three should receive an equal one-third of the equity in this home.

[158] Lee Webb, however, gave first her investments to make the purchase and their living arrangement possible and then contributed what appears to be more than one-third share to maintain the home. In addition, there were other cash gifts for which she seeks no compensation.

[159] Both Betsy Webb and Carm Robertson benefited from Lee Webb's generosity. Lee Webb's investment made possible the purchase of a home for her Betsy Webb and her partner and child when this clearly could not have happened without the investments.

[160] If I were to accept Carm Robertson's position and decide that Lee Webb ought not to be reimbursed for her investments, the result would be a payment to all three equally of approximately \$72,910 after the mortgage and closing costs are deducted (assuming no judgements exist against the property). Lee Webb would absorb the loss of her investment without receiving the enjoyment she expected.

[161] Both Carm Robertson and Betsy Webb would receive a windfall. In Carm Robertson's situation, it would be one toward which she made no financial contribution.

[162] As it related to Lee Webb, Carm Robertson has already received the benefit of the second mortgage. Lee Webb has not received any benefit of that advance although her equity will be reduced because of it.

[163] To divide the equity as suggested by Carm Robertson would be unconscionable.

[164] While the evidence shows that this agreement broke down in part because of the relationship between Carm Robertson and Lee Webb, the couple's relationship was also in trouble.

[165] While Carm Robertson was imposing limits on Lee Webb, Betsy Webb acquiesced in this behaviour until she herself decided the relationship was over.

Settlement Discussions

[166] Carm Robertson argues that both Lee and Betsy Webb fully expected to have to pay her out after which this would all be settled. In support of that claim, she offered evidence that Betsy offered to pay her out a sum of money that exceeded \$51,000. In addition, she could walk away with no responsibility for their debts.

[167] Betsy Webb wrote to Carm Robertson offering \$35,000 to settle all matters. Betsy Webb advised this money was an advance on her inheritance. She also told Carm Robertson that to settle the matter, Lee Webb would be prepared to add to the \$35,000 to meet her demand for \$51,000. Indeed this was a generous offer.

[168] The settlement discussions failed.

[169] These discussions were introduced by Carm Robertson because she believed the communication demonstrated evidence that Lee Webb and Betsy Webb believed Carm Robertson was entitled to such a settlement.

[170] Settlement discussions that are carried on between parties, without the protected environment accorded discussions between counsel, are problematic from an evidential point of view.

[171] It is settled law that the privilege ordinarily accorded settlement discussions is subject to exceptions and may be waived (Evidence in Family Law 8:50 at 8:60 www.canadalawbook.ca). In this instance, of the three conditions which must be established, litigation was very much in contemplation as was their desire to avoid this litigation. As well, the purpose of the letter tendered in evidence seems clearly to be settlement oriented.

[172] While there is dispute whether the second condition that the communication be made with the express or implied intent that it would not be disclosed is a necessary element (**Maxwell v. Maxwell** [2002]O.J.No 5089 (QL), in this instance I did not have evidence to conclude there was an implied wish to keep it confidential. Indeed, I do not believe there was any degree of sophistication involved in the communication.

[173] I have chosen to review the letter for the reasons adopted in **Moon v. Moon** 2011 Carswell Ont 2086 when the trial judge was asked to review conference materials which resulted in a settlement which was subsequently disputed. Recognizing that here we do not have a settlement, nonetheless the judge indicated he would review them to try to discover what the parties understood at the time of settlement.

[174] Having said that and on review of the letter, I conclude that they cannot be said to speak to Lee Webb and Betsy Webb's belief regarding what Carm Robertson was entitled to by law. The letter more probably speaks to their desire to settle the matter, avoid litigation and finalize what was a very difficult period in their lives regardless of and with little knowledge of Carm Robertson's legal entitlement.

[175] There was a clear belief that litigation would cost them considerably should the matter have to be prepared for and litigated for two days of court time as these two applications have been.

[176] Betsy Webb testified they would have paid a sum of money larger than they believed owing to settle the matter and avoid court.

[177] During the course of the proceedings, Betsy Webb testified that her mother had expended most if not all of her investment income in this enterprise and was no longer able to invest or bail them out further.

[178] Lee Webb was not asked to disclose her investment income or her statement of property and there was no suggestion that she should have. Her statement of property shows no other investments. I have insufficient evidence to conclude that she either has or has not other assets. In any case, it is not relevant to this decision.

[179] They have now incurred the legal costs of a hearing.

[180] Betsy Webb testified that her mother Lee Webb had reached the end of her financial resources such that this payment to settle all matters in dispute would no longer be possible.

[181] On the totality of the evidence before me, there is another element at play here. Without any intent to be harsh or judgmental in retrospect, Lee Webb was not prudent in her investment in this proposal of purchasing a home together with this couple. She rather blindly trusted that her daughter would take over from her late husband and her interests would be protected.

