

SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION

Citation: *Peters v. Reginato*, 2016 NSSC 345

Date: 2016-12-19

Docket: *Sydney* No. 093872

Registry: Sydney

Between:

Michael Peters

Applicant

v.

Laurie Don Reginato

Respondent

Judge: The Honourable Justice Theresa Forgeron

Heard: January 20, 21, 22, 25, March 17, 18, 24, 30, 31; and May 2,
2016 in Sydney, Nova Scotia

Written
Submissions: May 18 and July 8, 2016

Written Release: December 19, 2016

Counsel: Elaine Gibney, Counsel for the Applicant
Vincent Gillis, Q.C., Counsel for the Respondent

By the Court:

Introduction

[1] In September 2014, Mike Peters and Laurie Reginato's relationship ended violently. Their separation led to a myriad of court proceedings in the Provincial and Supreme Courts. The proceedings culminated in this 10 day hearing where four key issues were litigated.

[2] First, the issue of violence was subject to an intense debate. Ms. Reginato states that Mr. Peters was verbally and physically abusive during their relationship, often when Mr. Peters was intoxicated. In contrast, Mr. Peters denies systemic domestic violence. He suggests that the relationship ended because of mutual misconduct. He further states that his assaultive behaviour in September 2014 was an anomaly, an aberration. In addition, Mr. Peters denies abusing alcohol. In any event, Mr. Peters notes that mutual misconduct has no bearing on the legal issues which I must determine.

[3] Second, the parties disagree on what parenting plan is in the best interests of their children, seven-year-old Bella and three-year-old Addison. Mr. Peters seeks a joint and shared parenting order whereby Bella and Addison are in his care at least 50% of the time. In support of his position, Mr. Peters notes that as an equal primary caregiver, he will continue to cherish, support and nurture Bella and Addison. In addition, he states that Ms. Reginato cannot be entrusted with the children because she adopted a difficult and controlling demeanor on access and parenting issues, and she is an inattentive and self-absorbed mother.

[4] For her part, although Ms. Reginato agrees with the concept of joint custody, she seeks primary care. Ms. Reginato states that she has always been the primary care giver; it is in the best interests of Bella and Addison that the status quo be maintained. She says that Mr. Peters should have liberal, but not shared parenting time. Ms. Reginato takes exception to the allegations raised by Mr. Peters. Ms. Reginato suggests that her parenting plan will provide the children with the stability, routine and family life that they require to maximize their potential.

[5] Third, the parties disagree on the division of their home and contents. As a joint owner, Ms. Reginato wants the home sold. After the mortgage and usual closing adjustments are paid, she seeks to have the balance of the equity equally divided.

[6] For his part, Mr. Peters wants Ms. Reginato to quit claim her interest in the family home to him. Mr. Peters states that there is no equity in the family home. In addition to the mortgage, Mr. Peters states that three additional debts must be considered. First, he states that a \$10,000 Line of Credit /Visa was incurred for family purposes. Second, he states that he borrowed \$20,000 from his mother and \$28,092 from his parents' company to construct the home. Mr. Peters states that once these debts are factored into the mix, and certain post separation debt payments are adjusted, Ms. Reginato will actually owe him money.

[7] Finally, the parties disagree about maintenance. Ms. Reginato seeks time limited spousal support, the table amount of child support and contribution for s.7 child care expenses. In contrast, Mr. Peters asks that the court impute income to Ms. Reginato because she is underemployed. He objects to the payment of spousal support. He proposes that the set off method be used to calculate the table amount of child support, and that child care expenses be shared.

[8] The resolution of the property issues is unnecessarily complicated given the absence of a suitable legislative framework. The *Matrimonial Property Act* does not apply to this common-law couple. The parties must therefore resort to the provisions of the *Partition Act* and the equitable doctrine of unjust enrichment. The *Partition Act* is based on an 1851 revised statute. As I noted previously, an *Act* based upon the social conditions of 1851 is one that is not ideally suited to the resolution of property rights arising from the breakdown of conjugal relationships in the 21st century¹.

[9] **Issues**

[10] This decision will address the following issues:

- Did Mr. Peters abuse Ms. Reginato during the relationship?
- What factors are applied when determining the best interests of Bella and Addison?
- What parenting plan is in the best interests of Bella and Addison?
- What is the value of the family home?

¹ *Roach v. McNeil*, 2014 NSSC 112, para 49.

- Has Mr. Peters proven that the Visa/Line of Credit and the HSBC Financial debt were incurred for family purposes?
- Is there a debt outstanding to Mr. Peters' mother or to the family business?
- What relief is available under the *Partition Act*?
- Should Mr. Peters be awarded additional relief based on a claim of unjust enrichment and the equitable relief of constructive or resulting trust?
- What is the appropriate order in respect of the household contents?
- What is the appropriate child support order?
- What is the appropriate spousal support order?

Background Information

Formation of Relationship

[11] In 2007, Mr. Peters and Ms. Reginato began to date. Mr. Peters was employed with CBRM, while Ms. Reginato was a continuing care assistant. Mr. Peters was living with his parents; Ms. Reginato was living with her two children from a previous marriage, Cassie and Faith.

[12] As their relationship developed, Mr. Peters and Ms. Reginato discussed their future. Mr. Peters did not want to continue with the relationship unless Ms. Reginato consented to having another child. Although she had not planned to have more children, Ms. Reginato eventually agreed to do so. The parties then decided that they would live together.

Purchase of McKinley Drive Property

[13] On January 25, 2008, Mr. Peters purchased a small home on McKinley Drive in Coxheath for \$117,267.44. Mr. Peters' father advanced the \$5,500 down payment. The down payment was a gift. The balance of the home was financed with mortgage funds of \$119,255. The deed and mortgage were placed in the names of Mr. Peters and his mother.

[14] Before the parties moved into the home, renovations were completed on the main floor. The renovations were finished in about two weeks. Later, and after Ms.

Reginato became pregnant, the parties decided to build an additional bedroom in the basement, as well as completing some other minor work on the home.

Bella's Birth

[15] Bella was born in the spring of 2009. Ms. Reginato had to quit work earlier than planned because of health concerns which developed during her pregnancy. After Bella was born, Ms. Reginato took a maternity leave of about a year. Thereafter, the parties agreed that Ms. Reginato would only work on a part time basis so that Bella would primarily be raised by a parent, and not a babysitter.

Purchase of Hills Road Property and Construction of Home

[16] McKinley Drive was not the parties' dream home. Mr. Peters and Ms. Reginato both wanted to live in the Mira area. Originally, they discussed building next to Ms. Reginato's parents, but on December 2, 2010, they eventually purchased 77.5 acres of vacant land situate at 283 Hills Road, Mira for \$40,000. The property was placed in their joint names.

[17] To finance the purchase of the vacant land, Mr. Peters decided to remortgage the McKinley Drive home. On August 6, 2010, Mr. Peters remortgaged McKinley Drive to obtain an additional \$40,000. Mr. Peters, however, only netted \$17,400 from the remortgage² because of penalty and other charges.

[18] To secure the additional financing, Mr. Peters says he was forced to borrow \$30,387.87 from his parents' company KLM Holdings. He said that \$20,000 of this was repaid from his mother's inheritance, while \$10,387.87 remained on the books until McKinley Drive sold.³ On March 11, 2011, McKinley Drive was sold for \$168,000. Mr. Peters netted \$18,480.06 from the sale⁴ and used \$10,387 to pay off the corporate debt. He stated that the balance of the sale proceeds was used to pay for some preliminary work on the Hills Road property. Mr. Peters asserts that \$20,000 remains outstanding to his mother. Ms. Reginato disputes this allegation.

² Exhibit 43, page 2 indicates \$4,066.71 was transferred to Mr. Peters, while \$13,394.28 was placed in a holdback.

³ Exhibit 38, Tab A is a letter from the corporate accountant who states that on December 2, 2010, \$30,387 of corporate funds were advanced to LaFosse Macleod in Trust. The advance was recorded as an advance of the Director's Account of which \$15,000 was repaid by February 28, 2011 and the balance of \$15,387.87 was repaid by February 28, 2012.

⁴ Exhibit 41, page 2 shows \$18,480.06 as due to vendor.

[19] The construction of the home on Hills Road was financed through a mortgage in the amount of \$217,624.41. In order to secure the mortgage funds, Ms. Reginato had to release her interest in the property. She executed a Quit Claim Deed in favor of Mr. Peters on June 1, 2011. The mortgage was registered on June 1, 2011. On June 21, 2011, the Hills Road property was once again placed in names of Mr. Peters and Ms. Reginato as joint tenants.

[20] Mr. Peters states that the mortgage was insufficient to pay for the home's construction and that he borrowed an additional \$28,091.64 from KLM Holdings, which remains outstanding to date. Ms. Reginato disputes that assertion.

Addison's Birth

[21] After her maternity leave was over, Ms. Reginato returned to the work force on a part time basis for about two years. Ms. Reginato became pregnant with Addison in the spring of 2012. Once again the pregnancy was complicated and Ms. Reginato was forced to quit work about four months before Addison was born. After Addison's birth in January 2013, Ms. Reginato remained at home for another year, and thereafter returned to her job on a part time basis.

Separation and Court Proceedings

[22] In September 2014, the parties' relationship ended in an extremely violent manner. Mr. Peters was eventually charged and convicted of a number of offences including those involving assault, threats and mischief. He has since undertaken counseling and participated in group sessions on healthy relationships.

[23] Court applications were also filed because the parties were unable to resolve the family law issues associated with their separation. A number of interim motions were heard, which resulted in the following:

- An emergency protection order dated March 12, 2015 in favour of Ms. Reginato.
- An interim order dated April 28, 2015 which confirmed Ms. Reginato's interim possession of the family home; detailed Mr. Peters' maintenance obligations for the children; and divided the ongoing payment of bills associated with the home.

- An interim decision dated July 23, 2015 which confirmed that Ms. Reginato was not in breach of the interim order; refused Mr. Peters request for a parental capacity assessment; and ordered Mr. Peters to pay \$1,000 costs to Ms. Reginato.

Final Hearing

[24] The hearing into the divisive issues was held on January 20, 21, 22, 25, 2016; March 17, 18, 24, 30 and 31, 2016; and May 2, 2016. In addition to the evidence of the parties, the court heard testimony from the following witnesses: Lisa Sinclair, Lisa Peters, Kathy Peters, Krista MacLeod, Donald Wayne Reginato, Cassie MacDonald, William Martheleur, Sean Black, and Sandy Macneill, CPA CA. Post-trial briefs were filed to augment the oral and written submissions already filed. I reviewed all written and oral submissions in conjunction with the evidence.

Analysis

[25] **Did Mr. Peters abuse Ms. Reginato during the relationship?**

Legislative Factors

[26] In 2014, the *Maintenance and Custody Act* was amended to specifically underscore the connection between violence and the best interests of children. Section 18 (7) of the *Act* instructs the court to consider all relevant matters when issues of violence are raised during a parenting dispute, including the following:

- The nature of the family violence, abuse or intimidation.
- The timing and frequency of the family violence, abuse or intimidation.
- The harm caused to the child.
- The steps undertaken by the abuser to prevent further family violence, abuse or intimidation.

[27] In addition, s. 18(8) of the *MCA* states that the court must consider the impact of any family violence, abuse or intimidation when making a parenting order, including when giving effect to the maximum contact principle.

