SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION
Citation: *Tobin v. Hurley*, 2018 NSSC 313

Date: 2018-12-11
Docket: SFSNMCA No. 101160
Registry: Sydney

Between:

Katherine Tobin

Applicant

v.

Thomas Hurley

Respondent

LIBRARY HEADING

Judge: The Honourable Justice Lee Anne MacLeod-Archer

Heard: September 19, 20, 27 and 28, 2018, in Sydney, Nova Scotia

Summary: The parties shared a common law relationship. At issue was the date of separation, and whether the former common law wife had proven unjust enrichment and entitlement to spousal support

Key words: Family
Spousal support, Non-compensatory support
Trusts, Unjust enrichment, Constructive trust, Joint family venture
Common law relationship

Legislation: *Parenting and Support Act*, R.S.N.S. 1989, c. 160
Statute of Elizabeth (The Fraudulent Conveyance Act), 1571 (13 Eliz 1) c 5

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Written Release:	December 11, 2018
Counsel:	Candee J. McCarthy for the Applicant William P. Burchell for the Respondent

By the Court:

Facts

[1] The parties started living common law in Nova Scotia in 1999. They subsequently moved to Ontario, but Mr. Hurley suffered a workplace injury in 2002 and he moved back to Nova Scotia in the summer of 2005. Ms. Tobin followed several months later.

[2] Mr. Hurley's parents took title to a property at King Street in New Waterford in December, 2007. A few months prior, while awaiting closing, the Hurleys executed Codicils to their Wills, leaving the property to their son.

[3] The King Street property was renovated after 2007 and Ms. Tobin and Mr. Hurley lived there together. Mr. Hurley's parents executed a deed conveying title to him on August 20, 2014. He transferred title back to them on June 10, 2016.

[4] Ms. Tobin says the parties lived together as common partners until an incident of domestic violence on June 2, 2016. She advances a claim for unjust enrichment and a division of assets held by Mr. Hurley, including the home on King Street, in New Waterford. She also seeks spousal support. Mr. Hurley opposes her claims. He says they separated in 2005.

Issues

[5] The issues to be determined are as follows:

1. When did the parties separate?
2. Was there unjust enrichment and if so, does Ms. Tobin have a claim against the assets held by Mr. Hurley?
3. Should Mr. Hurley pay spousal support to Ms. Tobin?

Issue #1 - When did the parties separate?

[6] There is no contest that the parties shared a common law relationship at one time. The dispute is about how long it lasted.

[7] Mr. Hurley says the parties separated in 2005 when he left Ontario, and that they did not resume their common law relationship thereafter. He testified that:

1. they did not live together as a couple after 2005, rather Ms. Tobin stayed at various residences owned by his parents or him;
2. they did not present themselves as a couple and did not socialize together;
3. they did not share a bedroom;
4. he did not designate her as beneficiary on either his pension plans nor his RRSPs;
5. they did not share financial information;
6. Ms. Tobin didn't deposit money to their joint account, which was established to channel money for expenses while Mr. Hurley was away;
7. She didn't know about a 2nd joint account;
8. She didn't contribute to the purchase of the King St. property, despite having money in the bank;
9. Ms. Tobin was looking for another residence in April, 2016 at which time she listed herself as single;
10. she placed ads on dating websites in June, 2016;
11. they did not acquire any real property in their joint names; and
12. they were never engaged to be married.

[8] Ms. Tobin testified that the parties shared a common-law relationship up until June 2, 2016. She says:

1. she lived with Mr. Hurley after returning from Ontario, and they shared a conjugal relationship;
2. they had joint bank accounts;
3. she named Mr. Hurley as beneficiary under her RRSPs;
4. they purchased a home and renovated it together;
5. Mr. Hurley paid for her to get into the union to obtain work;

6. they were engaged to be married and Mr. Hurley gave her an engagement ring; and

7. they were in a monogamous relationship.

[9] Credibility plays a major role in determining whose version is accepted by the court in these cases. In **Hustins v. Hustins**, 2014 NSSC 185 Justice Beaton reviewed the law on credibility findings and stated as follows:

> **9** In their evidence each party recounted certain events in support of their respective positions … but the parties' differing versions of them did lead the Court to make determinations concerning the credibility of each party, using the framework for analysis discussed by Forgeron, J. in *Baker-Warren v. Denault,* 2009 NSSC 59:
>
>> [18] For the benefit of the parties, I will review some of the factors which I have considered when making credibility determinations. It is important to note, however, that 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. v. Gagnon** 2006 SCC 17, para. 20. I further note that "assessing credibility is a difficult and delicate matter that does not always lend itself to precise and complete verbalization:" **R. v. R. E. M.** 2008 SCC 51, para. 49.
>>
>> [19] With these caveats in mind, the following are some of the factors which were balanced when the court assessed credibility:
>>
>>> 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: **Re: Novak Estate**, 2008 NSSC 283 (S.C.);
>>>
>>> b)Did the witness have an interest in the outcome or was he/she 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 he/she 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. Chorney** [1952] 2 D.L.R 354;
>
> 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?