[182] Lee Webb had fairly recently lost her husband, who looked after all financial matters, lived geographically distant from the only family she knew and longed to live with her family until she died.

[183] She uprooted herself from her country of origin and moved to Canada. It appears she was trying to craft a life within which she could be cared for and she could care for her remaining family, and at that point she included Carm Robertson.

[184] That relationship never got off the ground. She overestimated the stability of the couple's relationship. This was an ill-conceived strategy to meet her needs and to help her family.

[185] To add to her vulnerability, she invested her money and her trust in this plan and in her daughter who, however well intentioned, did not have the ability to act

at arms' length and did not have the financial skills to manage the couple's finances let alone her mother's.

[186] Betsy Webb spoke and acted throughout with the express expectation and sense of entitlement regarding Lee Webb's money as her inheritance, as if it was her present right to spend this entitlement.

[187] Betsy Webb failed to distinguish her mother's rights and needs from the couples' lifestyle expectations. The couple's expectations were not reasonably founded.

[188] The settlement offer in the face of this evidence exemplifies the unrealistic expectations the couple each have with respect to their rights and responsibilities. There is a real disconnect between their lifestyle and their means, between their expectations and legal reality.

[189] Their lifestyle was historically made possible by someone other than themselves or their own resources. Their belief as to what they are entitled to receive simply did not match their means and legal entitlement.

[190] The offer is just one example of how a problem could be fixed by borrowing on an inheritance to pay out the partner.

[191] Unfortunately, other than counsel in this case, Lee Webb does not appear to have someone independently watching over her personal and business interests.

[192] I, therefore, do not place great weight on the suggestion that, because Lee Webb and Betsy Webb offered Carm Robertson this amount of money to settle the matter, that is what they thought she was entitled to or indeed what she was in fact entitled to receive.

[193] Given the absolute trust Lee Webb invests in her daughter, Betsy Webb failed to protect her mother's interests.

[194] Betsy Webb and Carm Robertson both received the benefit to the significant detriment of Lee Webb.

[195] I cannot by any stretch conclude that Betsy Webb acted with intent to deprive her mother of her investment. She appeared to act oblivious to the serious responsibility invested in her to separate out her mother's investments from her own lifestyle choices.

[196] Given what has occurred, the better course of action would be to place her mother's interests at arms' length to her own.

[197] I can conclude that Lee Webb's investment was well intentioned, naive, wistful and clearly not reflective of her best interests. She was not well advised, not well informed and not sufficiently cautious to document and secure her investment.

[198] While she may invest foolishly, I do hope Lee Webb obtains independent legal advice and comes to understand her vulnerability. If after this she wishes to completely dissipate her assets until she becomes destitute that would be her business.

[199] Betsy Webb must now realize that financial management is not her strong point Lee Webb ought to have had independent legal advice and advice at arms' length to the couple.

[200] Carm Robertson suggests that this investment was a gift. This position is not sustainable on the evidence. Indeed, Lee Webb's evidence was clear, documented and believable. She invested to have a home in which to live until she could no longer live there or until she dies.

[201] This couple did not stumble on her money. They sought this out to fulfill their dream. They encouraged her to come to Canada; she wanted to come to Canada. They supported in principle her immigration application. They knew of the death of her husband and the fact that she relied on him lifelong to manage their affairs.

[202] They were not then and not now in a position to purchase a home independently or jointly. They needed her contribution.

[203] They knew or ought to have known of her vulnerability and implicitly and explicitly agreed to take advantage of her money, her life investment, and in return she was to be provided a place to live until she needed more substantial care.

[204] The argument that these large sums were intended to be a gift to Betsy Webb with no expectation of a return simply ignores the fact that Lee Webb clearly expected to live there until she died or needed a nursing home.

[205] That Lee Webb continued to stay in the circumstances in which she lived to try to make it work is a testament to her tenacity given the circumstances of their life together, fundamentally altered within the very early years of their lives together.

[206] If I were to accept that these were gifts from Lee Webb solely to Betsy Webb this would simply transfer to Betsy Webb a strong argument for an unequal division under the *Matrimonial Property Act*.

[207] Finally, Carm Robertson argues it would be unjust if she walks away with nothing and Betsy Webb walks away with everything.

[208] Part of Carm Robertson's argument about fairness arises from her presumption that Betsy Webb has a softer landing than does she and that Betsy profits from her mother's resources. Adjusting a division of property between a couple for extended family wealth or lack thereof is not a factor I can consider.

[209] The evidence before me satisfies the test set out in **Kerr**.