Position of Mr. Peters

[28] Mr. Peters acknowledges his inappropriate conduct which occurred in September 2014. He, however, categorically denies all other abuse allegations. Mr. Peters indicated a number of factors supporting his position including the following:

- He states that he discovered Ms. Reginato's affair when he read the text messages on her phone in the early hours of the morning of the assault. Mr. Peters says that Ms. Reginato changed the content of the text messages before entering them as an exhibit. Mr. Peters indicated that he reacted violently when he learned of the affair because he was taken by surprise. He notes that he and Ms. Reginato each engaged in spousal misconduct.
- He accepted responsibility for his actions and his behavior which occurred in response to his discovery of his common law spouses' adultery.
- He sought assistance from a therapist to help cope with the stress caused by the marriage breakdown. He also completed a 10 week respectful relationship program with the Second Chance Society as part of his probation.
- He will participate in whatever further counselling the court deems appropriate.
- He pleaded guilty to several historical assault charges, despite his innocence, because he was afraid of being falsely convicted and being incarcerated. In reality, he did not commit those offences.
- He received a conditional discharge.
- His version of events is credible. He made an admission against interest when he stated that he thought the neighbor would be home on the morning that he vandalized the neighbor's property.

- Neither Ms. Reginato, nor her daughter, are credible. Ms. Reginato was argumentative, evasive and hostile when answering questions on cross examination. She was incapable of making an admission against interest. Cassie MacDonald's evidence was increasingly exaggerated and unreliable.
- Before separation, Ms. Reginato threatened to falsely accuse him of beating her by asking "... who do you think they will believe, poor little innocent me or a fat slob like you", while walking away laughing. Mr. Peters said that Ms. Reginato also threatened "to take everything I own as well as what my parents have".
- Donald Wayne Reginato described Mr. Peters as possessing a big heart; he did not observe family violence when he was present in the home.
- He was not intoxicated. He did not drink all of the rum, but rather poured it down the sink and left the empty rum bottle on the counter.

Position of Ms. Reginato

[29] Ms. Reginato states that Mr. Peters abused her physically, emotionally and verbally over the course of their relationship. In support of her position, Ms. Reginato notes as follows:

- She did not have an affair with the neighbor as Mr. Peters alleged. The text message is proof. She did not alter the text message before it was entered as an exhibit.
- Between May 2013 and August 2014, Mr. Peters assaulted her on five separate occasions. On February 12, 2015, Mr. Peters entered guilty pleas for each of the assault charges.
- Between May and October 2013, Mr. Peters fractured Ms. Reginato's finger. On February 12, 2015, Mr. Peters entered a guilty plea for assault causing bodily harm.

- In September 2014, Mr. Peters assaulted Ms. Reginato by spitting in her face, while he was restrained by his father and another man. On February 12, 2015, Mr. Peters entered a guilty plea to a charge of assault.
- In September 2014, Mr. Peters slashed the tires on Ms. Reginato's van and threw her clothes outside on the lawn. On February 12, 2015, Mr. Peters entered a guilty plea to a charge of mischief.
- In September 2014, Mr. Peters threatened to kill Ms. Reginato. On February 12, 2015, Mr. Peters entered a guilty plea to a charge of uttering threats to cause death or bodily harm.
- In September 2014, Mr. Peters went to his neighbor's home and smashed every window. On February 12, 2015, Mr. Peters entered a guilty plea to a charge of mischief in relation to property.
- She took no joy in reporting the abuse to the police. She did not falsely accuse Mr. Peters. Mr. Peters pleaded guilty to the offences.
- She denies the many negative allegations levelled against her by Mr. Peters, his mother and his sister.
- Mr. Peters was not credible.
- Mr. Peters drank beer and rum excessively, until intoxicated. He was an alcoholic.
- Mr. Peters called her derogatory names and demeaned her.

Decision

[30] In order to resolve this issue, I must make a determination about credibility and reliability. When assessing credibility and reliability in the civil context, I must apply the civil standard of proof, which is proof on a balance of probabilities. The evidence, in its totality, must be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test: **C. (R.) v. McDougall**, 2008 SCC 53 (S.C.C.).

[31] Guidelines applicable to credibility assessment were canvassed by this court in paras. 18 to 21 of **Baker-Warren v. Denault**, 2009 NSSC 59, as approved in **Hurst v. Gill**, 2011 NSCA 100, which guidelines include the following:

- Credibility assessment is not a science. It is not always possible to "articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events:" **R. c. Gagnon**, 2006 SCC 17 (S.C.C.), para.20. ... "[A]ssessing credibility is a difficult and delicate matter that does not always lend itself to precise and complete verbalization:" **R. v. M. (R.E.)**, 2008 SCC 51 (S.C.C.), para. 49.
- There is no principle of law that requires a trier of fact to believe or disbelieve a witness's testimony in its entirety: **Novak Estate, Re**, 2008 NSSC 283 (N.S.S.C.). On the contrary, a trier may believe none, part or all of a witness's evidence, and may attach different weight to different parts of a witness's evidence, **Novak Estate, Re**, supra.
- Demeanor is not a good indicator of credibility: **R. v. Norman** (1993), 16 O.R. (3d) 295 (Ont. C.A.) at para. 55.
- Questions which should be addressed when assessing credibility include:
 - a) What were the inconsistencies and weaknesses in the witness' evidence, which include internal inconsistencies, prior inconsistent statements, inconsistencies between the witness' testimony and the documentary evidence, and the testimony of other witnesses: **Novak Estate, Re**, supra;
 - b) Did the witness have an interest in the outcome or were they personally connected to either party;
 - c) Did the witness have a motive to deceive;
 - d) Did the witness have the ability to observe the factual matters about which they testified;
 - e) Did the witness have a sufficient power of recollection to provide the court with an accurate account;
 - f) Is the testimony in harmony with the preponderance of probabilities which a practical and informed person would find reasonable given the particular place and conditions: **Faryna v. Chorny**, [1952] 2 D.L.R. 354 (B.C.C.A.);

- g) Was there an internal consistency and logical flow to the evidence;
- h) Was the evidence provided in a candid and straight forward manner, or was the witness evasive, strategic, hesitant or biased; and
- i) Where appropriate, was the witness capable of making an admission against interest, or was the witness self-serving?

[32] I reject Mr. Peters' evidence as not credible. I find that Mr. Peters emotionally, verbally and physically abused Ms. Reginato during the course of their relationship. I make this finding for the following reasons:

- In February 2015, Mr. Peters entered guilty pleas to six counts of assault against Ms. Reginato; one count of assault causing bodily harm against Ms. Reginato; one count of mischief involving Ms. Reginato; and one count of uttering threats to cause death or bodily harm to Ms. Reginato. Mr. Peters pleaded guilty to each of these charges because he was guilty. I reject Mr. Peters' attempt to distance himself from his guilty pleas and consequent criminal convictions. Mr. Peters' evidence on this issue did little to enhance his over-all credibility.
- I accept the evidence of Ms. Reginato and her daughter, Cassie. Their evidence is in harmony with the preponderance of probabilities which a practical and informed person would find reasonable given the particular place and conditions: **Faryna v. Chorny**, supra. Their evidence had an internal consistency and logical flow. Mr. Peters' evidence did not.
- It is improbable that Mr. Peters would have reacted in such a violent and criminal manner in September 2014 unless he had a prior history of abuse. I do not accept that Mr. Peters went from a peaceful and tolerant partner to a controlling and violent abuser in the span of a few minutes. Rather, I find that Mr. Peters' targeted aggression was in keeping with his pattern of violence which he exhibited in the past when he lost control, felt threatened or wanted to assert dominance.
- The text messages between Ms. Reginato and the neighbor were entered as an exhibit. The text messages support Ms. Reginato's version of the events. Mr. Peters was not truthful when he recounted his recollection of

the text messages. Mr. Peters was not truthful when he said that Ms. Reginato altered the text messages before entering them as an exhibit. I find that Ms. Reginato did not alter the text messages.

- The text messages were not about an affair. The text messages establish that Ms. Reginato felt trapped in an abusive marriage as confirmed by the following words:

... I have four kids who I love dearly, but are a lot of work, a husband who is abusive, and I hate using that word because I think I'm better then that to put up with that but I love my house and our system sucks cause I can't ever make him leave because its his too, and I can't figure out how I was so stupid,

... Well my last couple of texts from my husband were I hate you you fucking bitch, you no good for nothing cunt!! And it goes on!!!

.... And not sure how I let this happen, never came from an abusive home, me and Darren never ever spoke to each other like that, we are actually good friends now and he tells me the same thing!! I know I'm going to sound like a real bad person right now but I hate him, and if you were to know half of the things he has done you would think I'm definitely more then a creeper!!Lol

... Oh just that I'm not a very nice person for telling someone that I barely know that I hate my husband!

.... I know that but I'm not up for a fight, and trust me it would be a fight, and I love my home, my kids love our home, and I keep telling myself one more year!!

.... I don't expect a lot but respect would be a start!! He is very mean!!!! And that's an understatement!!

- Mr. Peters fabricated the affair allegation in an attempt to deflect blame and avoid personal responsibility for his own criminal conduct. Ms. Reginato did not have an affair or romantic relationship with the neighbor. In any event, an affair would never justify or explain the violence.

- Mr. Peters' criminal conduct was not impulsive or reactive as the violence was spread out over many hours. Mr. Peters read the text messages at about 1:00 am. He immediately called Ms. Reginato's uncle, Donald Wayne Reginato who lived across the street. By that time, Mr. Reginato was sitting with Ms. Reginato in his car in his driveway. Mr. Peters spoke to Ms. Reginato while she was in the car with her uncle. Mr. Peters knew that Ms. Reginato was not with the neighbor.
- When Bella and Addison woke, he took them to his parents before returning home to settle the score. Mr. Peters' rage escalated. He was focused on revenge. By this time, Mr. Peters threw Ms. Reginato's clothes all over the yard. Mr. Peters then vandalized his neighbor's home by breaking every window. Mr. Peters also slashed the tires on Ms. Reginato's van. He chased her up the driveway. Mr. Peters was so enraged that his father and another man had to physically restrain him, after which Mr. Peters spit on Ms. Reginato and threatened to kill her. Mr. Peters' actions were not impulsive; they were planned and deliberate.
- I accept the evidence of Ms. Reginato and Cassie where it conflicts with the evidence of Mr. Peters. During one of the many arguments, Cassie saw Mr. Peters force back Ms. Reginato's finger until it broke. Cassie was a witness to the abuse because she lived in the home. Cassie heard the anger and observed the violence. Cassie provided her evidence in a direct and straight forward fashion.
- I am not surprised that Donald Wayne Reginato did not see Mr. Peters abuse Ms. Reginato. Family violence tends to be an offence which occurs behind closed doors.
- I do not accept that Mr. Peters emptied the contents of the rum bottle down the sink during the early hours of the morning of the assault. Rather, he drank the rum which fueled his rage. I accept that Mr. Peters was frequently intoxicated during the latter stages of the relationship.
- I find that Mr. Peters' violent conduct did not improve when he drank alcohol, which he did frequently. I accept the evidence of Ms. Reginato

and Cassie in respect of Mr. Peters' drinking habits. Their evidence is also supported by the testimony of Donald Wayne Reginato who visited frequently, and whose evidence I accept.

[33] What factors are applied when determining the best interests of Bella and Addison?

Legislative Factors

[34] When fashioning a parenting order, the court must choose the course that will best provide for the child's healthy development and best interests: **K. (K.) v. L. (G.)**, [1985] 1 S.C.R. 87 (S.C.C.) and s. 18 (6)(d) of the *MCA*.

[35] Section 18(6) of the *MCA* stipulates the factors that the court must consider when determining a child's best interests. These factors focus on the ability of each of the parents to meet the unique needs of the child grounded on an analysis of the competing parenting plans, in the context of a number of considerations, including those related to:

- The impact of family violence.
- The child's physical, emotional, social and educational needs.
- The parent's ability to foster the child's relationship with the other parent.
- The history of child care.
- The proposed parenting plans.
- The child's cultural, linguistic, religious and spiritual heritage.
- The child's views and preferences.
- The nature, strength and stability of the relationship between the child and each parent and important family members.
- The parent's ability to communicate and cooperate.