> [20] I have placed little weight on the demeanor of the witnesses because demeanor is often not a good indicator of credibility: **R v. Norman** (1993) 16 O.R. (3d) 295 (C.A.) at para. 55. In addition, I have also adopted the following rule, succinctly paraphrased by Warner J. in **Re: Novak Estate**, *supra*, at para 37:
>
> > *There is no principle of law that requires a trier of fact to believe or disbelieve a witness's testimony in its entirety. 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. (See **R. v. D.R.**, [1996] 2 S.C.R. 291 at 93 and **R. v. J.H.**, [2005] O.J. No. 39, *supra*).
>
> **10** Counsel for the Father urged it was "untenable" that his credibility would be impeached solely on the basis of his evidence as to having exaggerated his Linkedin account profile, with which I agree. However, the Court's concern about the Father's credibility is not limited solely to that aspect of his evidence.
>
> **11** I did not accept the Father's claim during cross-examination that he could not recall the authors of and contents of certain emails put to him concerning communications with other females during the period when the parties' marriage was ending. The subject matter in the emails made it difficult to accept the Father's amnesia as sincere, and while he did eventually volunteer his then-fresh recall of the emails during cross-examination, that too struck the Court as a disingenuous effort to rehabilitate his evidence on the point.

[10] I will review the evidence with the **Baker-Warren** list in mind. However, I am only providing examples of inconsistencies for each witness,

rather than an exhaustive review. There are many more examples I could use to explain my reasoning.

[11] The most glaring inconsistency in Mr. Hurley's evidence arises in the context of ads placed on dating websites in 2016.

[12] Mr. Hurley sought to introduce screen shots taken from online dating websites into evidence. Ms. Tobin objected to their admissibility, so a *voir dire* was held. At that time, Mr. Hurley testified that he found the web pages open on his laptop before Ms. Tobin moved out in June, 2016.

[13] Mr. Hurley testified that he'd allowed Ms. Tobin to live with him while awaiting her E.I. claim to be approved. He says he tried to get her to move out once her claim was approved, but she resisted.

[14] He testified that after discovering the open dating websites on his laptop, he left the pages open, and did not print screen shots until after he was served with papers in this proceeding.

[15] Ms. Tobin denies all knowledge of these ads. Her counsel vigorously cross-examined Mr. Hurley about the origin of the ads during the *voir dire*. She questioned the accuracy of the information contained on the sites, the origin of the information, and why the username "caperguy53" appears on some pages.

[16] Mr. Hurley denied being or knowing that user, and he denied that he created the ads. He was adamant in his evidence that they are Ms. Tobin's ads, and that he discovered them on his laptop before Ms. Tobin left the home in June, 2016.

[17] After I ruled the screen shots were admissible, the case adjourned until the next available date. On resuming his evidence, Mr. Hurley immediately sought to correct his earlier testimony. He said that he discovered the websites on Ms. Tobin's tablet which she'd left on the coffee table. He said he saved the pages onto his computer, and after Ms. Tobin moved out, his friend went onto the dating sites to see if it was really her. He said it was only after he learned that she was advancing a claim and the separation date was an issue that he printed the screen shots off his computer.

[18] This was a much different version of events, and one that Ms. Tobin argues only arose after Mr. Hurley was cross-examined during the *voir dire,* and realized that his version of events was not plausible.

[19] Mr. Hurley tried to excuse his reversal by saying he was “nervous” and experiencing a “lot of pain” when he testified on the *voir dire*. Yet, according to Ms. Tobin’s evidence, Mr. Hurley’s counsel produced those screen shots at his assault trial, during her cross-examination. That trial was over a year ago and Mr. Hurley was acquitted. Mr. Hurley had ample time to consider their origin before testifying at this trial.

[20] He says he only went back to look at the screen shots after he was cross-examined on the *voir dire,* and remembered that his friend accessed the sites for him. That explanation is simply not believable in the circumstances. The only logical reason for this complete revision of events is that Mr. Hurley realized his original story made no sense.