Calculations

[210] While there is no dispute as to what Lee Webb paid, Lee Webb is asking first to have her contributions to the home (aside from her monthly contributions) in the amount of \$161,248.55 paid out prior to the calculation of equity and presumably after the disbursements of sale and payout of mortgage occurs.

[211] Further, she is asking that she be credited with one-third of the remortgage monies in the amount of \$10,657.41.

[212] In addition, her counsel has suggested her debt created by the \$24,000 loan be paid out before the equity is determined. The result would be a payment of \$191,906. I do note that the parties talk as if the loan is \$20,000 not \$24,000 and I use the \$20,000 they have used in their calculations as an indication of the loan although the evidence suggests there have been no payments on this loan. It does not matter in the result as the real outstanding balance is known to the parties and both indicate an obligation to pay whatever is owing on that loan.

[213] Lee Webb shall be paid out her investment in the amount of \$171,906. before any equity is divided among the three. I have included the \$161,248.55 contributions to buy and improve the home and the one-third portion of the 2nd mortgage, a benefit she did not receive.

[214] The couple used the equity in the home at Lee Webb's expense, decreasing the equity to pay their mounting bills. Lee Webb received no benefit from the second mortgage. For the same reasons I concluded above, there was no intent to have this qualify as a gift and I include this in the repayment.

[215] I have not included the loan in the total payment before division due to the fact that under the third category of unjust enrichment (juristic reason) this debt is clearly a loan which would disqualify it from inclusion in the compensation for unjust enrichment. However, it will be treated as a matrimonial debt.

[216] The home was appraised at \$350,000 on February 14, 2011. The remaining mortgage as of December 7, 2011 was \$110,344.75.

[217] The home will be listed for sale immediately.

[218] In the event Lee Webb and/or Betsy Webb seek to purchase the property, they will effect the calculations based on the directions herein and within 30 days of the date of the decision pay over to the other that which is owed.

[219] The calculations for ordinary disbursements will be deducted regardless of buyout or sale.

[220] There will be \$17,500 in realty fees, \$2,625 in HST and I will allow \$800 for legal fees to effect the sale. The mortgage balance noted above shall also be deducted.

[221] Lee Webb shall be paid outright \$171,905.95.

[222] There after the remaining equity will be divided into three. The one-third interest payable to Lee Webb shall be paid before further deductions.

[223] The remaining two thirds equity shall be paid toward the outstanding indebtedness set out at tab "Q," "O," "P" and "L," that being:

MBNA in the amount of \$5453.68

Canadian Tire Master Card in the amount of \$7,605.25

CUA Master Card in the amount of \$4267.37 and

The loan from Lee Webb showing in the amount of \$20,000

[224] I was not given evidence of payments against this loan to the couple from Lee Webb and cannot determine how it was reduced from \$24,000 to \$20,000.

[225] The deduction of these debts from the couple's equity results in a deficit of \$6,108.

[226] Carm Robertson retains the car and the cash surrender value on her policy which essentially results in an unequal division of debts and assets in her favour. She will be responsible for paying her credit card debt of \$293.

[227] The remaining debts are in the name of Betsy Webb personally.

[228] I have not included either of the couple's tax debts as I had insufficient current evidence to address them.

[229] The remaining equity is required first to pay down the couple's debts as of the separation date. Those debts shall include Lee Webb's loan.

[230] If there is any positive balance, that balance will be divided equally between the couple. However, I anticipate a deficit.

[231] In the event there is no equity owed to either Betsy Webb or Carm Robertson, in return for a Quit Claim Deed, Betsy Webb shall provide proof to Carm Robertson that her equity was paid toward the couple's family debt inclusive of the grandmother's loan.

[232] I suspect there will be no equity after the debts are paid and that not all debts will be paid fully, although only a small fraction will remain.

[233] The remaining debt in Betsy Webb's name shall be absorbed by Betsy Webb.

[234] Carm Robertson will take responsibility for her remaining debt.

Registration and Rights and Obligations

[235] While I have not been provided with proof of the registration, there appears to be no dispute about the fact that this couple have a registered domestic partnership (*Vital Statistics Act*, R.S., c. 494, s. 1).

54 (1) In accordance with this Act, either of two individuals who are cohabiting in a conjugal relationship may submit a domestic-partner declaration made under Section 53 to the Registrar for registration . . .

and the Registrar shall, if satisfied of its truth and sufficiency, register the domestic partner [domestic-partner] declaration.

(2) Upon registration of a domestic-partner declaration, domestic partners, as between themselves and with respect to any person, have as of the date of the registration the same rights and obligations as . . .

(f) a spouse under the Maintenance and Custody Act;

(g) a spouse under the Matrimonial Property Act;

and the domestic partners, the registration of their domestic-partner declaration and their domestic partnership are subject to and give rise to the same operations of law that relate to those classes of persons under those Acts and those Acts apply mutatis mutandis with respect to the domestic partners, the registration of their domestic-partner declaration and their domestic partnership.