[36] Further, in all proceedings initiated under the *MCA*, courts begin with the premise that parents are joint guardians and are equally entitled to the care and custody of their child, unless otherwise provided: s.18(4).

Mr. Peters' Parenting Proposal

[37] Mr. Peters seeks an order of joint and shared custody with the children spending at least 50% of the time with him. He offers a number of reasons in support, including the following:

- He loves his children and they love being with him. They are happy to be in his care, typically vying for a place on his lap. They are sad when they return to their mother, often visibly showing their disappointment and upset.
- Before separation, he was a joint and equal care provider to Bella and Addison.
- He was and is a hands-on father, ensuring all of the children's needs are met – from cooking their meals, to overseeing their personal hygiene, to reading and playing with them, to taking them to activities and attending to their social and recreational needs.
- He works from 8:00 am to 4:00 pm Monday to Friday and is thus available to care for the children, or will provide suitable child care when he is unavailable.
- His family was and is supportive. Bella and Addison have a close and loving relationship with his parents and sister.
- He is prepared to work with Ms. Reginato in a cooperative manner to ensure that the children receive the maximum support, love and benefit of having both parents equally involved and committed to a joint and shared parenting arrangement.
- Joint and shared custody is an appropriate remedy, even in high conflict situations: **Cole v. Dixon**, 2014 NSSC 348. The absence of shared parenting can create a power imbalance.
- Joint and shared parenting was found to be an appropriate parenting arrangement in similar circumstances: **Gibney v. Conohan**, 2011 NSSC 268.

- The parties currently live in close proximity to each other and likely will in the future.
- The children will experience fewer transitions if placed in a joint and shared parenting arrangement. The children will thus be in a better position to develop a routine.
- Mid-week visits and flexible arrangements are acceptable to Mr. Peters.
- Ms. Reginato provided no credible evidence that parenting concerns exist when the children are in Mr. Peters' care. Ms. Reginato never expressed concern that violence had a bearing on the parenting issues. To the contrary, she reassured child protection authorities that Mr. Peters was no threat to the children.
- There is no reason to deny Mr. Peters the right to be an equal parent in raising the children.
- Ms. Reginato did not consult with Mr. Peters about matters concerning the children. Instead, she dictated access times, often changing times to suit her own needs, rather than meeting the needs of the children.
- Ms. Reginato did not notify Mr. Peters when she left the country for a vacation after separation. She did not allow Mr. Peters to care for the children when she was away.
- Ms. Reginato did not give heed to the maximum contact principle. Indeed, she limited the children's time spent with him and his family, including during the holidays.
- Ms. Reginato did not provide important information to him about the children, such as report cards and school information. Ms. Reginato did not list Mr. Peters on a school registration form as next of kin.
- Ms. Reginato adopted a disinterested parenting style, often not supervising the children adequately. Examples include Bella being left unattended after school; the children's clothing being unkempt and

inappropriate when with their mother; and Faith drinking alcohol while she was under her mother's charge.

- Ms. Reginato used access as a tool of punishment. For example, she demanded the children's return because Mr. Peters' father went to the family home to remove his horse sleigh.
- Ms. Reginato did not consistently take Bella to dance class.
- Ms. Reginato would not allow Mr. Peters to be present for the closing dance recital even though Mr. Peters paid for the lessons and costumes, and ensured Bella's attendance at practices. Bella was thereby deprived of having her father watch her dance, present her with flowers, and share an important moment in Bella's life.

Ms. Reginato's Parenting Proposal

[38] Ms. Reginato seeks a joint custody order with primary care for a number of reasons including the following:

- She was always the primary care provider. She stayed home to care for the children during both maternity leaves and also worked part time to ensure that the needs of the children were met.
- Mr. Peters did not spend a great deal of parenting time with Bella and Addison. Mr. Peters did not take parental leave. Mr. Peters did not work part time. Mr. Peters was also involved with hockey, usually several nights a week. Mr. Peters was often busy with other matters, such as helping with the construction of their home and maintaining the barn and horses. Mr. Peters spent a significant amount of free time drinking alcohol.
- She was not an inattentive parent. She never left Bella or Addison unattended. There was always a child care provider at home if she was at work. The children were appropriately clothed. She allows the girls to choose their own clothing for play time. She is an excellent mother.

- Before separation, she enrolled and ensured the children's attendance at various age appropriate activities. Mr. Peters was seldom in attendance. Ms. Reginato also took the children to their activities after separation when they were in her care, unless there was a good reason.
- She has a proven history of providing the stability, routine and care that the children need to develop to their true potential.
- Bella and Addison have a close and loving relationship with their older sisters, Faith and Cassie. These relationships must be maintained.
- She acted appropriately and ensured that access occurred even though Mr. Peters was abusive and his family was acting unilaterally and inappropriately. Ms. Reginato denies being difficult.
- She was primarily responsible for the medical, dental, educational and social welfare needs of Bella and Addison.
- Bella and Addison have developed into happy and well-rounded children under her primary care. There is no reason to disrupt the status quo.
- She is not violent; Mr. Peters can be violent when he is angry or upset. Mr. Peters is not a good role model when he is violent.

Decision

[39] I will now review my findings of the legislative best interests factors in the context of the evidence and the extensive written and oral submissions of counsel.

Violence

[40] I find that family violence is a significant factor in determining the best interests of Bella and Addison for the following reasons:

- Mr. Peters lacks insight. He holds but a shallow understanding of the negative impact that family violence has on children and families. Insight enhances the motivation to change abusive conduct and attitudes.

- Mr. Peters' lack of insight places Bella and Addison at risk of being exposed to his uncontrolled rages, just as Cassie and Faith were exposed to his rages and violence in the past. Cassie and Faith heard Mr. Peters call their mother a whore. Cassie and Faith were present during frightening arguments when Mr. Peters lost control.
- Bella and Addison will not always be compliant children set on pleasing their parents. Teenage years and the quest for greater autonomy are on the horizon. Unless Mr. Peters acquires a better set of parenting and anger management skills, he will be ill equipped to provide appropriate and healthy discipline to the children as they begin to test boundaries.
- Mr. Peters lacks genuine remorse. Remorse often provides motivation for change.
- Mr. Peters' denials prevent him from recognizing his triggers and learning healthy problem solving techniques to effectively manage his anger, frustration and upset.
- Mr. Peters does not acknowledge that Ms. Reginato was his victim. For example, Mr. Peters did not offer an apology to Ms. Reginato. Rather, during direct examination, the most that he could muster was as follows:

Ah, I'm extremely sorry for the grief that I've caused everyone by my actions. The embarrassment that I put on my girls having to drive by the house with the windows boarded up. For what my older girls had to listen to the night that I had found out what was goin on. For what I put my family through and putting them through now, and anyone else that I've affected in a negative way.

Mr. Peters did not specifically apologize to the primary victim of his abuse, Ms. Reginato.

- Mr. Peters attempted to paint Ms. Reginato as a villain throughout his evidence. For example, he insisted that Ms. Reginato's alleged affair somehow justified or minimized his own criminal conduct. He also blamed Ms. Reginato for his inability to attend the dance recital, even

though he was solely responsible for the no-contact provisions of the probation order.

[41] As I noted in other decisions, abuse and aggression must end because violence is never in a child's best interests⁵. Violence erodes confidence and self-esteem. Violence perverts a healthy family life. A child who is exposed to violence learns that violence is an acceptable way to resolve disputes. It is not. A child who is exposed to violence learns that violence is an acceptable way to express love. It is not. Mr. Peters must ensure that violence does not reoccur.

[42] Mr. Peters must attend therapeutic counselling with the following stated objectives:

- To obtain education about the impact that family violence has on children.
- To obtain better insight into the dynamics of family violence.
- To obtain better insight into the role that personal reflection, accountability and responsibility plays in the reduction of family violence.
- To acquire skills to recognize triggers, and to adopt responsible de-escalation techniques, appropriate anger management skills, and healthy problem solving practices.
- To acquire skills to communicate respectfully, reasonably and responsibly to Ms. Reginato and to the children.

Physical Needs

[43] Both parents are more than capable of meeting the physical needs of Bella and Addison. I am satisfied that they each will provide a comfortable home wherever they eventually live. Further, I am satisfied that they each will provide the children with nutritious meals and appropriate clothing and footwear.

⁵ *Desrosiers v. Pastuck*, 2016 NSSC 38

[44] I reject the evidence of Mr. Peters, his mother and sister which spitefully suggests that the children were often unattended, unkempt and inappropriately clothed when they were with Ms. Reginato. There is nothing inappropriate or unusual in Bella and Addison picking out their own clothes and developing their own clothing style. There is nothing inappropriate or unusual about Addison occasionally wearing her older sister's clothes or footwear. There is nothing inappropriate or unusual with Bella and Addison wearing old clothes when they are playing. Further, I accept Ms. Reginato's evidence that the children were never left unattended after school, or otherwise. I also reject the suggestion that Ms. Reginato did not assign priority to the needs of Bella and Addison.

Emotional Needs

[45] I am concerned about Mr. Peters' ability to meet the emotional needs of Bella and Addison for two reasons. First, as previously reviewed, Mr. Peters lacks insight into the dynamics of family violence. He has yet to learn and apply skills to ensure that his anger is managed in a healthy and responsible fashion. Until this occurs, Bella and Addison are at risk of being exposed to family violence. Exposure to family violence negatively impacts on the emotional health of children.

[46] Second, Mr. Peters, his mother and sister continue to blame Ms. Reginato for Mr. Peters' actions. They are quick to criticize and disparage Ms. Reginato. Their collective disdain for Ms. Reginato will inevitably be transferred to Bella and Addison. The children are bright and will be alive to direct and indirect cues communicating resentment. In fact, the children were already exposed to Mrs. Peters' berating Ms. Reginato on one occasion during an access exchange. Bella and Addison are at risk of being exposed to negative comments about their mother. Such exposure is not in the best interests of the children and will impact their emotional health.

[47] In contrast, I find that Ms. Reginato has, for the most part, met the emotional needs of the children. Ms. Reginato ensured that Mr. Peters and his family enjoyed liberal parenting time with Bella and Addison despite the challenging conduct of Mr. Peters and his family, which challenging behavior included the following:

- Mr. Peters' violence.
- Mr. Peters and his father charging into the family home unannounced and changing the locks when Ms. Reginato was on vacation. Cassie and

Faith were present and understandably frightened. Ms. Reginato was able to have Mr. Peters removed after she obtained an EPO while on vacation.

- Mr. Peters' father attending at the family home to remove goods without the permission of Ms. Reginato.
- Mr. Peters refusing to switch the utilities and cable bills into Ms. Reginato's name, and then filing an interim motion in an attempt to have Ms. Reginato removed from the home because he was forced to pay the utilities. This issue was eventually resolved by an order in Ms. Reginato's favour.
- Mrs. Peters verbally berating Ms. Reginato while Ms. Reginato was taking Addison out of her car seat during an access exchange.

Social and Recreational Needs

[48] Both parties are equally equipped to ensure that the social and recreational needs of the children are fostered and maintained. For example, Bella and Addison love horses; Ms. Reginato is primarily responsible for this activity. Bella also enjoys dance. Before separation, Ms. Reginato was primarily responsible for Bella's attendance at dance. After separation, both parties were involved. Occasionally Bella missed dance class. I am satisfied that Ms. Reginato had a reasonable excuse for not attending, such as poor weather conditions. Finally, both parents currently ensure that Bella and Addison spend time with extended family and friends.