[21] Ms. Tobin suggests that Mr. Hurley (or a friend known as caperguy53) placed these ads without her knowledge or consent. This is quite plausible. Mr. Hurley knew enough about Ms. Tobin to create the ads, and she says he knew her passwords. He also had a motive, which was to show that Ms. Tobin considered herself single in June, 2016, thereby detracting from any claim she might bring against him.

[22] The timing of Mr. Hurley’s “discovery” of the dating websites is important. The parties got into an argument on June 2, 2016, at which time, Mr. Hurley asked what it would take for her to leave. Ms. Tobin replied that she’d leave “for $100,000.00”, but then she said she would hire a lawyer and “get the house”. It’s shortly after this argument that her password was changed, and the ads were placed online.

[23] Also significant is the fact that only 8 days later Mr. Hurley signed a deed conveying title to the King St. home to his parents. Both Mr. Hurley (Sr.) and Mrs. Hurley testified that they were afraid they would lose their home, as they understood that Ms. Tobin intended to advance a claim against it. This information obviously worried the Hurleys, who by then had moved into the apartment on King Street. They wanted to do anything necessary to protect their home and son.

[24] After the June 2, 2016 altercation, Mr. Hurley was facing assault charges against Ms. Tobin and a possible claim against the King Street home. It's very likely he decided to make some pre-emptory moves by placing the OurTime ads and arranging to sign title over to his parents.

[25] There are issues with the reliability of the Hurleys' evidence, as they had a limited ability to observe who did what to improve the home after 2007, because they were living in Mira and visited infrequently. In addition, Mr. Hurley's parents have an interest in the outcome of this hearing, which impacts their credibility.

[26] In particular, there were inconsistencies that affected the credibility of Mr. Hurley (Sr.). These include:

- He testified that he didn't know Ms. Tobin well at all. Yet, Ms. Tobin and his son lived common law for at least 6-7 years, a portion of which was in Nova Scotia, and Ms. Tobin lived in several properties he owned.
- Despite claiming he didn't know Ms. Tobin well, Mr. Hurley (Sr.) acknowledged that Ms. Tobin accompanied him and his wife to purchase flooring and appliances for their apartment.
- Mr. Hurley (Sr.) acknowledged that they used Ms. Tobin's credit card to make some major purchases. Even if I accept that this was to allow Ms. Tobin to earn points, and that the Hurleys repaid her immediately after the purchase, this suggests a much closer relationship than what Mr. Hurley (Sr.) described. It doesn't make sense that you would take someone shopping for major appliances and flooring, and charge those items to their credit card, unless there was a close and trusting relationship.
- He was evasive and strategic when cross examined. For example, he remembered receiving funds from his son to build a garage on the property, but didn't remember how much he received or when he received the monies, nor who completed the work. Yet he testified that he arranged the builder through one of his contacts. When pressed for details, he claimed to have forgotten the name of that contact.

- Mr. Hurley (Sr.) also testified that he didn't remember when the loan for the house was paid off, yet he was sure it was paid in full prior to signing the house over to his son.

[27] Mr. Hurley says there were inconsistencies in Ms. Tobin's evidence which impact her credibility as well. He notes that after moving from Ontario in 2005, Ms. Tobin used a Mira address. He says that she lived in a cottage in Mira owned by his parents, not with him in New Waterford. Ms. Tobin says they lived together in New Waterford, but she used the Mira address because Mr. Hurley was collecting social assistance.

[28] Mr. Hurley was injured in Ontario in 2002 and his worker's compensation benefits ran out in 2004. Ms. Tobin supported them both before he moved back to Nova Scotia in 2005. Mr. Hurley collected income assistance until 2009. His benefits would have been reduced if they acknowledged living together, because Ms. Tobin was working. Both parties were complicit in this arrangement, which benefited them both. I accept this explanation from Ms. Tobin for the Mira address.

[29] I do not plan to review every other alleged inconsistency in Ms. Tobin's evidence. I do note, however, that she was candid about going to the home and taking the parties' dog without Mr. Hurley's consent. The dog was subsequently returned to Mr. Hurley, and she expressed regret about her actions. She was able to make this admission against self interest.

[30] In the end, Ms. Tobin's evidence was more cohesive and more consistent than Mr. Hurley's. It had a logical flow that Mr. Hurley's evidence lacked. I therefore accept her evidence where it differs from Mr. Hurley's.

[31] Before leaving the issue of credibility, I feel compelled to address one argument advanced by Mr. Hurley's counsel in his closing submissions. He argues that Ms. Tobin lacks credibility because while she testified, she and her mother passed "messages" between them. His submissions argue that this communication was "well rehearsed", and that such "precision" hasn't been seen since "Yogi Berra gave signals to pitcher Whitey Ford in the old Yankees Stadium".