Parenting Issues

[236] Carm Robertson acknowledges their child was nursed by Betsy Webb. She does not dispute Betsy's significant involvement in the early years. At the time that Betsy Webb returned to work, she was working 24 hours a week.

[237] Carm Robertson believes that she was also the nurturing parent from the beginning. She describes a life with her son doing many activities, exploring and engaging on a daily basis. This is not disputed.

[238] Carm Robertson talks to her son a great deal about her African descent to inform him and to keep herself aware of and ahead of any difficulties he might encounter at school or in the community.

[239] Both parties had and have a schedule that is flexible.

[240] The philosophical parenting approach of this couple is such that neither have engaged in employment activities with such vigour that they have been away from home for significant periods of time. They have limited their employment prospects to reflect their belief system that they should be child and home focussed.

[241] However, their capacity to achieve this was funded by monies other than their own.

[242] Thus, now that there is such a fundamental shift in their partnership and if the evidence is correct that Lee Webb has run out of her investments and the sad end to her dream stems the flow of cash to support this couple, the couple's lives as parents will fundamentally shift to reflect their fiscal reality.

[243] As that shifts, so will their scheduling needs. Continuing a schedule that is structured on who drives the child to school and back is fraught with the disputes which are problematic to the parents and thus the child.

[244] The evidence supports that the parents have been in close proximity to themselves and the child for much of his life. Neither have a traditional work schedule. They worked around each being significant parents to their child.

[245] The close proximity has only aggravated the differences between the parents and has not elevated the child from this silent conflict each and every day. While each claim to be primary parents, each at different times have adapted their roles to make each primary parents.

[246] Betsy Webb gave birth to the child, nursed him and believed she was the primary caregiver until he was 35 months old. Carm Robertson certainly participated significantly in his care during this period of time and at least until he was school age.

[247] I do not have sufficient evidence over the course of this child's young life to conclude that either is more of a primary parent than the other. Each is significantly involved.

[248] Their parenting styles are significantly different, certainly sufficiently different to cause strife between them and put the child in the middle.

[249] Betsy Webb's concern is that Carm Robertson is creating a significant dependence between herself and the child, e.g., she occupies him in activities as an eight-year-old that encourage his dependence rather than encouraging his independence in his school and his home. This includes what Betsy Webb considers very relaxed standards, no specific bed time, no specific expectations about eating, late night tv and late night reading sleeping with him in his bed, either alone, when he is with her or in their home.

[250] It appeared to me that this issue of sleeping with their son had more to do with each parent maintaining some control over their connection to him and less to do with meeting the child's needs.

[251] There is some evidence that this child suffers from fatigue in the morning going to school.

[252] Betsy Webb described herself as a more structured individual with specific bedtimes, specific boundaries around activities, including meal time.

[253] The parties have obviously not been able to reconcile their diametrically opposite parenting styles in spite of attending parenting courses, mediation and

consulting with mental health professionals in order to agree on some consistency with the child.

[254] They have been encouraged to assist this child to be more independent and to encourage him to perform his own personal cleaning routines particularly since he is now nine years old.

[255] Currently, the couple cannot parent together without placing this child in the middle of two polar opposite parenting styles.

[256] An example of their different parenting styles can be found in paragraphs 57 and 58 of Betsy Webb's Reply Affidavit sworn January 17, 2012. On one occasion she found her son with a sign on his room indicating no one over "8 years old" was to enter. While he was in his bedroom alone, he removed the storm window and screen in the bedroom and went out on the roof. Betsy Webb told him that this was not acceptable.

[257] In their discussion afterward, Carm Robertson indicated that there was no reason why he should not be on the roof.

[258] The current schedule does not lift the child out of the ongoing conflict between his two parents. A significantly different schedule will have to be invoked in order to allow him some peaceful time with each parent.

[259] I grant joint custody, retaining for each parent the right to be consulted on and jointly make decisions on significant decisions. It is premature to alter the historical status quo. A shared parenting schedule will be set out below.

[260] I am aware of the destabilizing conflict in their parenting styles.

[261] Each ought to be invested in an approach that allows the other to participate meaningfully in decision making while addressing the best interests of their child.

[262] Failing that, no doubt there will be a need to address whether the child's interests require a primary parent in the event this conflict continues.

[263] At that point, each will be judged on their own efforts to jointly parent and the effect of their efforts on their child.

[264] Both parents ought to retain their ability to be significantly involved with this child. They ought to share equally the responsibility to address his physical, emotional, psychological, spiritual and educational needs.

[265] While in the day to day care of each parent, each shall be responsible for his welfare. This includes coming to a peaceful resolution as to appropriate consistency regarding his bedtime, eating habits, etc.