[49] Neither party is in a stronger position when this factor is considered. Mr. Peters must, however, exercise caution to ensure that Bella and Addison are not over extended and over scheduled. It is important that the children have sufficient time to relax, play and visit with friends and extended family. Children benefit from organized activities, as well as unstructured free time.

Educational Needs

[50] Bella is in school while Addison attends daycare. Both girls are intelligent, independent and happy. Their formal educational needs are minimal at this time. Both parties assign priority to their daughters' education. I am sure this commitment will continue in the future.

Ability to Foster Relationship with Other Parent

[51] Contrary to what Mr. Peters alleges, I find that Ms. Reginato has and will continue to foster a relationship between the children and their father. She has done so for much of the time since separation. The following examples support my finding:

- Notwithstanding Mr. Peters' violence, Ms. Reginato ensured that the children spent liberal time with their father and his family, after being cleared to do so by child protection authorities. Access commenced very quickly after separation. Ms. Reginato did not terminate access for any extended period of time, despite the violence and despite the inappropriate conduct of Mr. Peters, and at times his family, as reviewed previously.
- Ms. Reginato provided additional access outside of the defacto access arrangement, including an extra visit during Remembrance Day; an extra visit so that Mr. Peters' sister could take the children to Margaree; occasional additional access on the weekends and week days.
- Ms. Reginato ensured that the children saw their father during Christmas in 2014 and in 2015.
- Mr. Peters did not see the children on Father's Day in 2015. He did not ask and Ms. Reginato did not offer. The children should spend Father's Day with Mr. Peters.
- Ms. Reginato's parenting plan allows for liberal parenting contact between Mr. Peters and the children.
- Ms. Reginato provided Mr. Peters with Bella's report cards, except on one occasion when she inadvertently forgot to do so.
- Ms. Reginato appropriately named Mr. Peters on the school registration form.

- Ms. Reginato did advise Mr. Peters through the access facilitator that she had enrolled Addison in daycare at CBU.

[52] In contrast, and as noted previously, Mr. Peters views Ms. Reginato in a negative light, although his parenting plan is one based on equal parenting time.

[53] Both parties will ensure that the children spend quality time with the other parent.

History of Child Care

[54] Ms. Reginato assumed the role of primary care provider throughout the relationship, both before and after separation. Ms. Reginato cared for the children during her maternity leaves. In addition, Ms. Reginato chose to work part time so that she could devote more time to the children.

[55] In contrast, Mr. Peters did not take parental leave and he worked full time. In addition, he also played hockey during the week. Further, Mr. Peters also spent time in the barn, especially during the latter part of the relationship.

[56] I find that Ms. Reginato assumed more of the primary care tasks, such as being primarily responsible for meals, child care, taking the children to activities and appointments, and being present for the children. I also recognize that Mr. Peters loves his children and enjoys their company. However, Ms. Reginato was and has remained the primary care giver of the children.

[57] The history of child care favors Ms. Reginato.

Cultural, Linguistic, Religious and Spiritual Heritage

[58] There is little difference in the parties' plans in relation to these factors. Both parents are committed to ensuring that Bella and Addison are appropriately exposed to their heritage.

Views and Preferences

[59] I am confident that Bella and Addison love both of their parents and enjoy spending time with each of them.

Stability of Relationships

[60] Bella and Addison have a stable relationship with Ms. Reginato. Further, Bella and Addison have a strong and loving relationship with their sisters, Faith and Cassie. Likewise, Bella and Addison enjoy the benefits that flow from being a part of the large Reginato extended family. It is important that these relationships be maintained and promoted.

[61] Bella and Addison also have a stable relationship with Mr. Peters and his family. Mr. Peters and his family are supportive of the children, frequently participating in their activities, enjoying their company and lavishing them with love. For the most part, this involvement is positive and healthy.

[62] I am nevertheless concerned about the manner in which Mr. Peters' parents and sister have contributed to Mr. Peters' lack of remorse and failure to accept responsibility for two reasons. First, his mother and sister believe that Ms. Reginato's alleged affair was responsible for Mr. Peters' violence. As a result, they view Mr. Peters as the victim and Ms. Reginato as the villain.

[63] Second, the manner in which Mr. Peters' family came to Mr. Peters' aid in September 2014 is troubling. For example, Mr. Peters' father immediately arranged for Ms. Reginato's tires to be replaced after Mr. Peters slashed them. Mr. Peters is not required to repay his parents for this expense. In addition, his parents immediately arranged to clean and replace all the vandalized windows in the neighbor's home. Mr. Peters is not required to repay this expense. Further, Mr. Peters' sister gathered, washed, dried and folded Ms. Reginato's clothing that Mr. Peters had thrown out of the house, at no expense to Mr. Peters. By protecting and shielding Mr. Peters in this manner, his parents and sister have contributed to Mr. Peters' lack of insight and remorse. This type of protection is not an example of good parenting. This type of protection does not produce healthy relationships.

Ability to Communicate and Cooperate

[64] By agreeing to joint custody, both parents made a commitment to jointly discuss important matters affecting the health, education, and general well-being of Bella and Addison in a respectful, reasonable and reflective manner. Despite this joint commitment, I am nonetheless concerned about Mr. Peters' ability to do so given his past conduct and lack of genuine remorse. The order will therefore include a provision that if Mr. Peters becomes aggressive or abusive, or uses inappropriate language in his communication, Ms. Reginato will no longer be

required to communicate with Mr. Peters. Joint custody ceases to be in the best interests of children if there is aggressive or violent communication.

[65] Further, in the circumstances of this case, it is in the best interests of the children that final decision making authority be designated so as to avoid conflict. Therefore, in the event of disagreement after timely and fulsome consultation, Ms. Reginato will have final decision making authority. As primary care giver, Ms. Reginato has a history of making appropriate decisions. I am also confident that given her history, Ms. Reginato will not abuse the authority entrusted to her.

Summary of Best Interests Factors

[66] I find that Bella and Addison have a family life that for the most part is nurturing, supportive and stable. Family violence, and alcohol abuse however, negatively affected Mr. Peters' parenting, and will continue to do so unless Mr. Peters obtains counseling and makes permanent changes in his attitude and behavior. I am hopeful that Mr. Peters can and will make the necessary changes out of love for Bella and Addison.

[67] I further find that Ms. Reginato is in a better position to provide the day to day care for Bella and Addison based on my examination of the best interests factors stipulated in the *MCA*. Ms. Reginato will safeguard the children's emotional, psychological, educational, and social welfare needs, and will provide a structured, timely and organized routine while ensuring that Mr. Peters' relationship is respected and maintained through a liberal parenting order. Mr. Peters' role will continue to be important, but a parenting arrangement based upon Ms. Reginato having primary care, and not shared parenting, is in the children's best interests.

[68] What parenting plan is in the best interests of Bella and Addison?

[69] The parenting plan that is in the best interests of Bella and Addison is as follows:

Joint Custody

[70] Mike Peters and Laurie Reginato will share joint custody of Bella and Addison Peters. Laurie Reginato will have primary care of Bella and Addison according to the parenting schedule stated in this order.

Decision Making Authority

[71] Laurie Reginato and Mike Peters must consult with each other, on a timely basis, about important decisions which impact the health, education, religion, heritage and general welfare of Bella and Addison. All such discussions must be meaningful, child focused and respectful. If after meaningful discussions, the parties are unable to reach agreement, then Laurie Reginato will have final decision making authority on all issues, including the choice of school.

[72] In the event of a medical emergency, the party having physical care of Bella and Addison will be entitled to make decisions which are necessary to alleviate the emergency and will notify the other parent as soon as possible as to the nature of the emergency and emergency treatment.

[73] Routine day to day decisions, including child care decisions, will be made by the party who is scheduled to have physical care of Bella and Addison.

Communication

[74] All communication between the parties must be child focused and respectful. Both parties must exchange e-mail addresses to assist with communication. Text messages should be avoided where possible.

[75] Neither party will speak disparagingly of the other party, or their family, in the presence or hearing distance of Bella and Addison.

[76] Neither party will use the children to relay messages to the other party.

[77] Each party must notify the other by email of the following routine decisions made while the children are in their care: particulars of minor illnesses and any medication that was administered; particulars of homework assignments, projects and tests; particulars involving activities, practices, games and tournaments; and particulars relating to significant social welfare matters. All such notifications must be timely, and also must provide sufficient details so that both parties can attend any of the children's special functions, if they are able to do so. All such communication must be respectful and child focused.

[78] In the event Mike Peters becomes aggressive, abusive or disrespectful, Laurie Reginato will no longer be required to communicate or consult with Mike Peters.

Meetings, Concerts and Activities

[79] Both parties are entitled to attend parent teacher meetings, and all major school events, including concerts, programs and activities. In the event tickets are limited to such performances, each parent will have priority for tickets. The use of any additional tickets will be determined by the parent who has physical care of Bella and Addison on the day the special event occurs.

[80] Each party must ensure that Addison and Bella attend school, their activities and birthday parties where at all possible, except when Addison and Bella are ill or are away from the area, or in the case of inclement weather, or as a result of other reasonable excuses.

Educational Assistance

[81] Each party is responsible for supervising the completion of homework and assignments when they have physical care of the children, and each party must cooperate with educators to ensure that the children's educational needs are met.

Medical, Dental, Health Cards and Insurance Forms

[82] Both parties will be provided with the children's health card numbers, and both parents will share particulars and forms of any health plan which covers the children.

Access to Professional Records and Information

[83] Each party has the right to communicate with all professionals involved with the children's care, and each has the right to obtain information and documentation respecting the children from all medical professionals, educators, health professionals and social welfare professionals without the further consent from the other party.

Travel

[84] Each party will notify the other of travel plans involving the children. Notice will include dates of travel, location, address, and telephone numbers where the children can be reached, and any applicable flight details. Both parties will accommodate any requirements for passport documentation to allow the children to vacation with the other parent outside Canada, and both parties will sign any

necessary letter to permit travel outside of Canada. The children's passports will be maintained by Laurie Reginato but will be made available to Mike Peters for vacation plans outside of Canada.

Telephone Contact

[85] Each party will have reasonable telephone contact with the children while the children are in the care of the other party.

Alcohol

[86] Mike Peters must not consume alcohol when exercising parenting time with the children.

Therapeutic Interventions

[87] Mike Peters must attend therapeutic counselling with the following stated objectives:

- To obtain education about the impact that family violence has on children.
- To obtain better insight into the dynamics of family violence.
- To obtain better insight into the role that personal reflection, accountability and responsibility plays in the reduction of family violence.
- To acquire skills to recognize triggers, and to adopt de-escalation techniques, anger management skills, and healthy problem solving practices.
- To acquire skills to communicate respectfully, reasonably and responsibly to Ms. Reginato and to the children.

[88] Mike Peters must file with the court and with Laurie Reginato proof that he has successfully completed therapeutic counselling on the stated objectives.

Regular Parenting Schedule

[89] The regular parenting schedule will be based on the following two week rotation:

- On week one, Mike Peters will exercise parenting time with the children from Wednesday at 2:00 pm until Saturday at 5:00 pm. The children will be in the care of Laurie Reginato for the balance of the week.
- On week two, Mike Peters will exercise parenting time with the children from Thursday at 2:00 pm until Saturday at 5:00 pm. The children will be in the care of Laurie Reginato for the balance of the week.

Special Occasions and Holidays

[90] The regular schedule will be suspended for special occasions and holidays, and the following parenting schedule will be followed instead, unless the parties reach an alternate arrangement as confirmed in writing:

[91] *Mother's Day and Father's Day:* The children will spend the Mother's Day weekend with Laurie Reginato and the Father's Day weekend with Mike Peters, commencing after school on Friday and continuing until 6:00 pm on Sunday, at which time the parties will revert back to the regular schedule.

