SFHF 007637

IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

BETWEEN: **ROBERTA CLARK** **- APPLICANT**

-AND-

TERENCE VINCENT KELLY **-RESPONDENT**

DECISION

HEARD: **AT HALIFAX, NOVA SCOTIA BEFORE THE HONOURABLE JUSTICE DOUGLAS C. CAMPBELL ON OCTOBER 12, 2001, JANUARY 21, 2002 AND JANUARY 22, 2002**

DECISION: **JUNE 27, 2002**

COUNSEL: **B. LYNN REIERSON, COUNSEL FOR THE APPLICANT**

MICHAEL KING, COUNSEL FOR THE RESPONDENT

This matter arises as a result of an application pursuant to the *Family Maintenance Act* (now the *Maintenance and Custody Act* R.S.N.S. 1989, c.160 as amended most recently by S.N.S. 2000, c.29) for spousal support combined with an application by Ms. Clark for a declaration of an unjust enrichment so as to recognize a claim by her in respect of certain of his assets. Ms. Clark also contends that the *Matrimonial Property Act* S.N.S., 1980 c*.9* would apply to the parties, notwithstanding the fact that they are not married. She seeks a division of assets thereunder. The parties were never married but lived in a common-law relationship. Their positions as to when that relationship began to constitute a so-called common-law relationship are apart by approximately seven years. They are agreed that the final thirty-one months of their relationship so qualified.

The parties first met in 1987. At that time Ms. Clark resided in Halifax, Nova Scotia and Mr. Kelly resided in Toronto, Ontario where he had been practicing law for many years. He was also a director of Maple Leaf Gardens and therefore was involved with the Toronto Maple Leafs hockey team and its organization. Ms. Clark had been separated from her first husband with whom she had three children, two of which were residing with her at the time. She was not gainfully employed except for some work as a babysitter.

The parties soon became romantically involved and began visiting each other, usually either in Halifax or Toronto. The frequency of the visits was roughly every

second or third weekend. When those weekend visits took place in Toronto, the parties stayed at a hotel despite the fact that Mr. Kelly had a place of residence in Toronto. When the visits took place in Halifax, the parties often stayed at a hotel although they also stayed at Ms. Clark's residence. In Toronto they ate all their meals in restaurants and usually did so when in Halifax as well.

This arrangement changed in January 1996 when Ms. Clark moved to Toronto and took up residence with Mr. Kelly. He purchased a residence there and their cohabitation continued until approximately July 1998 when Ms. Clark returned to Nova Scotia. There is no question (and the parties both agree) that the above period of cohabitation for thirty-one months was a time frame during which they could be said to have been in a common-law relationship.

Ms. Clark contends that the entire eleven year period between 1987 and July of 1998 represents the period of their common-law relationship. She notes that the relationship was an exclusive one, that it involved intimacy, that they were in contact very frequently when separated by geography, that they had long-term intentions and that they presented publicly as a couple. They attended many functions involving Maple Leaf Gardens and travelled to watch Maple Leaf hockey games to various cities where the team was playing. She lists a large number of services which she performed for the benefit of Mr. Kelly including assisting him with his wardrobe, diet, personal hygiene and other domestic and personal services.

At the commencement of the parties' relationship Ms. Clark was beginning to face difficulties with regard to her finances. She had problems with her health. The

spousal support from her first husband had terminated due to his health problems. Her remaining children soon reached financial independence so that the child support came to an end. Her investments which came from the property settlement in her divorce were valued at approximately $35,000.00 and, of those, approximately $17,000.00 was in the form of an account receivable. To assist with her finances, Mr. Kelly in or about 1990 set up a trust fund from which the sum of $1,000.00 per month was payable to the applicant to assist her with her rent and other expenses. This amount continued to be paid monthly until the parties began their cohabitation in January 1996.

In or about November 1996 a second trust was set up by Mr. Kelly as part of a tax plan used by himself and his law partners to divert income to family members. The trust was to expire on December 31st, 2000. From this fund, Mr. Kelly directed to Ms. Clark the sum of $2,000.00 per month which continued until the trust expired. In addition, Mr. Kelly paid the mortgage installment for the Halifax property to be referred to below since its acquisition in the summer of 1998. The amount of that installment was $956.00.