[266] Both parents indicate they can work around a schedule with their hours.

[267] Carm Robertson has asked the Court to impose a supervision on any contact between Lee Webb and the child. She has concluded that Lee Webb "appears to share some of the old American racial stereotypes . . . it is very important to me that [D] not be subject to racially-tinged aggressive behaviour . . . "

[268] The evidence does not support this request.

[269] While in the day to day care of Betsy Webb, it is her responsibility to ensure the child's contact with others, including his grandmother, is respectful of his cultural and racial identity. I have no evidence that Betsy Webb will make irresponsible decisions relating to her son.

[270] Each shall be entitled to have reasonable access to information from third-party service providers who provide for their child.

[271] Each shall consult with the other and agree on extracurricular activities and shall share the cost once agreed upon.

[272] In the event one parent chooses to engage the child in extra curricular activities without the consent of the other, the activity shall not occur on the other parent's time without their consent.

[273] The parents shall make every effort while in the same geographic area to have the child treated by the same doctor or clinic where possible. That means they are to coordinate his care.

[274] Each shall have access to school information and shall keep the other informed of school activities in advance.

[275] They both propose shared time either week to week or a variation of that schedule.

[276] Carm Robertson proposed a more restrictive parenting schedule in her favour; that is, two days per week with Betsy Webb from Sunday to Tuesday noon with the remainder of the time in her care except for holidays.

[277] This is overly restrictive and not reflective of the historical way in which both parents have fostered the attachment of the child to the other parent.

[278] Both parents have flexible schedules. Carm Robertson is going to have to move to self sufficiency, look for and become gainfully employed either at carpentry, using her research skills or in some other occupation.

[279] I order a shared parenting arrangement divided into two week cycles:

Week One: the child shall be with Betsy Webb on Sunday, Monday, Tuesday and Wednesday overnight, going to Carm Robertson Thursday, Friday and Saturday overnight.

Week Two: the child shall be with Betsy Webb Sunday, Monday, Tuesday, going to school Wednesday and with Carm Robertson overnight Wednesday, Thursday, Friday and Saturday.

[280] The child is to be returned to the school in the morning of the day when his other parent takes over and will be the responsibility of that parent to pick him up and return him to school from their home.

[281] This gives each parent one day on the weekend and time to adjust their work schedule to reflect their parenting time.

[282] The two-week Christmas schedule shall take priority over the regular schedule:

Christmas 2012 and every even year thereafter the child shall be with Carm Robertson from 3:00 p.m. Christmas Eve to Christmas Day at 3:00 p.m. and then with Betsy Webb from 3:00 p.m. Christmas Day to 3:00 p.m. Boxing Day.

Christmas 2013 the child will be with Betsy Webb from 3:00 p.m. Christmas Eve to 3:00 p.m. Christmas Day and ever alternate odd-numbered year thereafter.

[283] The child shall be with Betsy Webb on Easter Saturday and Sunday until 3:00 p.m. on odd-numbered years and with Carm Robertson on even-numbered years.

[284] It being intended that in the year in which one parent has Christmas Eve, the following Easter shall be with the other parent to ensure each parent celebrates major holidays with the child.

[285] The parents shall agree on sharing equally the remaining days in the child's Christmas vacation.

[286] The child shall be with Betsy Webb on his birthday 2012 and every even-numbered year thereafter and with Carm Robertson every odd-numbered year.

[287] The parents shall share March Break. Should they wish to do otherwise, they shall agree on the terms in advance in writing.

[288] Each parent shall have telephone access to the child on these special occasions. In addition, the child will have reasonable telephone access to either parent except to the extent it disturbs the integrity of the parent's home in which he resides.

[289] In the event of an emergency, the parent shall immediately address the child's needs by taking the child to emergency, etc. and as soon as practicable thereafter that parent shall inform the other parent of the emergency.

[290] The parent with whom the child is shall be responsible for arranging a caregiver in the event they need to work during this time.

[291] The parties have exhibited the ability in the past to work out schedules. In future, should they wish to change the schedule, each must consent in writing if they choose to alter this order significantly. However, on an *ad hoc* basis they shall be free to consent to such other contact as they determine necessary.

Child Support

[292] At this time Betsy Webb has agreed to pay child support in accordance with the guideline income, \$279.27, monthly while Carm Robertson has insufficient income to contribute.

[293] Carm Robertson has an obligation immediately to seek meaningful employment and earn income in accordance with her ability and skills. She will be required to report on a regular basis in order to advise as to what efforts she is making to find employment.

[294] Each party will provide to the other on or before June 1st full and complete particulars of their Income Tax Returns containing any information slips as to any income earned or received and any grant or scholarship in order to determine whether the guideline amount ought to be changed.