[92] *Summer Vacation:* Each party will have the children in their care for 10 consecutive days during the summer. During the even numbered years, Mike Peters will provide notice to Laurie Reginato of the 10 days he wishes to take no later than May 1, and Laurie Reginato will advise Mike Peters of the 10 days she intends to take no later than May 30. During the odd numbered years, Laurie Reginato will provide notice to Mike Peters of the 10 days she intends to take no later than May 1, and Mike Peters will advise Laurie Reginato of the 10 days he intends to take no later than May 30.

[93] *Christmas:* Christmas is deemed to cover the period from 2 pm on December 23 until 2 pm on January 3. The children will be in the care of Laurie Reginato from 2:00 pm on December 23 until 2:00 pm on December 25; and from 2:00 pm on December 28 until 2:00 pm on December 31. The children will be in the care of Mike Peters from 2:00 pm on December 25 until 2:00 pm on December 28; and

from 2 pm on December 31 until 2 p.m. on January 3, at which time the parties will revert back to the regular schedule. [It is in the best interests of the children to wake up Christmas morning in their primary care home, with their mother and sisters.]

[94] *Spring Break*: Spring Break is deemed to cover the period from 9 am on Friday of the last day of school until 9 am on Sunday before school recommences. The children will be in the care of Laurie Reginato during the March breaks of the even numbered years, and in the care of Mike Peters during the March breaks of the odd numbered years. The parties will revert back to the regular schedule after the conclusion of the Spring Break holiday.

[95] *Easter*: Easter is deemed to cover the period from 10:30 am on Holy Saturday until 2:00 pm Easter Monday. The children will be in the care of Mike Peters from 10:30 am Holy Saturday until 10:30 am Easter Sunday. The children will be in the care of Laurie Reginato from 10:30 am Easter Sunday until 2:00 pm on Easter Monday. The parties will revert back to the regular schedule after the conclusion of the Easter holiday.

[96] *Birthdays*: The parent who is not ordinarily scheduled to have care of Addison and Bella on their birthdays will exercise access to Addison and Bella from 3:00 pm until 5:00 pm unless the children are on vacation and not available.

Ad Hoc Special Family Events

[97] The parties will use their best efforts to accommodate any special family reunion, wedding, or other event that is scheduled at a time when the children are in the care of the other party. Written notice will be provided, well in advance of the scheduled event, to determine if the regular schedule can be altered to permit the children's attendance at the special function. The parties will be as flexible as possible in such circumstances, however, no change in the schedule will occur without the written authorization of the party in whose care the children are scheduled to be at the time of the special family function. If accommodation cannot be made, the party refusing must provide the other party with written reasons for their refusal. Make up time will be provided to the party who agrees to rearrange the schedule as that party requests.

[98] **What is the value of the family home?**

[99] The parties each retained a certified residential appraiser to ascertain the value of the family home situate at 283 Hills Road. The family home was constructed in 2011 and is a modern, one story dwelling with a finished basement. It has about 1600 square feet above grade and slightly less below grade. The home is situate on 77.5 acres of land which has a mixture of cleared areas and trails, and contains both hardwood and softwood trees. The property also has a detached barn, with power, which is used for horses.

[100] Mr. Martheleur testified that the value of the property was \$273,000. He applied the direct comparison approach by examining three other properties and making adjustments to their sale values. Two of the sale comparables were located in Alberta Bridge, while one was found in a subdivision in Sydney River. In addition to the sale comparables, Mr. Martheleur also valued the undeveloped land at \$350 per acre, based on research which he previously conducted. Mr. Martheleur did not use the cost approach because he lacked expertise in the area.

[101] Mr. Martheleur took exception to two of the sale comparables used by Mr. Black. He also disagreed with Mr. Black's rate of depreciation. He felt that a more appropriate discount would be at least 10%.

[102] For his part, Mr. Black stated that the family home had a value of \$335,000. When completing his analysis, Mr. Black applied the direct comparison approach, as well as the cost approach. According to Mr. Black, both approaches are based on the principle of substitution. With the direct comparison approach, the question is why would a purchaser buy this home if the purchaser could buy a comparable home for the same or lower price. With the cost approach, the question is why would a purchaser buy this home if the purchaser could build a comparable home for the same or lower price. Mr. Black said that the cost approach lends credence to the value which he calculated based on the direct comparison approach. Mr. Black indicated that the cost approach would be applicable for newer improvements with a limited amount of depreciation.

[103] Mr. Black indicated that the 5% depreciation rate was appropriate given the pride of ownership evident in the home. He confirmed that the only visible damage was minor wall damage in the rec room downstairs which would cost approximately \$100 to repair. A lower depreciation rate was correct in the circumstances.

[104] Mr. Black also valued the undeveloped vacant land at \$49,000 based on other comparable land sales in the previous year and a half. He indicated that the market for vacant land is fairly static in CBRM.

[105] *Decision*

[106] I find that the market value of the family home, including the additional acreage is \$320,000. My finding is based on the following:

- The vacant land has a current market value of \$40,000. The parties purchased the vacant land for \$40,000 in December 2010. Mr. Martheleur stated that there was little market fluctuation in CBRM since approximately 2010. He stated that real estate values have remained constant since that time. Mr. Black also noted that the residential market is quite flat in CBRM. In the circumstances, Mr. Martheleur's valuation of the vacant land is too low; Mr. Black's valuation is closer to my finding.
- Although sales comparable 343 Hills Road is the closest geographically to the family home, sizeable upward adjustments are required because of the significant differences between the two properties. 343 Hills Road sits on 1.62 acres of land; the family home is composed of 77.5 acres. 343 Hills Road has only 960 square feet above grade, while the family home has 1600 square feet above grade. Both properties have developed basements. Further, 343 Hills Road is a two bedroom home, while the family home has three bedrooms above grade and two bedrooms below. 343 Hills Road was a completely renovated 27- year old home; the family home shows pride of ownership and is 5 years old. In contrast, a negative adjustment is required because the family home has a gravel driveway while the driveway at 343 Hills Road is paved. Minimal adjustment for the garage is required because the family home has a large barn. In total, an adjusted sale price of \$320,000 is appropriate.
- Although comparable 25 Lanceleve Crescent is located in a rural area close to the family home, it too requires significant adjustments. The site size is less than 40,000 square feet. Livable floor space was only 1,043 square feet. It was 13 years old. It had two bedrooms. The basement was only partially developed. Minimal adjustment for the

garage is required because the family home has a large barn. In total, an adjusted sale price of \$320,000 is appropriate.

- Comparable 151 O'Neils Lane must also be subject to an upward adjustment because it had only 16 acres of land, 1200 square feet of livable floor space, and an undeveloped basement. Although the property was not located near the family home, it was found in a rural area with similar adjacent services. In total, an adjusted sale price of \$320,000 is appropriate.
- Comparable 9 Carriage Hill Drive is not relevant because it is located in a highly desirable subdivision of the city; it is not a rural area.
- Comparable 1727 Trout Brook road is not relevant because it is a highly desirable waterfront property situated on the Mira.
- The cost approach calculated by Mr. Black lends credibility to my finding that the market value of the family home is greater than that calculated by Mr. Martheleur, and is correctly valued at \$320,000.

[107] Has Mr. Peters proven that the Visa/Line of Credit and the HSBC Financial debt were incurred for family purposes?

Position of Mr. Peters

[108] Mr. Peters asserts that the Line of Credit/Visa, held in his name alone, was used to pay for expenses associated with the renovation of the McKinley Drive property in 2008, including the creation of a downstairs bedroom, and the installation of new flooring, countertops, baseboards, doors and door jams, and a deck. Mr. Peters states that the Line of Credit/Visa was maxed out since 2008. Mr. Peters states that his Line of Credit/Visa had a balance of \$9,769.60 as of September 13, 2014. Mr. Peters states that he was unable to locate the 2008 records.

[109] Mr. Peters states the HSBC Financial debt was incurred by him to pay for dental work which Ms. Reginato had completed during the course of their relationship.

Position of Ms. Reginato

[110] Ms. Reginato states that Mr. Peters' Line of Credit/Visa was maxed out before the renovations to McKinley Drive were started. She further notes that the renovations cost considerably less than \$10,000 in any event; they installed cheap flooring and laminate counter tops. Ms. Reginato states that she never saw Mr. Peters using the Line of Credit/Visa at any time.

[111] Ms. Reginato denies that Mr. Peters paid for the cost of her dental care. She confirmed that she had a root canal and wisdom teeth removed while she was pregnant. According to Ms. Reginato, Blue Cross insurance paid for the majority of the root canal. Ms. Reginato states that she paid for the balance of the root canal and the wisdom teeth extraction, including associated travel expenses. She denies any contribution from Mr. Peters.

Decision

[112] Mr. Peters did not prove, on a balance of probabilities, that the \$9,769 Line of Credit/Visa was incurred to pay for renovations to McKinley Drive or for any other family purpose. Mr. Peters did not prove, on a balance of probabilities, that his HSBC debt was incurred to pay for Ms. Reginato's dental expenses. Mr. Peters produced no documentary evidence showing that his debt was incurred for the reasons he stated. Mr. Peters was not a credible witness and in these circumstances, I do not accept Mr. Peters' viva voce evidence as sufficient proof.

[113] **Is there a debt outstanding to Mr. Peters' mother or to the family business?**

Law

[114] In **Pecore v. Pecore**, 2007 SCC 17 (S.C.C), the Supreme Court of Canada explained the doctrine of resulting trust as paras 24 – 26 as follows:

24 The presumption of resulting trust is a rebuttable presumption of law and general rule that applies to gratuitous transfers. When a transfer is challenged, the presumption allocates the legal burden of proof. Thus, where a transfer is made for no consideration, the onus is placed on the transferee to demonstrate that a gift was intended: see *Waters' Law of Trusts*, at p. 375, and E. E. Gillese and M. Milczynski, *The Law of Trusts* (2nd ed. 2005), at p. 110. This is so because equity presumes bargains, not gifts.

25 The presumption of resulting trust therefore alters the general practice that a plaintiff (who would be the party challenging the transfer in these cases) bears the legal burden in a civil case. Rather, the onus is on the transferee to rebut the presumption of a resulting trust.

26 In cases where the transferor is deceased and the dispute is between the transferee and a third party, the presumption of resulting trust has an additional justification. In such cases, it is the transferee who is better placed to bring evidence about the circumstances of the transfer.

[115] Although the presumption of resulting trust applies to transfers between a parent and an adult child, the court noted that this presumption could nevertheless be displaced where the evidence confirmed that the transfer was intended to be a gift. Rothstein, J. held at para 41 as follows:

41 There will of course be situations where a transfer between a parent and an adult child was intended to be a gift. It is open to the party claiming that the transfer is a gift to rebut the presumption of resulting trust by bringing evidence to support his or her claim. In addition, while dependency will not be a basis on which to apply the presumption of advancement, evidence as to the degree of dependency of an adult transferee child on the transferor parent may provide strong evidence to rebut the presumption of a resulting trust.

[116] Rothstein, J. also held that the balance of probabilities is the standard by which the presumption of resulting trust can be rebutted; evidence of the transferor's contrary intention is required: para 43. The trial judge must weigh all of the evidence when making a finding of the transferor's actual intention: para 44.

[117] In **Kerr v. Baranow** 2011 SCC 10 (S.C.C.), Cromwell, J explained how trial judges should approach the issue of resulting trusts at paras 18 and 19 which state as follows:

18 The Court's most recent decision in relation to resulting trusts is consistent with the view that, in these gratuitous transfer situations, the actual intention of the grantor is the governing consideration: *Pecore v. Pecore*, 2007 SCC 17, [2007] 1 S.C.R. 795 (S.C.C.), at paras. 43-44. As Rothstein J. noted at para. 44 of *Pecore*, where a gratuitous transfer is being challenged, "[t]he trial judge will commence his or her inquiry with the applicable presumption and will weigh all of the evidence in an attempt to ascertain, on a balance of probabilities, the *transferor's actual intention*" (emphasis added).