Mr. Kelly remained married to his first wife, despite their separation for many years until he was finally divorced at the instigation of his former wife in February 1997. By then, the parties had been cohabiting in Toronto for about thirteen months. After that event, Ms. Clark began to shop for a ring which she considered to be an engagement ring. Mr. Kelly testified that he did not see it in that way and indicates that they did not make any wedding plans. The ring was purchased at a cost, including financing, of almost $30,000.00 and was in Ms. Clark's possession as of the trial date.

During the period when the parties resided together in Toronto, they, according to Mr. Kelly, did not refer to each other as "wife", "husband" or "spouse" but according to Ms. Clark they presented themselves socially as a couple.

The relationship began to break down soon after the cohabitation began and after some time Mr. Kelly began to sleep in the basement of their home.

As the summer of 1998 approached, the relationship had become quite uncomfortable for both of the parties. Ms. Clark felt that they had been happier when conducting the long distance relationship described above and wished for a return to that arrangement. It was agreed that she would shop for a place to live in Halifax. It was her preference to purchase a home and she chose a three bedroom home at 232 Spinnaker Drive, Halifax for a price of $195,500.00. The title was taken in joint tenancy although the purchase funds were provided by Mr. Kelly. Furniture was moved from the Toronto home to Halifax and the Toronto property was eventually sold.

The parties have opposite versions of the events relating to the separation itself. It is Ms. Clark's view that her move from Toronto to Halifax in the summer of 1998 was not intended to be the commencement of a separation; rather it was a return to their long distance relationship. She indicates that at or about the time of her departure from Toronto, she was told by Mr. Kelly that the relationship was over. Her various attempts to reach him to discuss their relationship by telephone failed and she testified that she was told by Mr. Kelly's private accountant that her attempts to reach Mr. Kelly were not appreciated.

By contrast, Mr. Kelly and his accountant indicated that Mr. Kelly would have welcomed the contact. Mr. Kelly appears to have interpreted the move by Ms. Clark from Toronto to have constituted a termination of their relationship.

CREDIBILITY

Counsel for Ms. Clark urged me to conclude that she had successfully impeached the credibility of Mr. Kelly's evidence by pointing out that he had sworn to the truthfulness of his statement of financial information having omitted to list his present wife and her parents as parties living in his household as required by part D of the standard form. He had, at or about the same time remarried. His counsel took complete responsibility for the preparation of that form and its omission. It is completely understandable that counsel would be concentrating on the revision of the budgeted revenue and income items having worked from an earlier draft prepared at a time when Mr. Kelly had not yet remarried. I find that that kind of inadvertent omission is a legitimate and unintended oversight and was not intended to mislead anyone. When counsel for Ms. Clark inquired about Mr. Kelly's marital status a number of days prior to the commencement of the trial, he freely confirmed his remarriage. I was not made aware that anything was done to subpoena or require income information from his new spouse. I find that where the evidence of the parties was different, it was mostly a matter of perspective, emotion and memory that would explain those differences and that the outcome in the case would be unaffected by the adoption of either version of events. The integrity of Mr. Kelly's evidence is unaffected by the omission in his sworn statement of financial information. I also have no hesitation

confirming the forthright nature by which Ms. Clark testified even though there are many differences in their respective characterizations of events.

ISSUES

The issues are:

1. Whether there is an entitlement to spousal support and if so the quantity and duration is to be determined.
2. Whether the *Matrimonial Property Act* applies to this couple for purposes of dividing their assets, notwithstanding the definition of spouse which does not include common-law spouses.
3. Whether the applicant is entitled to compensation or a remedial constructive trust in relation to unjust enrichment of the respondent.
4. Costs.

SPOUSAL SUPPORT

For spousal support to be payable, the *Family Maintenance Act, supra* requires by virtue of the definition of spouse in section 2(m), that common-law partners "live together as husband and wife for one year". That statute was applicable to the parties at the time of the commencement of the application and therefore probably governs. The amendment to the statute when its name was changed to *Maintenance and Custody Act* defines "common-law partner of an individual as meaning another individual who has cohabited with the individual in a conjugal relationship for a period of at least two years". Section 3 gives the court its authority to order spousal support for a common-law partner.

Regardless of which statute is applicable to this application, it is clear that jurisdiction for spousal support exists because, for the thirty-one months between January 1996 and July 1998, the parties were in a conjugal relationship in excess of two years and also lived together as husband and wife for one year thereby complying with the definitions in both versions of the statute.