[32] I did direct Mrs. Seymour not to communicate with her daughter while she testified. That direction was given because she was observed to nod, smile and occasionally interject during her daughter's testimony.

[33] While communication with a witness who's testifying is inappropriate, many people nod unconsciously in agreement with someone who's speaking, and with whom they agree. Others might smile at a witness to encourage and support them, and occasionally a family member tries to finish a witness' sentence. I am satisfied that Mrs. Seymour's actions were far from underhanded, and that no "messages" were relayed. She was cautioned twice, but thereafter sat quietly in the gallery. I draw no negative inference against Ms. Tobin in these circumstances.

[34] The testimony of several witnesses supports Ms. Tobin's version of events. Mallory Tobin is married to Ms. Tobin's son Andrew. She observed Ms. Tobin wearing an engagement ring, and she knew Mr. Hurley as Andrew's step-father. They shared meals together with Mr. Hurley and Ms. Tobin in New Waterford.

[35] Ms. Tobin's friend Darlene Schruder knew them as a couple, though she acknowledged that she only saw them together socially on one occasion.

[36] In support of his argument that they didn't share a common law relationship after 2005, Mr. Hurley notes that he didn't designate Ms. Tobin as his beneficiary. Yet Ms. Tobin designated him on her investments, instead of her own children. This supports her assertion that they were in a committed relationship well after 2005.

[37] Further, had Mr. Hurley made it clear after 2005 that he and Ms. Tobin had no future together, it's unlikely she would have given her time and energy towards improving King Street. She had savings in 2005, from which she could have secured her own home. Indeed, shortly after she left in 2016, she was able to help her son purchase a home where she now lives.

[38] There's evidence of tension between Ms. Tobin and Mrs. Hurley, as well as evidence of problems between Mr. Hurley and Ms. Tobin after 2013. A separation date during that period might have been more believable. However, if the parties separated after 2007, this gives rise to a potential claim by Ms. Tobin to the King Street property. Mr. Hurley's insistence that the parties separated in 2005 is less convincing because he clearly recognized this.

[39] I accept that Ms. Tobin and Mr. Hurley lived together as common law spouses until June 2, 2016. They lived apart at times while one or both

worked in another province, but they returned to live in Cape Breton together every spring. Although they didn't socialize a lot, they attended family gatherings and social occasions together. There is no evidence to contradict Ms. Tobin's claim that they were monogamous.

[40] On June 2, 2016 when Ms. Tobin left the home they'd shared together, the parties had been common law partners for almost 18 years.

Issue #2 - Was there unjust enrichment and if so, does Ms. Tobin have a claim against the assets held by Mr. Hurley?

[41] The Supreme Court of Canada in **Kerr** v **Baranow** 2011 SCC 10 laid out the principled approach to unjust enrichment claims. To be successful in her claim, Ms. Tobin must establish the following:

1. Mr. Hurley has been enriched at her expense;
2. She was deprived as a result of his enrichment;
3. There is no reason in law or equity for the enrichment.

[42] Ms. Tobin says that she contributed to the acquisition and improvement of the King St. property. However, her name was not placed on title. The home can be sold to anyone without her consent. Ms. Tobin says she has been deprived of any benefit from her contributions to the home as a result.

[43] Mr. Hurley's parents obtained a loan to purchase the King St. property. Ms. Tobin claims that she and Mr. Hurley agreed to proceed in this way, because he was in receipt of income assistance. She says the Hurleys agreed that when she and Mr. Hurley (Jr.) repaid the loan, title would be transferred to them.

[44] Ms. Tobin says that she and Mr. Hurley discussed the purchase of King Street. She says they knew it involved a lot of work, so Mr. Hurley told her that he was going to bid $35,000 for the property, a low offer they laughed over. The offer was, however, accepted and she says he called and told her that the "house is ours".

[45] At the time, Mr. Hurley was collecting income assistance benefits and Ms. Tobin was working in Ontario during the summers. The Hurleys financed the actual purchase, but the parties paid their living expenses and the loan.

[46] Ms. Tobin says that she and Mr. Hurley moved into King Street in December, 2007. She says that when they first viewed this property, the real estate agent wouldn't even go inside. The building needed gutting, as the walls and some doors were kicked in, and there was garbage strewn throughout.