19 As noted by Rothstein J. in this passage, presumptions may come into play when dealing with gratuitous transfers. The law generally presumes that the grantor intended to create a trust, rather than to make a gift, and so the presumption of resulting trust will often operate. As Rothstein J. explained, a presumption of a resulting trust is the general rule that applies to gratuitous transfers. When such a transfer is made, the onus will be on the person receiving the transfer to demonstrate that a gift was intended. Otherwise, the transferee holds that property in trust for the transferor. This presumption rests on the principle that equity presumes bargains and not gifts (*Pecore*, at para. 24).

Position of Mr. Peters

[118] Mr. Peters states that he owes \$20,000 to his mother and \$28,091.64 to his parents' company, KLM Holdings Ltd. He states that he incurred these personal loans to buy the 77.5 acres of land situate at 283 Hills Road and to pay for the construction of the family home. In particular, Mr. Peters testified as follows:

- He attempted to buy the vacant land by remortgaging the McKinley Drive home for an additional \$40,000. Mr. Peters, however, only netted \$13,395 from the remortgage because of penalty and other charges.
- To secure the additional financing, Mr. Peters says he was forced to borrow \$30,387.87 from his parents' company KLM Holdings. He said that \$20,000 of this was repaid from his mother's inheritance, while \$10,387.87 remained on the books until McKinley Drive sold. On March 11, 2011, when McKinley Drive sold for \$168,000, Mr. Peters netted \$18,480.06 from the sale and used \$10,387 to pay off the corporate debt. Mr. Peters asserts that \$20,000 remains outstanding to his mother.
- Mr. Peters said that he used the company's business account at a local building supply store to pay for the materials to construct the family home. He then repaid the company through the release of mortgage funds.
- The cost of the home construction exceeded the available mortgage funds, primarily because of Ms. Reginato's unreasonable and materialistic demands; as a result he has an outstanding debt of \$28,091.64 due to KLM Holdings.
- Mr. Peters states that Ms. Reginato was well aware of these debts because they had countless arguments about them. Mr. Peters states that Ms. Reginato knew that he intended to repay his mother and KLM Holdings once the mortgage came up for its five-year renewal.

- Mr. Peters further notes that the company debt is recorded in the corporate financial statements as confirmed by Sandy Mcneill, CPA, CA.
- In **Tobias v. Tobias**, [2016] B.C.J. No.138 (B.S.S.C.), in facts that are similar to this case, the court held that the monies advanced by the husband's parents from their company was a debt for which the parties were jointly liable.

[119] Mrs. Peters testified that she expected that the money would be repaid and noted as follows:

- She has two children and Mrs. Peters did not give a comparable gift to her daughter.
- She provided money to her son to reduce the financial pressures on her son and because it helped her grandchildren; the money was put to good use.
- She discussed her personal loan with Ms. Reginato on one occasion and was shocked to learn that Ms. Reginato thought the debt was only \$10,000.
- She is a shareholder of KLM Holdings. The company loaned money and it must be repaid.

Position of Ms. Reginato

[120] Ms. Reginato vigorously disputes that any money is owed to Mr. Peters' mother or to the family company. She states as follows:

- The first she ever heard of an alleged debt was after separation. There was absolutely no mention of any outstanding debt before the parties separated.
- Mr. Peters did not produce documentary evidence to support the allegations that he made. Mr. Peters and his mother are not credible.
- The corporate ledger contained ambiguities and unsupported hearsay.
- Mr. Peters' parents were financially generous after the alleged loans were made. Their continued gift giving confirms that there was no expectation of repayment of the alleged earlier loans.

- Mr. Peters' parents paid for all expenses required to repair and replace the property destroyed by Mr. Peters in September 2014. There was never any demand or expectation of repayment.
- Ms. Reginato denies all attempts to portray her as a gold-digger who was focused on taking as much money as possible from Mr. Peters and his family. Ms. Reginato also denies stealing from the building supply store by switching stickers on a rug.

Decision

[121] Ms. Reginato rebutted the presumption of resulting trust in respect of the money transferred to Mr. Peters by Mrs. Peters and by KLM Holdings Ltd. Ms. Reginato has proven that Mrs. Peters and KLM Holdings Ltd intended the transfers to be gifts. I make this finding for the following reasons:

- There was no contemporaneous document evidencing a loan signed between Mrs. Peters and Mr. Peters in respect of the \$20,000.
- There was no contemporaneous document evidencing a loan signed between KLM Holdings and Mr. Peters in respect of the \$28,091.64. The financial statements prepared by Sandy Mcneill were not prepared until after the transfer had occurred. Sandy Mcneill simply created a financial entry based on the information supplied to him. The financial entry is not an independent and contemporaneous document evidencing a loan. There is no promissory note.
- There was no security provided to Mrs. Peters or to KLM Holdings Ltd.
- The KLM Holdings transaction is irregular. It is reported as a nonbusiness loan to a nonshareholder which was not repaid within two years as generally deemed appropriate by CRA.
- There was no demand for repayment and no payments were made. To the contrary, Mrs. Peters continues to regularly transfer gifts of money to Mr. Peters and has done so since the home was built. She transfers \$100 weekly from a joint account which she owns with her husband, and \$100 every two weeks from her own bank account. These payments equate to a gift of approximately \$650 per month or \$7,800 per year. There was and is no expectation that any of these monies will be repaid.

- Mr. Peters' parents continued to provide monetary gifts after the money was advanced. For example, they bought clothing and gifts for their grandchildren, including a car for Cassie's 18th birthday. Mr. and Mrs. Peters constructed a sleigh road and cleared land for pasturing horses. Mr. Peters' father contributed \$1,200 towards the purchase of a camper, and about \$5,000 to enlarge the barn to accommodate the horses belonging to Mr. Peters, sr. There was and is no expectation that any of these monies will be repaid.
- Mrs. Peters and her husband paid for all expenses to repair and replace the property which Mr. Peters destroyed in September 2014, including all windows destroyed in the neighbour's home and the tires slashed on Ms. Reginato's van. There was and is no expectation that any of these monies will be repaid.
- Mr. Peters' parents were consistently generous to Mr. Peters, Ms. Reginato and their children. Their generosity was in the form of gifts, some small and others substantial.
- Ms. Reginato was not advised of the alleged debt before separation. Ms. Reginato's surprise was evident in her email of January 7, 2015. By this time, she was aware of the claims set out in Mr. Peters' Statement of Property filed in November 2014.
- I accept that Mrs. Peters told Ms. Reginato on various occasions that the \$20,000 she gave Mr. Peters was a gift.
- The claim that the funds would be repaid by refinancing when the mortgage was renewed in 2016 was a strategic and convenient afterthought that was invented after the parties separated and in the throes of a bitter legal dispute.
- I find Ms. Reginato credible on this issue; I do not find Mr. Peters or Mrs. Peters credible.

[122] In summary, Ms. Reginato rebutted the presumption of resulting trust based on the totality of the evidence. On a balance of probabilities, all moneys transferred were intended by Mr. Peters' parents, or through their company, as gifts when they were advanced without expectation that the funds would be repaid or returned. Mr. Peters and his parents only began to characterize the funds as loans after the

acrimonious separation and Ms. Reginato's attempt to obtain an equal share of the equity built up in the family home.

[123] In addition, I also note that the detailed accounting entries found in exhibit 60 do not confirm that KLM Holdings actually provided \$28,091.64 to Mr. Peters. Sandy Mcneill indicated that as Mr. Peters and his father hold the same name, "jr" is added to differentiate between the father and son. The journal entries show that that the outstanding \$28,091.64 is composed of advances paid to Mr. Peters, the father, in the amount of \$13,325; Mrs. Peters, the mother, in the amount of \$5,000; and CIBC Visa, an account which is not claimed on Mr. Peters' Statement of Property, of \$16,667.37. The only advance directly attributed to Mr. Peters, the son, is a \$3,000 advance on May 3, 2011. There are also several entries associated with other businesses. No invoices were provided to link the payments to construction materials used by Mr. Peters and Ms. Reginato.

[124] **What relief is available under the *Partition Act*?**

Legislation and Law

[125] As I noted in the Introduction, the provisions of the *Matrimonial Property Act* do not apply to this unmarried couple. Because they are joint tenants of the Hills Road property, the *Partition Act* applies.

[126] In **Roach v. McNeil**, 2014 NSSC 112 (S.C.), I reviewed the court's jurisdiction in respect of proceedings arising under the provisions of the *Partition Act* at paras 48 – 58; I adopt this reasoning.

[127] Two remedies are available under the *Partition Act*. I can either appoint commissioners to have the property partitioned, or I can order that the property be sold. If I decide that the property must be sold, I then have to determine how the sale should proceed. There are two options. I can order a sale through a process similar to a foreclosure sale, or I can order that the property be sold through a listing agent: **Roach v. McNeil**, supra at para 63.

[128] Next I must consider if there are equitable allowances that will impact on how the sale proceeds will be divided. In **Finanders v. Finanders**, 2005 NSSC 145, Edwards, J. reviewed the law on equitable allowances in the context of a *Partition Act* claim at paras. 19 to 22; I adopt the law as stated. According to these authorities, in making an order for sale, courts must take into account equitable

allowances. What comprises an equitable allowance is fact specific and based on the unique circumstances of each case.

[129] In **Soubliere v. MacDonald**, 2011 NSSC 98, Jollimore, J. discussed the *Partition Act* in the family law context. Jollimore, J. ordered an equal division of the property held in the joint names of the parties, notwithstanding the fact that the husband made the down payment, and all mortgage and tax payments before the parties' separation. Jollimore, J. gave effect to the presumption in favor of an equal division, and the principles which emerged from the case law, including **Anderson v. Wilson** (1986), 73 N.S.R. (2d) 1 (T.D.); **Primeau v. Richards**, 2004 NSSF 86 (S.C.); **MacDonald v. Jollymore**, 2006 NSSC 152 (S.C.); and **Davis v. Munroe**, 2011 NSSC 14 (S.C.). In contrast, Jollimore, J. also noted that mortgage and property taxes made post separation are generally equally divided at para 32.

[130] In **Roach v. McNeil**, *supra*, I also ordered an equal division of the sale proceeds in the family context despite the request to divide the property unequally.

Position of Mr. Peters

[131] Mr. Peters wants Ms. Reginato to quit claim her interest in the Hills Road property to him. In addition, Mr. Peters wants Ms. Reginato to pay him an additional sum of money based on an equalization of the debts, including the money he states he owes to KLM Holdings Ltd, to his mother, to Scotiabank, and reimbursement for other expenses paid. Specifically he seeks \$10,561 from Ms. Reginato which represents the net difference between what he paid for the mortgage, municipal taxes, property insurance, telephone and cable, power, and oil less notional child support payments which he was unable to pay because of his other financial obligations. In addition, Mr. Peters seeks another \$1,085.04 for van payments which he made post separation and \$1,900 for a HSBC account to pay for Ms. Reginato's dental care.

Position of Ms. Reginato

[132] Ms. Reginato wants the Hills Road property sold and the net proceeds equally divided after paying out the mortgage and the usual adjustments on closing. Initially, she was open to Mr. Peters buying out her interest. She denies any money is owing to Mr. Peters. She further notes that Mr. Peters owes her money for retroactive child and spousal support.