After the second trust's mandate to pay $2,000.00 per month expired on December 31, 2000, Mr. Kelly consented to an order for spousal support on September 24, 2001 at the rate of $2,000.00 per month(plus $8,190.00 for a retroactive period) plus his commitment to pay the mortgage payment of $956.00 in respect of the jointly held property in Halifax possessed by Ms. Clark. Therefore the question of entitlement is essentially consented to and the real issue is the duration of support which is part of the quantification process.

The length of the common-law relationship is relevant to this analysis. Section 5 of the original and amended versions of the Act requires the maintained spouse or common-law partner to assume responsibility for his own maintenance unless "considering the ages of the spouses, **the duration of the relationship**, **the nature of the needs of the maintained spouse and the origin of those needs**, it would be unreasonable to require the maintained spouse to assume responsibility for his maintenance and it would be reasonable to require the other spouse to continue to bear this responsibility" (emphasis added). The amended version of that section is identical except that the words "common-law partner" are added wherever the words "spouse" appears.

Clearly the parties had a relationship for approximately eleven years. However, the word “relationship”, as used in the above noted section of the Act refers to the duration of the spousal relationship or common-law partner relationship.

It is not unusual for parties to a relationship to go through a period, sometimes lengthy, during which they are dating and before they either begin to cohabit (thereby commencing a common-law relationship) or marry. The period during which they are dating is usually not even referred to, let alone relied on, by the court in quantifying or setting the duration for support.

In my view, the test for determining whether or not the seven year relationship that existed prior to cohabitation constitutes a common-law relationship is met by asking whether an entitlement to support would have existed on the day before cohabitation began. In other words, could it be said that the parties were in a common-law relationship between 1987 and January 1996 while they were living in Toronto and Halifax respectively and visiting with each other on certain weekends?

In my view, the answer is that no such entitlement would have arisen at any point prior to the cohabitation. If the original *Family Maintenance Act* applies, the operative words in the definition of spouse in section 2(m) are "lived together as husband and wife...". If the amendments under the newly titled Act apply to this case, the operative words are "who has cohabited with the individual in a conjugal relationship...". Under either statute, there is a requirement for cohabitation which implies the establishment of a shared place of residence.

Counsel for Ms. Clark suggests that the parties were in fact cohabiting or living together during those weekends when they met prior to January 1996. She notes that many married people, common-law or otherwise, find themselves separated by distance and meeting very infrequently without it being suggested that the relationship has ended.

In those situations, however, the parties usually have had a settled common household and simply find themselves later separated by geography without any intention of terminating their spousal relationship. Even when distance separates them from the start, a common household or households is/are usually an essential manifestation of the marriage, common-law or otherwise. By contrast, when a long distance relationship consisting of significantly interrupted contact occurs prior to cohabitation, no matter how exclusive the relationship may be, the parties would be said to be dating as opposed to being in a common-law relationship.

Section 5 of the Act sets out a number of factors which affect the obligation for spousal support, one of which is the "duration of the relationship". This of course refers to the spousal or common-law relationship and not the dating relationship.

In *Cann v. Huxley* (1987), 78 N.S.R. (2d) 422 at page 430 Daley, J.F.C. listed relevant factors in testing for common-law relationships as follows:

> *"1. There must be a living together as husband and wife so as to connote an element of intention, permanence and commitment, some sort of stable relationship;*

2. *This stability involves sexual activity and a commitment between the parties;*

3. *It generally necessitates living together under the same roof, sharing of household duties and responsibilities and financial support;*

4. *The couple should present themselves to their community or society as husband and wife."*

The Nova Scotia Court of Appeal in *Soper v. Soper* 44 R.F.L. (2d) 308 (C.A.) at page 15 outlined the test for the establishment of a common-law relationship as follows:

> *"I think it would be fair to say that to establish a common-law relationship there must be some sort of stable relationship which involves not only sexual activity but a commitment between the parties. It would normally necessitate living together under the same roof with shared household duties and responsibilities as well as financial support. I would also think that such a couple would present themselves to society as a couple who were living together as man and wife. All or none of these elements may be necessary depending upon the intent of the parties.*
>
> *I have carefully reviewed the evidence of this case and I am unable to find many of the essential elements that would establish a common-law relationship. There have been occasional sexual relations between the appellant and Mr. Roberts but there is no evidence that they lived together; there is no evidence that they shared a stable relationship; there is no evidence of a commitment between the parties; there is no evidence of a sharing of financial responsibilities nor any indication that Mr. Roberts contributes in any way to the financial support of the appellant, nor is there any evidence that they presented themselves to society in a husband and wife relationship."*

This thirty-one month common-law partnership was a second marriage for both parties at a later in life point for both of them, more so for Mr. Kelly in his mid-sixties at the start. Ordinarily, the duration of spousal support would bear some relationship to the length of the spousal relationship. Mr. Kelly has paid Ms. Clark the sum of

$2,000.00 per month pursuant to the second trust (starting with a date prior to the separation and continuing from separation in July 1998 until December 31, 2000.) This resumed on September 1, 2001 after a retroactive payment above noted. From roughly September of 1998 he also paid the mortgage installment above noted. Assuming that he has continued to pay between the date of the trial and the date of this decision, he will have paid something in the order of forty-eight months at the rate of $2,000.00 and probably in the range of forty-six months of mortgage installments at $956.00. Whatever the exact payments were, the aggregate commitment is many tens of thousands of dollars (probably approaching $140,000.00) and has lasted for a period in excess of the length of the common-law relationship.

Having concluded that the seven year dating period prior to the common-law relationship is not part of that relationship, I conclude that it is not irrelevant to the task of fixing the duration of support payments on the very particular facts of this case. Unlike most daters, Mr. Kelly had been forwarding money to Ms. Clark throughout that entire seven year period mostly at the rate of $1,000.00 per month to assist with her expenses. She had thereby depended upon his financial contribution for more than the period of their common-law relationship and this is a factor that affects my conclusion as to duration of support. However, there are other factors.

Section 5 of the Act lists a number of factors from which the court may be assisted in concluding whether it will be reasonable to require the paying spouse to bear responsibility and unreasonable to require the maintained spouse to assume

responsibility for her own maintenance. One of those is the "nature of the needs of the maintained spouse and the **origin** of those needs" (emphasis added).

Ms. Clark, at the commencement of the dating relationship was fast approaching a very likely financial crisis. Spousal support from her first husband had terminated due to his health and her child support entitlement had ended (as did the costs of raising the children). Her matrimonial asset settlement of some $35,000.00 would have been her only significant means by which she could support herself and that would have been expended over a short period of time at the end of which she might have been expected to be financially destitute.

The dating relationship and the common-law partner relationship that followed had significant and valuable financial consequences for Ms. Clark. She enjoyed a very good lifestyle. She was able to avoid spending her capital to the point that she still had it as of trial date. She received the various monthly amounts from the two trusts (although during cohabitation the later one was essentially an income splitting device) mentioned above and she has a 50% ownership of the property in Halifax paid for by Mr. Kelly. She has a diamond ring which cost $27,000.00. The residential property has an appraised value of $220,000.00. It has an equity before disposition costs in the high $70,000.00 range.

There is no question that Ms. Clark has significant need and that she is unlikely to be able to obtain self-sufficiency at a comfortable lifestyle on her own. If sympathy were the test, an indefinite order in some amount would be required. However, the origin of those needs does not lie in the common-law relationship and should not be the

indefinite or even long term responsibility of Mr. Kelly no matter how much compassion will be felt for Ms. Clark's likely eventual dire circumstances. She was facing a likelihood of financial crisis when the dating relationship began. It and the subsequent common-law relationship afforded her the opportunity to defer that inevitability. There is a difference between "depending" upon a spouse for financial support as Ms. Clark does now and in the future and being "dependent" in the legal sense of that word.

The Supreme Court of Canada decision in *Bracklow v. Bracklow* [1999] 1 S.C.R. 420 is a leading decision with respect to the current law of spousal support. It is often relied on as an expression of the principles of entitlement to spousal support and for the far reaching nature of the obligation to pay spousal support, given the fact that Mrs. Bracklow was dependent for health reasons not connected to the marriage or the payor's behaviour in the context of a relatively short marriage. However, it often goes unnoted that, in the end, the Supreme Court hinted that the duration for the support obligation - a matter to be sent back to the trial judge - may have been already reached or nearly so. Strengthened by that suggestion, the trial judge who re-heard the matter terminated the support.