Special expenses

[295] The child is enrolled in a private school with costs of \$861.50 per month currently. These costs are being absorbed by Betsy Webb. Currently it appears while Carm Robertson is on social assistance; she is not able to contribute.

[296] Either Betsy Webb will have to pay for this or make other arrangements for less expensive schooling or the couple will have to consider other options.

[297] Once Carm Robertson becomes employed, she shall provide ongoing disclosure. The couple will share the costs of the private school pro rata or they will jointly make a decision whether they can continue to have their child enrolled in private school.

[298] Carm Robertson shall make every effort to become gainfully employed. Once in receipt of income from any source, she shall forthwith advise Betsy Webb

in writing in order to adjust the child support award in accordance with this shared custody plan.

[299] I do not have sufficient evidence to find that Carm Robertson is unable to work.

Spousal Support

[300] The *Maintenance and Custody Act*, Chapter 160, R.S 1989 states as follows:

Priority

3A (1) Where the court is considering an application for a child maintenance order and an application for a spousal or common-law partner maintenance order, the court shall give priority to child maintenance in determining the applications.

Factors considered

4 In determining whether to order a person to pay maintenance to that person's spouse or common-law partner and the amount of any maintenance to be paid, the court shall consider

- (a) the division of function in their relationship;
- (b) the express or tacit agreement of the spouses or common-law partners that one will maintain the other;
- (c) n/a
- (d) custodial arrangements made with respect to the children of the relationship;
- (e) the obligations of each spouse or common-law partner towards any children;
- (f) the physical or mental disability of either spouse or common-law partner;
- (g) the inability of a spouse or common-law partner to obtain gainful employment;
- (h) the contribution of a spouse or common-law partner to the education or career potential of the other;
- (i) the reasonable needs of the spouse or common-law partner with a right to maintenance;
- (j) the reasonable needs of the spouse or common-law partner obliged to pay maintenance;
- (k) the separate property of each spouse or common-law partner;
- (l) the ability to pay of the spouse or common-law partner who is obliged to pay maintenance having regard to that spouse's or common-law partner's obligation to pay child maintenance in accordance with the Guidelines;

(m) the ability of the spouse or common-law partner with the right to maintenance to contribute to his own maintenance. R.S., c. 160, s. 4; 1997 (2nd Sess.), c. 3, s. 3; 2000, c. 29, ss. 5, 8.

Obligation of maintained spouse or partner

5 A maintained spouse or common-law partner has an obligation to assume responsibility for his own maintenance unless, considering the ages of the spouses or common-law partners, the duration of the relationship, the nature of the needs of the maintained spouse or common-law partner and the origin of those needs, it would be unreasonable to require the maintained spouse or common-law partner to assume responsibility for his maintenance, and it would be reasonable to require the other spouse or common-law partner to continue to bear this responsibility. R.S., c. 160, s. 5; 2000, c. 29, s. 8.

Reduction or forfeiture of maintenance

6 (1) Maintenance to which a spouse or common-law partner would otherwise be entitled may be reduced where the spouse or common-law partner entitled to maintenance engages in conduct that arbitrarily or unreasonably prolongs the needs upon which maintenance is based or that arbitrarily or unreasonably prolongs the period of time required by the person maintained to prepare himself to assume responsibility for his own maintenance.

Historical Income

[301] I have less income information about Carm Robertson than I do about Betsy Webb.

Carm Robertson

[302] In 2007 Carm Robertson's earnings did not exceed \$2,000 Canadian.

[303] In 2008 she received an educational transfer of \$13,000 and child tax benefit of \$1,200 for a total income of \$14,200.

[304] In 2010 employment and business income was \$8,248.

[305] In 2012 she received social assistance of \$764 monthly, for an annual income of \$9,168.

Betsy Webb

[306] The table below details the income of Betsy Webb from 2000 to 2010:

2000	\$7,519.00
2001	\$16,000.00
2002	\$14,000.00
2003 - year of her pregnancy	\$1,483.00
2004	\$6,137.00
2005	\$21,000.00
2006	\$11,000.00
2007	\$13,000.00
2008	\$18,000.00
2010	\$33,153.00

[307] Carm Robertson's financial contribution to the household was minimal.

[308] Given Carm Robertson has worked in carpentry as well as a research consultant, this appeared to be something that would facilitate her contributing financially to the household and to her own welfare.

[309] Their child is now attending school. He is nine years old. Certainly, if not between 2005 and the time he entered school, clearly thereafter Carm Robertson had a clear responsibility to become self-sufficient and to contribute to the household.

[310] In spite of not being gainfully employed, the couple had access to the \$23,000 equity from the sale of Betsy Webb's home, her investments, Lee Webb's investments and cash contributions a \$20,000 loan in 2007 and remortgage monies of \$31,972.25 in 2009.