Decision on Sale or Partition

[133] No partition of the property is ordered for three reasons. First there was no specific request: **Deloisio v. Dolejs** [1994] N.S.J. No. 565 (C.A.). Second, I have no information or data about any additional costs associated with the appointment of commissioners or the partition process. Third, the partition process would be a lengthy one which would require a level of co-operation that is lacking.

[134] The property will therefore have to be sold, unless Ms. Reginato consents to Mr. Peters purchasing her one-half and equal interest in the Hills Road property based on a value of \$320,000 less deductions for notional sales costs of \$23,000⁶ and the outstanding mortgage balance. If possible, it would be advantageous to keep the property within the family for the benefit of Bella and Addison.

[135] In the event Ms. Reginato does not consent to a buy out, then I order the property sold through a listing agent as this method will likely expose the property to a larger market and maximize sale proceeds. The order for sale will provide as follows:

- The parties must list the Hills Road property with a mutually acceptable realtor, and at a listing price set in conjunction with the realtor, who is knowledgeable of property values in the area where the property is situate. In the event, the parties cannot agree on a listing agent or listing price, either party may apply to the court, on abbreviated notice, for an order confirming the listing agent or listing price, or both. Costs may also be sought.
- No reasonable offer will be refused by either party. In the event the parties cannot agree on what is a reasonable offer, either party may apply to the court, on abbreviated notice, for an order confirming that an offer is reasonable. Costs may also be sought.
- Both parties must co-operate in the listing and sale of the Hills Road property by signing whatever documentation may be required, or by performing such actions that may be required to effect the terms and provisions of this order.

⁶Real estate commission, GST, and legal fees.

- Until the property is sold, Ms. Reginato will continue to have interim exclusive occupation and use of the Hills Road property pursuant to s. 7 of the *Maintenance and Custody Act*. Mr. Peters is not permitted to attend at the property. Ms. Reginato must cooperate with the realtor in showing the property to potential purchasers.
- Each party must pay ½ of the monthly mortgage payments, taxes, and insurance on the Hills Road property commencing January 1, 2017 and continuing until the property is sold.
- Ms. Reginato must pay all utilities until the Hills Road property is sold.
- In the event the parties cannot agree on what is entailed by this order, either party may apply to the court, on abbreviated notice, for an order confirming that detail. Costs may also be sought at this time.
- Once the Hills Road property is sold, the net proceeds of sale must be retained in a solicitor trust account, which solicitor is mutually acceptable to the parties, and the funds disbursed according to the formula to be outlined. In the event the parties cannot agree on the terms of the disbursement of the proceeds of sale, either party may apply to the court, on abbreviated notice, for an order confirming the same. Costs may also be sought.

Decision on Division of Sale Proceeds & Adjustments

[136] I am ordering an equal division of the sale proceeds, after the payment of real estate commission, legal fees, the usual adjustments on closing, and the outstanding mortgage.

[137] From her share of the sale proceeds, Ms. Reginato must reimburse Mr. Peters for any missed mortgage payments that he made after the interim order was put into place.

[138] From his share of the sale proceeds, Mr. Peters must reimburse Ms. Reginato for any missed child support payments, inclusive of his proportionate share of the child care expenses, any missed payments for insurance and property taxes, and any outstanding costs order.

[139] I will not order Ms. Reginato to reimburse Mr. Peters for the expenses that he paid after separation and before the interim order took effect including payments related to the mortgage, taxes, property insurance, utilities, and the van loan. In addition, I will not order Ms. Reginato to reimburse Mr. Peters for the payments which he made for property taxes and insurance payments after the interim order issued. I make this decision for the following reasons:

- Prior to the granting of the interim order, Mr. Peters was neither paying child support, nor spousal support. Mr. Peters had an ability to pay both child and spousal support because he was not incurring any shelter related expenses while living with his parents. Ms. Reginato and the children had a corresponding entitlement to and need of support as will be discussed later in this decision.
- Mr. Peters' criminal conduct precipitated the parties' separation. Ms. Reginato did not ban Mr. Peters from the home. Rather, Mr. Peters was unable to return home because he assaulted Ms. Reginato.
- Ms. Reginato was primarily responsible for the children post separation and was doing her best to juggle the bills on their behalf.

[140] Further, I refuse to order reimbursement for Mr. Peters' \$1,900 HSBC account because he failed to prove that the bill was incurred on Ms. Reginato's behalf. I find that it was not. I refuse to order reimbursement for Mr. Peters' Visa/Line of Credit because Mr. Peters failed to prove that this debt were incurred for renovations, or on Ms. Reginato's behalf, or for family purposes. I find that it was not. I refuse to order reimbursement to Mr. Peters, or to his mother, or to KLM Holdings because Ms. Reginato rebutted the presumption of resulting trust; she has proven that the transfer of \$20,000 from Mr. Peters' mother was a gift; and that any transfer from KLM Holdings, in the amount of \$28,091.64 or otherwise, was likewise a gift.

[141] In ordering an equal division, I reject the other claims of the parties, including an unequal division claim advanced by Mr. Peters. My reasons for so doing include the following:

- The parties placed the Hills Road property in their joint names on two separate occasions. They could have chosen another route. By so doing, they expressed an intention of equal ownership.

- Mr. Peters did not inject all of the proceeds from the remortgage or sale of the McKinley Drive property into the purchase of the Hills Road property. He retained \$4,066.71 from the remortgage and \$8,093.06 from the sale proceeds.
- While Mr. Peters worked many hours assisting in the manual construction of the family home, Ms. Reginato spent many hours caring for Bella and the home, while traveling to stores and selecting materials and colors that would be used in the home's construction. The planning and construction of the home was very much a joint effort.
- I do not find that the work performed by Mr. Peters was any more valuable than the work performed by Ms. Reginato. Both worked tirelessly for the family, whether it was through the primary care of the children and the performance of the vast amount of housework or by assisting in the planning and construction of the home. Both parties assumed a role that was appropriate at the time based on the needs and demands of the family. Both work had equal value. The evidence to the contrary represents a fundamental misapprehension of the important social and economic value of work traditionally performed by women. I reject all evidence that states that Ms. Reginato's exemplary contribution was less valuable than Mr. Peters' contribution. It was not.
- I reject the evidence which minimizes Ms. Reginato's contributions and which inflates the characterization of Mr. Peters' efforts. Such evidence is not credible.
- Although there were a few errors in her evidence and Statement of Property, I nonetheless find Ms. Reginato credible. I find that she provided balanced evidence. Further, Ms. Reginato's errors paled in comparison to the many misrepresentations found in Mr. Peters' evidence.
- I reject the many attempts of Mr. Peters, his mother and sister to portray Ms. Reginato as a lazy, self-absorbed mother who did little for her family, and who orchestrated a plan to bleed the Peters dry. All such evidence is not credible and I specifically reject it.

- Although the parties kept separate finances, both nonetheless contributed to the operation of the family and household. I accept that Ms. Reginato was primarily responsible for buying the groceries, household supplies, clothing and Christmas gifts. She paid for her vehicle expenses, which vehicle was used to transport the children. She paid for the children's activity expenses. She paid the power bill. Ms. Reginato spent her money on the family just as Mr. Peters spent much of his money, and that gifted by his parents, on the family. Mr. Peters also enjoyed playing hockey several times a week as well as regularly drinking alcohol.

[142] In summary, it is difficult for the court to discern, with precision, the exact input of each of the parties over the totality of their relationship. I am satisfied, however, on a balance of probabilities, that there was an approximate equal conferral of mutual benefits over the course of the relationship. Fairness and equitable principles support an equal division of the sale proceeds in the manner described.

[143] **Should Mr. Peters be awarded additional relief based upon a claim of unjust enrichment and the equitable relief of constructive and resulting trust?**

Position of Mr. Peters

[144] Mr. Peters seeks a finding of unjust enrichment with a constructive and resulting trust remedy such that he retains the entire Hills Road property without paying Ms. Reginato any money for her interest. Mr. Peters states that constructive and resulting trusts are terms which are used interchangeably and are essentially the machinery that courts employ "because B ought to surrender property to A."

[145] Mr. Peters states that he satisfied the criteria necessary to succeed in his claim for unjust enrichment for several reasons, including the following:

- In **Beaton v. MacNeil**, [2011] N.S.J. No. 419 (N.S.S.C.), a case similar to this one, the court held that the appropriate remedy for an action in unjust enrichment was a constructive and resulting trust with a proprietary award on the entire property since a monetary award would not be sufficient.
- In another similar case, **Dempsey v. Edwards**, [2005] N.S.J. No. 283 (N.S.S.C.), the court held that although it would be unusual for a female

claimant not to make a contribution by way of childcare, housekeeping and other domestic chores, it did not automatically follow that the making of such a contribution was sufficient for unjust enrichment to apply. Further, while childcare and homemaking will sometimes establish an unjust enrichment claim, such will often not be the case. When contributions are indirect and mutually beneficial, they will need to be very substantial and to have very clearly enriched the titled' spouse to support an unjust enrichment finding.

- Ms. Reginato made no contribution to Mr. Peters that would support his enrichment and she suffered no deprivation. To the contrary, Ms. Reginato was enriched to the extent that her student loan was paid in full; she is retaining a trailer which was purchased in 2014 for \$5,000, including the \$1,200 contribution from Mr. Peters' father; she holds RRSPs of \$5,747; Bella's pony cost \$2,500 and the horse Blossom cost \$5,000. Ms. Reginato is exiting the relationship with assets and is debt free. She entered the relationship with minimal, if any, assets of value.
- The real property was acquired by Mr. Peters with his own funds and borrowed funds. Mr. Peters' ability to acquire the property was not related to Ms. Reginato's child care or the household sharing of costs.
- Ms. Reginato had two other children by the time Bella was born. Therefore, caring for Bella was not an economic deprivation. Rather, Ms. Reginato enjoyed the dream of only having to work part time so that she could be home with her children.
- Any contribution for domestic services was set off by the value of little to no shelter costs over the course of the relationship.
- Ms. Reginato's involvement in the building of the home was limited to what can only be described as the "fun part" while Mr. Peters was involved in the physical construction and budgeting.
- Ms. Reginato was given the benefit of holding title to the property jointly. This constitutes an unjust enrichment and the principle of equity must apply to restore the benefit to Mr. Peters.

- Ms. Reginato was holding the property in her name jointly on the condition that her future cooperation would be required to address further financing and to ensure that any equity in the property would be available to Mr. Peters to repay his parents.
- It would be unfair, inequitable and an unjust enrichment to allow Ms. Reginato to retain an interest in the real property. If anyone was enriched in this relationship, it was Ms. Reginato and there was no enrichment of Mr. Peters. In fact, he suffered significant financial loss. There was no such deprivation to Ms. Reginato.

Position of Ms. Reginato

[146] Ms. Reginato states that an equal division of the equity in the family home has been accomplished under the provisions of the *Partition Act* and that Mr. Peters did not prove the elements necessary to support his claim for unjust enrichment and the equitable remedies of a constructive or resulting trust for several reasons, including the following:

- The parties enjoyed a joint family venture as evidenced by four characteristics found in their relationship. First, mutual effort was proven in that the parties were working towards a common goal. Second, there was economic integration in that Mr. Peters was the primary wage earner, while Ms. Reginato was a stay at home mother who provided child care and domestic services, and who worked part time. Third, the parties' actual intent is confirmed by their decision to place title in both of their names as joint tenants. They lived their lives as a couple in every meaningful and real sense. They raised two children of their own, planned for an indefinite future together and lived collaboratively as would any family unit. Fourth, they each assigned priority to their family.
- The parties planned the construction and design of their home. Title to the property is as joint tenants. This is evidence of a joint commitment and interdependence.
- The property was placed in their joint names on two occasions. If Mr. Peters did not intend that Ms. Reginato be a joint owner, why did he ensure that title was in both names a second time after financing was arranged? Why

not continue to leave title in his name only - because it was a carefully reasoned decision to acknowledge their actual intention, namely that they owned the Hills Road property as joint tenants, equal in every sense. It was there they intended to live and raise their family.