Counsel for Ms. Clark contends that the spousal support should be set at $4,500.00 per month for the years 2002 and 2003 and then $3,000.00 per month when Mr. Kelly's post-retirement income is projected to decline substantially and that it should be payable indefinitely. I would conclude that a spousal support award of that magnitude would be seriously overreaching in light of the thirty-one month length of the

common-law relationship after giving appropriate weight to the seven year dating relationship.

There was evidence before me that Mr. Kelly has very generous tendencies. From 1981 to 2000 his charitable donations totalled $477,211.00. The gratuitous payments he made to Ms. Clark during their dating relationship was a further example of his generosity. His benevolence should not be turned against him in order to create such a sizable and long term commitment at a time when he begins his retirement and expects significant reductions in income.

The principles in *Bracklow, supra*, which support Ms. Clark's entitlement to spousal support are virtually conceded. Her common-law relationship was much shorter than Ms. Bracklow's relationship. Ms. Bracklow had a higher probability of being unable to support herself than Ms. Clark. Termination nonetheless applied to Ms. Bracklow.

Recognizing the significant advantages derived by Ms. Clark over the 11 year period that she knew Mr. Kelly and the post-separation support already paid, I would conclude that the legal dependency which derives from their thirty-one month common-law partnership is such that the obligation for support should be terminable. It shall continue at the current rate of $2,000.00 per month but limited to the 1st day of each and every month hereafter, to and including December 1st, 2002. In addition, Mr. Kelly would continue to be responsible to pay the monthly mortgage installment with respect to the mortgage with Canada Trust charging 232 Spinnaker Drive, Halifax until such time as the property is sold. The continuation of the monthly support obligation

will result in a total support regime for a period considerably in excess of the common-law partnership itself. There are several reasons for this untypical result. The unusual fact of the seven year dating relationship being accompanied by monthly financial support upon which Ms. Clark was earnestly depending distinguishes this case from others. Without that fact, an award in the area of one to two years from the July 1998 separation date may have been appropriate.

At the conclusion of the trial in late January 2002, counsel for Mr. Kelly wisely refrained from suggesting an immediate termination and argued that the maximum time frame would be one year and urged the court to restrict it to eight months. My decision provides Ms. Clark with support for the balance of the calendar year being eleven months from the completion of the trial; a period not outside that which was generously conceded by Mr. Kelly as a maximum.

As a matter of law, the spousal support payments of $2,000.00 per month will be tax deductible to Mr. Kelly and taxable to Ms. Clark. A payment to a third party such as, in this case, Canada Trust, does not have those tax implications unless the parties elect or the court directs that the provisions of sections 56.1 and 60.1 of the *Income Tax Act* apply. The current interim order refers to the mortgage payments being paid by Mr. Kelly as being "further interim support payments". I assume, without knowing, from that wording that the parties intended those installments to be deductible from and included in their respective incomes for tax purposes. With respect to those mortgage payments to be paid after the date of this decision, I would be prepared to include in the order a provision that 56.1 and 60.1 of the *Income Tax Act* are intended to apply with

the effect that these installments are to be treated as spousal support and included in the income of Ms. Clark and deducted by Mr. Kelly provided the order also includes a provision that Mr. Kelly shall reimburse Ms. Clark for any and all tax or other costs associated with such inclusion. That will be Mr. Kelly's choice. If he elects not to oblige himself to that reimbursement, that provision for deductibility of the mortgage installments shall not apply.

APPLICABILITY OF THE MATRIMONIAL PROPERTY ACT

The Court of Appeal in *Walsh v. Bona* [2000] N.S.J. No. 117 declared that the definition of spouse in section 2(g) of the *Matrimonial Property Act*, *supra*, ("*MPA*") is of no force or effect because it violated a Charter right by discriminating against common-law couples. However, the court temporarily suspended the effect of that declaration for a period of twelve months to enable the legislature "to devise new criteria for eligibility under the *MPA*, including whatever transitional provisions may be deemed necessary and to pass new legislation that meets the constitutional requirements of section 15(1) of the Charter".