[47] According to Ms. Tobin, the parties had been living in an apartment owned by Mr. Hurley (Sr.), but they couldn't afford to maintain it while renovating King Street, so they moved into King Street while work was completed. She says she cleaned and hauled away garbage, repaired and painted walls, chose the finishes and directed some of the work completed by others.

[48] She acknowledges that Mr. Hurley worked on the home too. However, when she was away working the summer of 2008, she says he didn't do much to improve the interior. Instead, he put his motorcycle and other personal items in the other side (which was subsequently renovated into an apartment for Mr. Hurley's parents in 2013) and thereafter opened a motorcycle shop in that space.

[49] Mr. Hurley disputes Ms. Tobin's contribution to the home. He acknowledges that Ms. Tobin helped clean the property, but he says that he hired and paid drywallers and builders to do the renovations. He denies that Ms. Tobin did drywalling, crack-filling or the other work she described.

[50] I accept that Ms. Tobin helped clean the property after the deal closed in December, 2007. I also accept that Mr. Hurley hired drywallers and other workers to help renovate. However, that does not mean Ms. Tobin did not assist as she describes. I accept that she helped with the renovations (painting, crack-filling, etc.) and that she chose finishes and directed some of the work. Her contributions helped to improve the property's value and utility.

[51] However, Ms. Tobin did not contribute directly to the acquisition of the home and there's nothing in writing to confirm her interest.

[52] That doesn't end the inquiry. Ms. Tobin directly contributed to the improvement of the home. The property purchased in 2007 bears little resemblance to the home appraised in 2018. Mr. Hurley was enriched by Ms.

Tobin's contributions, and she has been deprived by reason of that enrichment.

[53] In 2014, Mr. Hurley acquired title to a valuable asset with no debt, in his name solely. Ms. Tobin's name was not placed on title. In 2016, Mr. Hurley transferred title to his parents. Ms. Tobin will be left with nothing for her efforts if her claim for unjust enrichment is not successful.

[54] There is no juristic reason for the enrichment to Mr. Hurley and/or his parents. There is no legal or equitable reason that Mr. Hurley should benefit from the contributions made by Ms. Tobin.

[55] Ms. Tobin voiced her concern in 2014 when title was transferred to Mr. Hurley alone. She clearly expected that after contributing to the parties' long term home, she would be placed on title. Mr. Hurley didn't tell her that he didn't consider them a common law couple, or that he didn't believe she was part owner of the home. Had he done so, she might have left and filed a claim sooner. The fact that she didn't is testament to her belief that she had an interest as a common law spouse.

[56] The claim of unjust enrichment has been proven on a balance of probabilities. Ms. Tobin's contributions were not a gift to Mr. Hurley. She had a reasonable expectation that she would benefit from her contributions to the home's improvement.

[57] It would offend public policy to hold that Ms. Tobin's contribution of money and labour towards improving King Street should go unrewarded. In 2007 when the property was acquired, Ms. Tobin was as a common law spouse of 8 years, who'd supported Mr. Hurley after his injury, who worked to make the home habitable, and who helped pay the bills while living there. By 2016 she'd invested 9 more years of time and expense to the King Street home.

Family Venture

[58] There is a clear link between Ms. Tobin's contributions and the home's current value. The next question is whether there is a link between Ms. Tobin's contributions and the accumulated wealth of the parties (other than the home).

[59] I've reviewed all the evidence and find no direct link between her contributions and the accumulation of other assets in Mr. Hurley's name. However, I must also consider whether there was a joint family venture which would support a division of the accumulated wealth, irrespective of direct contributions.

[60] I find there was no family venture, based on the following:

- There were no children of the relationship. Ms. Tobin's daughter lived with the parties for a period of time, but Ms. Tobin received child support for her.
- There is no evidence that the parties discussed or turned their minds to their respective contributions to and interests in the other assets.
- Both parties maintained their own bank accounts, as well as their own retirement plans.
- Both had separate savings accounts to which the other did not have access.
- There was one joint bank account through which they funnelled monies for payment of living expenses, but the parties did not intermingle their other assets.
- There was no express or implied intention to share the other assets accumulated by the parties during their relationship.

Compensation

[61] Having found that Mr. Hurley was unjustly enriched at the expense of Ms. Tobin in relation to the home, I must analyze the compensation due to her.

[62] The appraisal presented at trial was accepted by both sides. It places a value on the home of $95,000.00. The appraisal includes the one bedroom apartment which was built for Mr. Hurley's parents. It does not break out the value attributable to that unit and the one occupied by the parties. However, it does note that the condition of the apartment is superior to that of the three bedroom unit where Ms. Tobin and Mr. Hurley resided.