- Mr. Peters cannot now retrospectively create a scenario where the financial aspects of his and Ms. Reginato's relationship existed in some ascetic type atmosphere, separate and apart from what was actually lived.
- Mr. Peters' position is not supported by the evidence. Mr. Peters ignores the intangible contributions of Ms. Reginato and the parties' shared understanding and expectations.
- Case law is fact specific. For example, **Beaton v. MacNeil**, supra, involved more than one property and a bankruptcy. Mr. MacNeil abandoned his claim to the matrimonial home in favour of Ms. Beaton, and instead focused on the rental property which had been placed in Ms. MacNeil's name as a judgement avoidance scheme. Ms. Beaton had nothing whatsoever to do with the rental property. The fact that Ms. Beaton retained the family home was a factor in the court's decision to allow Mr. MacNeil to retain the rental property.
- Ms. Reginato relies upon **Soubriere v. MacDonald**, 2011 NSSC 98 (N.S.S.C.) which most closely resembles the facts in this case.

[147] *Law*

[148] In **Kerr v. Baranow**, supra, Cromwell, J discussed the doctrine of unjust enrichment and the corresponding available remedies. In order to succeed in a claim of unjust enrichment, three elements must be proved as follows:

- The plaintiff must first prove an enrichment - the plaintiff gave something that the defendant received and retained. The benefit must be tangible, either positive or negative. It need not be retained permanently. An economic approach is applied to this element of the test.

- The plaintiff must prove a corresponding deprivation - the defendant's enrichment corresponds to the plaintiff's loss. An economic approach is applied to this element of the test.
- The plaintiff must prove an absence of juristic reason - there is no reason in law or justice for the defendant's enrichment and the plaintiff's loss, such as donative intent (gift), contract, or disposition of law. If there is no juristic reason, the plaintiff has made out a *prima facie* case which is rebuttable by the defendant. At this stage, the court is permitted to look to all of the circumstances in order to determine if there are other reasons to deny recovery, and specifically the court must examine the reasonable expectations of the parties and public policy considerations, including how the parties organized their affairs. Mutual benefit conferral can be considered at this stage.

[149] If an unjust enrichment is proven, the court then must determine the appropriate restitutionary remedy, one which results in the defendant repaying or reversing the unjust enrichment. Available remedies include a monetary award, which can be based on a value survived approach or a fee for service approach. Cromwell, J.A. discussed the types of available remedies, which are summarized as follows:

- The first remedy is a monetary one. A monetary award is usually appropriate in most circumstances. A monetary remedy can be based upon the value survived approach or the fee for service approach.
- The second remedy is a constructive trust. A proprietary order will be granted if the plaintiff can demonstrate a nexus, or causal connection between his or her contributions, and the acquisition, preservation, maintenance, or improvement of the disputed property, and that a monetary award would be insufficient. In such a case, a constructive trust can be impressed upon the property in proportion to the claimant's contribution.

Decision

[150] Mr. Peters fails in his claim for additional relief based on an unjust enrichment and the equitable remedies of a constructive or resulting trust. I make this finding for the following reasons:

- Both provided the other with tangible benefits, in the form of cash and services over the course of their relationship and as extensively detailed in the analysis of the previous issue. Ms. Reginato provided primary housekeeping and child care services as well as financial contributions from her part time employment, child support received, and government benefits. Mr. Peters provided more financial contributions and less child care and housekeeping services.
- Both suffered a corresponding loss by the benefits received by the other.
- Ms. Reginato remained out of the work force because she and Mr. Peters had children.
- Ms. Reginato's housekeeping and child care services had undeniable economic value.⁷ She was under no duty to perform such services on Mr. Peters' behalf. These services constituted an enrichment to Mr. Peters and a deprivation to Ms. Reginato. The fact that Ms. Reginato performed these services out of love for her family does not detract from the economic value associated with the services.
- Ms. Reginato's assumption of a greater proportion of the domestic and child care functions allowed Mr. Peters the opportunity to participate in a full-time career and freed him up to assist in the construction of the family home.
- The accumulation of the equity in the Hills Road property was because of a joint family venture. Both parties contributed to the acquisition of the Hills Road property and the equity which ultimately was accumulated.
- The parties worked collaboratively toward a common goal. They decided to have children and to raise them in a traditional model whereby Ms. Reginato was their primary caregiver. She also performed most of the traditional housekeeping functions. She only worked part time after sick leaves and maternity leaves were exhausted. The parties' common goal also included the purchase, planning and construction of the dream home property.

⁷

- Although the parties did not share a common bank account, their lives were nonetheless integrated from an economic perspective. They divided household expenses and shared their financial resources with their family.
- The parties intended to share the equity in the family home equally as is evident from the fact that the property was placed in their joint names, not once, but twice.
- The parties assigned priority to their family. Ms. Reginato sacrificed financially for the family. She worked part time so that Bella and Addison would have the benefit of being raised by a parent during their early years. Ms. Reginato relied on the stability of the relationship for economic success. She remained out of the work force for the benefit of the family.
- The mutual benefits conferred, over the totality of the relationship, are approximately equal based on the evidence which was presented. Mr. Peters contributed more financially because he was employed on a full time basis and Ms. Reginato was employed on a part time basis. Ms. Reginato contributed more from a nonfinancial perspective because she was the primary care provider and cared for the home. Both contributed equally, albeit differently, to the family and to the planning and construction of the home.

[151] I also find that Ms. Peters' remedial claim would be negligible because of the nature of the mutual benefits conferred over the totality of the relationship and as reviewed under the previous issue.

[152] Mr. Peters has not provided the court with sufficiently clear, convincing, or cogent evidence to support additional relief pursuant to his claim for unjust enrichment. The mutual conferral of benefits was approximately equal.

[153] **What is the appropriate order in respect of the household contents?**

[154] The parties' agree on the division and ownership of most of their household contents, with the exception of the camper trailer and dining room set. I find that the dining room set and camper are owned by Ms. Reginato because she bought them. They are to be retained by her. Ms. Reginato will continue to use them for the benefit of the children.

[155] Mr. Peters asks that Ms. Reginato be ordered to repay his father the \$1,200 which he gifted towards the camper's purchase. I deny this claim for two reasons. First, the contribution was a gift. Second, Mr. Peters' father is not a party and did not present evidence.

[156] **What is the appropriate child support order?**

Table Amount

[157] Ms. Reginato seeks the table amount of child support and contribution for s.7 child care expenses. Mr. Peters was not successful in his claim for shared parenting and thus must pay the table amount of support. His income for 2015, according to his last pay stub, was \$52,199.36 less union dues of \$781.61 for a total income for child support purposes of \$51,417.75. Mr. Peters income is fairly stable. Mr. Peters' income equates to the monthly table amount of \$720. All maintenance is payable through MEP.

Child Care Expenses

[158] Child care expenses must likewise be shared on a prorata basis.

[159] Child care expenses were about \$200 per month, without benefit of a tax deduction, when a private individual provided care. As of September 2015, child care expense are \$322 a month, but with the benefit of a tax deduction as Addison now attends a day care.

[160] Ms. Reginato was required to accept a full time daycare position even though full time hours were not required, or she would have lost the daycare space. I accept that finding suitable childcare is difficult. I find Ms. Reginato's decision was reasonable, especially in light of the fact that Ms. Reginato is now working a second job at a Yoga studio and the daycare expense is tax deductible.

Ms. Reginato's Income

[161] In order to set the prorata contribution, I must determine Ms. Reginato's annual income for 2015, 2016 and prospectively. In 2015, Ms. Reginato's income was \$16,800 less union dues of \$180, for a total income of \$16,620. I do not include the nonrecurring RRSP income. In 2015, Ms. Reginato was working on a part time basis. She has since started a second job as an instructor in a Yoga studio. She is also able to pick up additional shifts with her current employer.

[162] Mr. Peters asks that I impute income to Ms. Reginato because she has chosen to work part time when full time hours are available to her and in keeping with s.19 (1)(a) of the provincial *Child Support Guidelines*.

[163] I reject the request to impute income on a retroactive basis. Ms. Reginato's underemployment was required by the reasonable needs of Addison and Bella. Part time work was deemed reasonable by the parties before separation and remained reasonable during the transitional separation period. However, given that Ms. Reginato started to work at a Yoga studio, I find that Ms. Reginato likely earned about \$24,000 in 2016. Prospectively, however, I find that Ms. Reginato has an income earning capacity of \$30,000 effective January 1, 2017.

Child Care Calculations

[164] Child care expenses are to be prorated as follows:

- For 2015, Mr. Peters is to pay 76% of the outstanding child care expenses.
- For 2016, Mr. Peters is to pay 68% of the outstanding child care expenses, less 68% of the income tax benefit associated with the child care claim once Addison started daycare. The parties are to use a child support program to determine the tax benefit.
- For 2017 and onward, Mr. Peters is to pay 63% of the monthly child care expense of \$322, which equates to an additional \$202.86 per month, less 63% of the income tax benefit associated with the child care claim. The parties are to use a child support program to determine the tax benefit. The net child care amount will then be added into the child support order so that it will be enforceable through MEP.

[165] **What is the appropriate spousal support order?**

[166] Section 3 of the *MCA* provides the court with the jurisdiction to make a spousal support order. The factors which I must consider are set out in ss. 4, 5 and 6. I have reviewed these factors and find that Ms. Reginato has established an entitlement to spousal support for the following reasons:

- Ms. Reginato assumed a traditional role whereby she primarily cared for the children and home, and worked on a part-time basis for the benefit of the family unit.

- Mr. Peters encouraged Ms. Reginato to work on a part time basis.
- Ms. Reginato continues to be the primary care parent.
- Ms. Reginato will continue to need the ongoing financial support of Mr. Peters so that she can meet the reasonable needs of Bella and Addison and her own reasonable needs. This will be challenging until Ms. Reginato receives her share of the equity in the family home.
- Mr. Peters has an ability to pay support because he lives with his parents and pays no shelter related expenses.
- Ms. Reginato did not engage in any misconduct which would disentitle her to support as stated in s. 6 of the *MCA*.

[167] Until Ms. Reginato receives her share of the equity in the family home, Mr. Peters will pay Ms. Reginato spousal support of \$200 per month based on the factors stated, the incomes of the parties, and their reasonable needs. No retroactive award is provided given my ruling on the equitable adjustments from the net proceeds of sale.

Conclusion

[168] The following relief is granted:

- Ms. Reginato and Mr. Peters are awarded joint custody of Bella and Addison, with Ms. Reginato having primary care. Mr. Peters is granted liberal parenting time according to the parenting plan.
- There are no debts outstanding to Mr. Peters' parents or to their company.
- The family home is to be sold at fair market value, upon terms and conditions outlined in this decision, unless Ms. Reginato agrees to transfer her interest in the home based on the stated formula.
- In the event the home is sold, the net proceeds of sale will be divided equally, but subject to the specific adjustments noted. The court retains jurisdiction to determine issues which may arise as a result of the order for sale.

- No further relief is awarded by reason of the unjust enrichment claim or the equitable doctrines of constructive or resulting trust.
- Mr. Peters must pay the table amount, and his pro-rata share of s.7 child care expenses.
- Mr. Peters must continue to name the children on his medical plan.
- Mr. Peters must pay spousal support of \$200 per month commencing January 1, 2017 and continuing every month thereafter until Ms. Reginato receives her share of the equity in the family home.

[169] Mr. Gillis will draft the order. If either party wishes to be heard on the issue of costs, written submissions are to be provided by January 20, 2017.

Forgeron, J.