The clear words of the *MPA* restrict its applicability to couples who are legally married or parties to a voidable marriage that has not been annulled or gone through a form of marriage in good faith that is void. Clearly the Act, on its words, does not apply to common-law partnerships.

Within the prescribed year the legislature passed certain statutory amendments which allow common-law couples including same sex couples, to register their domestic partnership thereby subjecting themselves to the provisions of the *MPA*. Counsel for

Ms. Clark argues that such an arrangement falls short of correcting the constitutional requirements of the decision in *Walsh v. Bona, supra* and that accordingly the *MPA* must be taken to now apply to common-law partnerships.

It is important to note that this argument is not being made before me as a Charter argument, per se, given that notice was not provided to the Attorney General. Therefore, the direct question of whether the above amendments represent a violation of Charter rights is not before me.

The *Walsh v. Bona*, *supra* decision of the Court of Appeal has been appealed to the Supreme Court of Canada. At the time of preparing this decision, the Supreme Court has reserved its decision. I might have preferred to continue to reserve my decision until the outcome there is known but the further delay which this would occasion to the parties would create an unnecessary hardship and I have determined, for reasons that I will give below, that my conclusion would be the same no matter what is done in that case.

In the absence of a successful Charter application challenging the new provisions for registration of domestic partnerships, I must assume that the new legislation is effective. The Court of Appeal did not elaborate to indicate what happens to the *MPA* after twelve months. At most, the definition of spouse in the *MPA* is null and void since that is precisely what the Court of Appeal prescribed. It is not for me to decide, in the context of this case, whether the new provisions corrected the Charter concerns enunciated by the Court of Appeal. If the amendments were successful, then the *MPA* would continue to apply only to married couples and to those non-married

couples who have registered their domestic partnership. If the amendments did not succeed in that task, then I would be expected to apply a *MPA* which has no valid definition of spouse. When approaching the task of dividing matrimonial assets pursuant to sections 12 and 13 of the Act, my authority would be to do so only in respect of "spouses". With no definition in the Act to turn to, I would feel compelled to apply the ordinary meaning of that word which by dictionary and common usage refers to a couple who are legally married.

In reaching that conclusion, I am cognizant of the fact that many federal and provincial statutes have been amended so as to, by definition, include common-law couples for the purpose of those statutes respectively. This trend toward treating common-law couples and married couples in the same way for various and particular laws does not change the fact that the word "spouse" means legally married spouses. I conclude as well that the growing tendency to refer by way of vernacular to one's common-law spouse as one's "spouse" does not change the meaning and intent of the legislature.

In any event with no Charter challenge before me and with there having been no particular mechanism by which the initiatives of the legislature would be assessed, I must conclude that the registration system was the legislature's response to the Court of Appeal's concerns and that it met those concerns.

I have therefore concluded that the *MPA* does not apply to this couple and that no remedy pursuant to it is available.

I have not been made aware of the exact issue before the Supreme Court of Canada in *Walsh v. Bona, supra,* in terms of what options may exist as to possible outcomes of that decision. However, if one option is to rewrite the legislation to include common-law partnerships within the purview of the *MPA,* it would have been important for me to direct my mind to the Act's application here. In that case, relying on the very short duration of the common-law relationship, and having regard to the one-sided history of the acquisition of most of the assets as I would be expected to do under sections 13(d) and (e) of the Act, I would have made no larger award than I have done below.

Each of the parties had assets at the time cohabitation began. Mr. Kelly had been substantially established through his law practice and has significant assets. Ms. Clark had a relatively small net worth. By virtue of the above subsections of the *MPA* a very small percentage division in favor of Ms. Clark would have been awarded, easily satisfied by Ms. Clark's interest in the Halifax home, its furniture, the diamond ring and by the denial of the claim which Mr. Kelly would have to Ms. Clark's assets.

In summary, as I read the current state of the law therefore, the *Matrimonial Property Act* does not apply to common-law couples and if that is to change, the remedy for Ms. Clark would be no greater than that which I will direct below.

CONSTRUCTIVE TRUSTS/UNJUST ENRICHMENT

Counsel for Ms. Clark argues that Mr. Kelly has been unjustly enriched by services provided for his benefit by Ms. Clark. Without reviewing them in detail, I find that the services relied on are not of such a type as to give rise to an enrichment and

that if there was an enrichment at all it would be for Mr. Kelly to claim by virtue of his provision of 50% of the equity in the Halifax home along with various chattels including the valuable diamond ring.