[63] The question is whether Ms. Tobin is entitled to 50% of the home's value. There is no presumption in favour of an equal share. I must assess the extent to which Mr. Hurley was enriched at Ms. Tobin's expense. She did not contribute to the acquisition of the property, rather she contributed to its improvement. The unimproved property was purchased for $35,000, thus the difference between the appraised value and the purchase price is $60,000.00.

[64] That value less 5% realty fees and HST and reasonable legal expenses nets out at $56,050.00. I direct that Mr. Hurley pay Ms. Tobin half that sum, being $28,025.00 within sixty days. This will fairly compensate her for the unjust enrichment he gained through her contributions to the home.

[65] Mr. Hurley conveyed title to his parents in 2016. He did so knowing that Ms. Tobin planned to advance a claim against the home. He did so with the intent of depriving her of that opportunity.

[66] In **Chisholm v Chisholm**, 2016 NSSC 245 I directed that a deed conveyed to the husband's brother in an attempt to subvert the wife's claim be rescinded. In my decision I said:

> 21 "Most decisions dealing with attempts to set aside conveyances reference the **Statute of Elizabeth (The Fraudulent Conveyance Act)**, 1571 (13 Eliz 1) c 5. That ancient English legislation continues to apply in Nova Scotia today. In **Bank of Montreal v. Crowell and Crowell**(1980), 37 N.S.R. (2d) 292 (TD) Justice Hallett (as he then was) reviewed the history of the **Statute of Elizabeth**. He concluded that in order to be successful under it, a plaintiff need only prove three facts:
>
>> "1.The conveyance was without valuable consideration. It may not be sufficient if the plaintiff proves only that the consideration was somewhat inadequate (Leighton v. Muir, [1962] N.S.J. No. 15 supra); in that case, there was inadequate consideration and although the Court held the conveyance could not be set aside under the Statute of Elizabeth, it was set aside under the Assignment and Preferences Act. The consideration must be "good consideration"; so-called meritorious consideration, that is, love and affection, is not valuable consideration and therefore not consideration within the meaning of the Statute of Elizabeth. (Cromwell v. Comeau (1957), 8 D.L.R. (2d) 676, at p. 684..)
>>
>> 2.The grantor had the intention to delay or defeat his creditors. It is not necessary that the creditor exist at the time of the conveyance (Traders Group Ltd. v. Mason et al., [1973] N.S.J. No. 155 supra.).

> However, the Court will impute the intention if the creditors exist at the time of the conveyance provided the conveyance is without consideration and denudes the grantor debtor of substantially all his property that would otherwise be available [*page304] to satisfy the debt (Sun Life v. Elliott, 31 S.C.R. 91 supra). Apart from that situation, intention to delay or defeat creditors is a question of fact. The Court must look at all the circumstances surrounding the conveyance. The Court is entitled to draw reasonable inference from the proven facts to ascertain the intention of the grantor in making the conveyance. Suspicious circumstances surrounding the conveyance require an explanation by the grantor.
>
> 3.That the conveyance had the effect of delaying or defeating the creditors. This too is a question of fact. The plaintiff must first obtain a judgment against the debtor prior to commencement of proceedings to set aside the conveyance under the Statute of Elizabeth and must on the application to set aside adduce sufficient evidence to enable the court to make a finding that the conveyance had the effect of delaying or defeating the creditors."
>
> [emphasis added]

22 In **Koziol v. Smith** (1997) 160 N.S.R. (2d) 227 (SC) Justice J. Michael MacDonald (as he then was) set aside a conveyance in which a former common-law spouse conveyed a home, which he had shared with his partner, to his parents after separation. He did this despite a cohabitation agreement which gave the former partner a share in the proceeds of the home. The former partner applied under the **Statute of Elizabeth** to have the conveyance set aside. She argued that the home was conveyed without consideration, with the intention of defeating her claim as a creditor. The court agreed.

23 Justice Goodfellow in **Gale v. Gale** 2008 NSSC 177 set aside a deed in similar circumstances to the case before me. In that case, the parties lived in a home they purchased from family friends. The parties agreed that the purchasers would receive a deed when they had paid $50,000.00 towards a total purchase price of $80,000.00. The husband paid $1,000.00 per month as required by the agreement, but after separation the family friends and the wife executed a deed in favour of the wife's daughter and her boyfriend. In the deed, the wife swore an affidavit that she and her husband had never lived in the property. The court set aside the conveyance, and classified the home as a matrimonial asset, the value of which was divisible.

. . .