[311] When one looks at the source and amount of the income this couple had coming into their household and compares this to their actual income, it is an understatement to conclude that they not only lived well above their means but they lived off the efforts and investments largely of Betsy Webb's parents, and Betsy Webb's investments, leaving Carm Robertson essentially free from responsibility to contribute financially to the household.

Carm Robertson's History and Qualifications

[312] Carm Robertson was born in Halifax, Nova Scotia on November 29, 1962.

[313] As a result of her father's occupation with the army, she lived a number of years in Oromocto, New Brunswick; in northern Germany; and during her early teenage years in southern Germany.

[314] As a result of her life experience, she became interested in her roots and genealogy. After high school, she joined Canada World Youth, first working in British Columbia and then in India.

[315] After returning from India, she enrolled in Mount St. Vincent University, obtaining her Bachelor of Science degree. While there she joined the army reserves and after graduation became a junior officer in charge of a support troop.

[316] She was given a term contract as computer operator with Maritime Command. After leaving the Canadian Forces, she worked for a time as an archival assistant at Nova Scotia Archives.

[317] During the academic year of 1999 to 2000, she enrolled in an entrepreneurial training program at Dalhousie University. Her interest was in developing a business model for pursuing a career as a historical and genealogical researcher and consultant.

[318] In 2000 Carm Robertson was receiving EI benefits while taking a Dalhousie entrepreneurial training program. Since then, she worked at various things including carpentry, being a commissionaire, conducting genealogical and historical research for various agencies and organizations. She worked as a consultant to an author, and spent time stocking shelves at Wal-Mart and cleaning homes. While at Wal-Mart she worked from 11 in the evening until 7:00 in the morning, coming home to take her son to school in the morning, clean the house, pick up the child after school, prepare supper, put the child to bed and then sleep. She advises that later in the relationship she delivered newspapers late at night to contribute to the household finances.

[319] Carm Robertson reflected back to the couple's perspective in 2003 when they were considering buying a house and around the birth of their son in 2003. She said: "I was hopeful that I could start building my historical research / consultancy business out of our new home" (paragraph 3, Supplementary Affidavit).

[320] Carm Robertson asserts that her role was to stay at home with their child. She believed it was Betsy Webb who would be the primary financial provider. Betsy Webb disagrees with this perspective.

[321] Carm Robertson offered her letter of January 24, 2008 in support of Lee Webb's application to become a landed immigrant as proof that the couple had designed certain roles for each other. Neither Betsy Webb nor Carm Robertson had sufficient income to sponsor Lee Webb into Canada.

[322] In that letter, written solely by Carm Robertson, she expresses the fact that her role in the family is to be homemaker and primary caretaker of their young son.

[323] She advised Immigration that she had surgery in 2006 and as a result was *temporarily* out of the work market. She also advised that she is a trained carpenter and her self-employment in the home was expected to supplement her role as home maker. She admits that when the outbuilding was completed, she was to resume working in her main occupation, which is that of a freelance historical researcher and that she would be dependent on contracts she found and grants she was able to obtain to sustain her. She advised that the family would have low cash flow. She acknowledges that the family together did not meet the financial constraints as set out by Immigration in 2007. She had a contract in 2008.

[324] Carm Robertson advised that her financial contribution to the household is to augment the income contribution of Betsy Webb who was the principle wage earner in the family but she acknowledged that in 2007 her earnings did not exceed \$2,000 and the household income did not meet their requirements.

[325] Notwithstanding her admission in 2007, Carm Robertson indicates in her reply affidavit filed January 31, 2012 at paragraph six that she was not aware that her partner had earned only \$14,008 in 2007.

[326] The information in her affidavit is in direct contradiction to the information she conveyed to the immigration authorities by her letter of January 24, 2008.

[327] What the parties do agree upon is that both agreed to stay in the Halifax area and raise this child together. This may or may not be a sustainable proposition.

[328] Betsy Webb advises that she expected her partner to work, that she could not sustain the relationship alone. She worried about their finances and encouraged Carm Robertson to find work.

[329] It is clear that the couple contemplated her working out of the home when they designated the dining room as her office space, when they planned using Lee Webb's cash to construct a shed, exterior to the home, which could operate as Carm Robertson's working space.

[330] Carm Robertson was very protective of the dining room that was designated as her office. This was the source of considerable conflict between the parties. That the couple invested a part of their home as an office for the respondent speaks to their expectations that the office would be used presumably for creating employment.

[331] Carm Robertson acknowledged that she was to build a structure outside to free up the dining room and to give her space to become employed. She believes that when the funds were cut off, i.e., Lee Webb no longer invested funds, she could not finish the structure.

[332] She considered going back to university to complete a Master's Degree. She looked at NSCAD for art history and accepted when she was told by Betsy Webb that they simply could not afford more education.