The property at 232 Spinnaker Avenue in Halifax is held in the joint names of the parties. Mr. Kelly concedes that Ms. Clark is entitled to 50% of the net proceeds of sale and I agree that, as joint owner, a gift to her of that interest was intended. Similarly a gift in the form of the diamond ring was intended to pass title to Ms. Clark.

Counsel for Ms. Clark contends that she is entitled to $125,000.00 arising from the fact that he had set this sum aside for her in the above noted trust in order to provide an income from which to pay her a monthly sum. When Mr. Kelly purchased the home in which the parties resided in Toronto in January 1996, he had Ms. Clark sign cheques totalling $125,000.00 in order to liquidate that trust to raise part of the funds for the Toronto purchase. The Kelly trust was no longer needed since the parties were residing together and Ms. Clark was being thereby supported directly. When the Toronto property was sold in July 1998, the proceeds were not shared with Ms. Clark. That property, originally purchased in Mr. Kelly's name was transferred to joint title thereafter. The property increased in value from $292,000.00 to $342, 500.00 by July 1998. After Ms. Clark moved back to Halifax in 1998, that property was sold.

It is argued that Mr. Kelly was unjustly enriched by use of the corpus of the trust to buy that property and that her compensation should be $125,000.00 which equates with the amount originally set aside for her in trust.

Based on the evidence, I have concluded that the creation of the trust was a unilateral gratuitous arrangement made by Mr. Kelly in order to provide income to Ms. Clark during their dating relationship which would allow that income to be taxed at her lower rate. She was the person who was enriched, he was correspondingly deprived and there was no juristic reason offered. I find it not to be unreasonable that when the trust was no longer needed it would be dissolved and the money given back to its original owner.

As I read the argument for Ms. Clark, apart from the payback of the trust corpus, the enrichment/deprivation contention rests exclusively in the various domestic services provided. When those are offset against the significant financial support provided by Mr. Kelly including opportunities for exceptional forms of socializing including numerous international trips, it is impossible to conclude either that he was enriched or that she was deprived. Regarding the Toronto home, if either party could be said to have held their interest in trust for the other, it would be Ms. Clark holding title in trust for Mr. Kelly. I find it entirely to be reasonable that he would retain the proceeds of the Toronto home especially since he almost contemporaneously created equity in the vicinity of $76,000.00 in the joint names of the parties of the Halifax home.

I have concluded therefore that no further compensation is required in respect of the Toronto home or in respect of either of the trusts.

THE PARTITION ACT

For married couples, the *MPA* gives the court clear authority to direct the sale of matrimonial assets and a distribution of their proceeds. Assuming as I do that the

MPA does not apply to this couple, that authority is not available. I am unaware of any authority to direct the sale of assets even in those situations where a resulting or constructive trust is found to exist. The remedy appears to be in damages.

The remedy in the case of a property jointly held by unmarried couples, and in the absence of a consent arrangement, is an application pursuant to the *Partition Act* SNS c. 333 for an order requiring a sale of the property and an equal division of its proceeds. It would be obvious to the parties that a sheriff's sale will add to the expense and is most likely to promote a dramatically lower than market value sale price. I would therefore urge the parties to consent to an immediate listing of the property for sale with a real estate agent utilizing multiple listing and to agree that the net proceeds of sale after pay out of all encumbrances, closing costs and adjustments be divided equally between them. If not, then I acknowledge counsel's intention to bring such an application on behalf of Mr. Kelly and I reserve the court's jurisdiction to hear it.

I find that Mr. Kelly acquiesced in the purchase by Ms. Clark of the diamond ring and that it was intended to be a gift to her. As such she is the owner and is entitled to retain possession of it.

The furniture purchased during the relationship and currently in the possession of the parties respectively shall be owned accordingly.

COSTS

In the event that either party wishes to address the court in respect of costs, that party shall do so by either contacting, within thirty days of the date of this decision, the scheduling office of this court for the purpose of arranging a one hour hearing on my

docket accompanied by a confirmation by letter to me or by electing to address the question of costs in writing within forty-five days of the date of this decision whereupon the opposing party shall reply in writing within fourteen days of receipt of that brief.

CAMPBELL, J.

DCC/wak