32 The next question in **Crowell** (*supra*) is whether the deed was conveyed to defeat the claims of creditors. According to Justice MacDonald in **Koziol** (*supra*), creditors

need not have a recorded judgment at the time the deed was signed, but must have been in a position to advance a valid claim.

33 I have found that the home is a matrimonial home under the **Act**. In 2014 the parties were separated. As a separated spouse, Ms. Chisholm had a valid a claim to an interest in the home under the **Act**. … Yet Blair Chisholm effectively says he waived his rights under the option and gifted any equity in the home to his brother after separation. In doing so, Mr. Chisholm robbed Ms. Chisholm of any claim to the home.

34 The crown was a creditor too. After Blair Chisholm was charged and found guilty of dealing in illegal cigarettes, a substantial fine was imposed and the crown took a judgment against him. That judgment was recorded in 2015. It would have created a lien on the home, had title been in the name of Blair Chisholm at the time.

35 There need not be direct evidence of an intention to defeat a creditor's claim (**Koziol**, supra). This can be inferred from established facts. I am prepared to draw an inference, based on the facts before me, that the deed to Daren Chisholm was intended to defeat the claims of creditors.

36 I am mindful of the Court of Appeal's caution in **Hurst v. Gill** 2011 NSCA 100 where a judge's power to set aside conveyances or encumbrances was canvassed. The court held that "although s.10(1)(d) captures more than a breach of s. 8 of the **MPA**, it is not a license to rearrange the property interests of third parties, absent of breach of the Act, inequitable conduct or other wrongdoing."

37 I am satisfied that there is a "breach of the Act, inequitable conduct or other wrongdoing." The conveyance has a number of "badges of fraud" (**Prodigy Graphics Group Inc. v. Fitz-Andrews**, [2000] O.J. No. 1203) , including:

> *The deed went to a non-arm's length person;
>
> *It left Ms. Chisholm with no claim for the home;
>
> * It left the crown with no claim to Blair Chisholm's share of the home, and no property against which to execute with its judgment;
>
> * The recipient of the deed knew that the home was worth more than he says he paid in rent between 2011 - 2014;
>
> *Ms. Chisholm was not advised a deed had been signed;
>
> *The vendor was not advised of the arrangement;

> * The deed was arranged just before Blair Chisholm was criminally charged.

...

> **50** The third question to be addressed under **Crowell** (*supra*) is whether the conveyance had the effect of delaying or defeating the claims of creditors. In the case of Ms. Chisholm it has done so. The home can be sold at any time without her consent. She is not legally entitled to any compensation for its sale. She is effectively a tenant in possession of the home from month to month.
>
> **51** The inequity of the situation is clear. Ms. Chisholm lived in the home with Blair Chisholm and their family for eight years, during which time the rent-to-own payments were made. She thought the home would be theirs eventually. Although there was much evidence on which of them actually paid the rent before separation, the point is moot. They were married and both had income. Even though Ms. Chisholm's name wasn't on the final lease and option, she had an interest that crystalized when the parties separated.

[67] Ms. Tobin advanced a claim for "division of common law property" in her Application. She did not plead the **Statute of Elizabeth Statute (The Fraudulent Conveyance Act),** 1571 (13 Eliz 1) c 5 and although she made submissions based on unjust enrichment and constructive trust, those forms of relief were not actually pled. However, Mr. Hurley clearly anticipated a claim from her asking that the deed be overturned, as his brief argues that the court has no jurisdiction to do so.

[68] If title remains with Mr. Hurley's parents, there's little chance Ms. Tobin will collect on her judgment. Mr. Hurley has few assets against which Ms. Tobin can execute.

[69] I have already found that Mr. Hurley conveyed title in 2016 with the intent of depriving Ms. Tobin of a claim to the home. There was no consideration for the transaction. Mr. Hurley's parents always intended for him to retain an interest in the home, according to their evidence and the Codicils they signed. So the deed was a sham.

[70] For these reasons I direct that the deed to Gerald and Helen Hurley is rescinded, and that all right, title and interest in the King Street property vests with Mr. Hurley effective June 10, 2016. Failing payment by Mr. Hurley of the amount ordered herein, Ms. Tobin may enter judgment and record her interest against the home, effective the date this decision is released.

ISSUE # 3

[71] Ms. Tobin claims spousal support from Mr. Hurley. He opposes that claim, arguing that she is fully able to support herself.

[72] Ms. Tobin worked summers with Breyer's Ice Cream in Ontario before moving back to Nova Scotia in 2005. She returned to Ontario to work in the summers of 2006, 2007 and 2008, after which she sought employment locally. She worked at Tim Horton's before securing a job through the labourer's union with Mr. Hurley's assistance.