[333] She was offered a \$12,000 scholarship in September of 2008 from St. Mary's to be a full time student and complete her thesis to obtain her degree; however, this was not possible.

[334] In March 2010 she was in the process of completing her thesis. This was due the end of March 2010; however, it was not completed.

[335] She expressed an interest in reenlisting in the Canadian Forces as an officer.

[336] The argument advanced vigorously by counsel and Carm Robertson herself is that she relied on Betsy Webb absolutely for their financial management. She argued that she was primarily responsible for the child's care. She argues this created a dependency and that she is entitled to spousal support as a result of that dependency.

[337] This relationship commenced in 2000 and terminated in 2009. Both parties were independent, educated and physically able to work.

[338] The child is nine years old and has been school age for sufficient time to allow the respondent to become gainfully employed.

[339] This relationship did not create a dependency nor did Carm Robertson's role in the marriage create a disadvantage.

[340] Both parents spent considerable time with their son at and around birth. The career path of Carm Robertson has not faltered because of her role with child care. If there was any agreement that she would put her career on hold (which has not been proven), once the child went to school, every effort ought to have been made to become employed to contribute to the family finances.

[341] I have insufficient evidence particularly medical evidence to conclude the respondent is unable to work.

[342] While they had little income as a couple, Betsy Webb is earning significantly more now than at the time of the union. There is no explanation for Carm Robertson's lack of employment efforts.

[343] If any reason exists for Carm Robertson's current state of unemployment, it is because from 2005 to 2011 the couple were supported by Lee Webb. That has come to an end.

[344] Lee Webb was not then and is not now responsible for the upkeep of this couple.

[345] It is Betsy Webb's position that she expected Carm Robertson to contribute financially. She confirms she did not agree that Carm Robertson could stay at home and not contribute financially to the household.

[346] In fact, Betsy Webb encouraged Carm Robertson to finish the workshop so that she could focus on her work "and obtain contracts to bring in an income."

[347] Their home was arranged around Carm Robertson working and monies were invested to create more space for her work.

[348] Betsy Webb advised that when they moved into the new house in 2005, Carm Robertson did not advise her former contacts of her change in email or phone number, therefore reducing the possibility of work.

[349] It is Betsy Webb's belief that they were to be equal partners. It was clear that she could not support the household on her income alone and that she needed help.

[350] I am not convinced on the totality of the evidence that Carm Robertson has proven she is entitled to spousal support.

[351] In any event, although there is likely not any equity in the property, post separation Betsy Webb advanced Carm Robertson \$2,000 against any entitlement she may have to assist her in reestablishing herself. That is more than Carm Robertson would receive given their debt situation and the lack of equity in the home.

[352] Carm Robertson is 49 years old. She has the ability and the educational experience to work. She has not given evidence that would satisfy me that she has made sufficient effort to become self-sufficient and to support herself, in particularly after the child went to school in 2008 or 2009.

[353] I am further not satisfied that at least since 2008 to 2009 Carm Robertson's role in the partnership has put her in a position where she has been unable to or disadvantaged by the relationship. She has been fully supported by both Lee Webb and Betsy Webb.

[354] I do not have evidence that would allow me to consider that she has made diligent efforts to be employed.

[355] Carm Robertson has been historically under employed. She is now obliged to make significant efforts toward self-sufficiency.

[356] She is in receipt of social assistance and has an apartment separate from the couple's home. She has not contributed to the home financially in any significant way, either prior to or subsequent to the separation.

Property

[357] The parties have divided their household items in accordance with their wishes and declare none to divide at this point in time. There is a life insurance plan with a cash surrender value of \$671.76 and a Subaru Outback with a value of \$1,500 in the possession of Carm Robertson.

[358] There is no request for a division of any other property between the two parties.

Birth registration

[359] The child was registered with given names Dimitri Degathea Robertson Webb.

[360] There is also an adoption order dated October 15, 2003 confirming upon the application of Carmelita Robertson and Mary Elizabeth Webb that this child is indeed their child.

[361] The parties have had a dispute about changing the name to reflect their current status.

[362] As counsel for Carm Robertson indicated, the child should be called what he was always called.

[363] This dispute tends to address the parents' issues and not the interests of the child.

[364] The child has been known as Dimitri Degathea Robertson Webb since birth and I have been given insufficient evidence to change that.

[365] His registration in school and extra curricular activities in the community will reflect Dimitri Degathea Robertson Webb.

[366] The parties shall sign such documents and prepare such releases to effect the directions in this decision and may return to Court in the event of a dispute regarding sale or disposition.

[367] Lee Webb's counsel shall prepare the order respecting the home and counsel for Betsy Webb shall prepare the order regarding the resolution of the couple's issues.

Legere Sers, J.