[73] Since becoming a member of the union, Ms. Tobin has worked out of province as a labourer, doing snow removal. In 2017 she earned just under $51,000.00.

[74] Mr. Hurley had no employment income between 2005 and 2009. He returned to work in 2010, and at one time earned over $170,000.00 per annum. However, his income declined significantly after 2014, when he opted stay and to work in Cape Breton.

[75] Ms. Tobin is 56 years of age. She presented no medical evidence to indicate that she is unable to continue working as a labourer. She purchased a home with her daughter and son-in-law after separation, and resides with them when she's not away working.

[76] However, its clear that Ms. Tobin was a stay-at-home mom when the parties met. She started working at a school cafeteria in Ontario, and she has continued to work regularly since.

[77] Mr. Hurley worked as a labourer in Ontario until he was injured in 2002. In 2010, he returned to work through the labourer's union. Since 2014 he has stayed and worked in Cape Breton earning much less then he did with the union. There's no evidence he cannot return to work with the union should he wish.

[78] The relevant factors from the **Parenting and Support Act** R.S.N.S. 1989, c. 160 (as amended) include:

1. There is little evidence on the division of roles, though Ms. Tobin was a stay-at-home mother when the parties met.
2. There is no express or tacit agreement dealing with support

3. There is no written agreement.
4. There are no children of the relationship.
5. There are no dependent children.
6. Mr. Hurley suffered a workplace injury years ago but successfully returned to work in 2010. Ms. Tobin is healthy.
7. Both are able to work.
8. Mr. Hurley assisted Ms. Tobin in obtaining work through the union.
9. Ms. Tobin's budget shows a deficit. Mr. Hurley did not tender a statement of expenses or his 2017 income tax return, so his ability to pay support is unclear.
10. Mr. Hurley lives in a home with no mortgage. His other reasonable needs are not clear.
11. Ms. Tobin has a tax free savings account, two RRSPs, savings and a small pension. Mr. Hurley has two union pensions, a home with no debt, tax free savings, an RRSP and several vehicles. He also retained all of the household furnishings after Ms. Tobin left.
12. There is no child support payable.
13. Ms. Tobin is able to earn income, but she travels for work as a labourer to earn her current income.

[79] Having considered the legislative factors and the evidence, I find that Ms. Tobin is entitled to spousal support on a non-compensatory basis.

[80] Ms. Tobin claims retroactive spousal support for three years prior to her Application on the basis of **D.B.S. v. S.R.G.** 2006 SCC 37. That case directs me to consider the conduct of the payor, the circumstances of the spouse who's claiming support, and any hardship that might arise from a retroactive award.

[81] Mr. Hurley has exhibited blameworthy conduct. His efforts to defeat Ms. Tobin's claim to a share of the home are but one example. Ms. Tobin had E.I. benefits when they separated, but no home or furnishings. She took just her personal belongings. She effectively had to start over. Although he

made her personal effects available Mr. Hurley made no effort to support her financially.

[82] I have no evidence that a retroactive award would cause hardship to Mr. Hurley. There's evidence that he has assets available to pay.

[83] Mr. Hurley should have paid support to Ms. Tobin after separation to allow her to re-establish herself after a lengthy common law relationship. It's appropriate that he pay a retroactive award now. I direct that he pay a total of $10,000.00 as lump sum retroactive spousal support within 60 days. This figure represents a net sum, because Mr. Hurley will not get the tax deduction associated with periodic payments.

[84] Ms. Tobin shows a monthly shortfall of $471.60 but some of her expenses are discretionary and don't appear to reflect her shared living arrangements. Again, I don't have Mr. Hurley's budget or current income. However, I do know that he earned over $100,000.00 annually while working with the union, and that he lives in a home with no mortgage. He chooses to work in Cape Breton for less, but he also testified that he keeps cash around the home, so I will assume that his income meets his needs and more.

[85] I direct that Mr. Hurley pay periodic and ongoing spousal support of $300.00 monthly to Ms. Tobin, commencing December 1, 2018 and continuing until December 1, 2022 when it will terminate. Ms. Tobin will be 60 years of age and eligible for Canada Pension benefits at that time.

Conclusion

[86] Ms. Tobin is entitled to payment for her interest in the home. She is also entitled to retroactive and ongoing spousal support. Her counsel will prepare the order. I will hear counsel on the issue of costs if they cannot agree, in which case time for submissions may be booked through the Scheduling office.

MacLeod-Archer, J.