

**SUPREME COURT OF NOVA SCOTIA**  
**(FAMILY DIVISION)**

**Citation:** *Dunn v. Murphy*, 2013 NSSC 444

**Date:** 20130715

**Docket:** SFSNOTH-063283

**Registry:** Sydney

**Between:**

Leslie Dunn

Plaintiff

v.

Thomas Murphy

Defendant

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**DECISION**

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**Judge:** The Honourable Justice M. Clare MacLellan

**Heard:** August 7, August 8, September 13, and November 2,  
2012 in Sydney, Nova Scotia

**Oral Decision:** July 15, 2013

**Counsel:** Elaine Gibney, Counsel for Leslie Dunn

David Iannetti, Counsel for Thomas Murphy

[1] The parties began to date in 1989. At that time, Ms. Dunn had just purchased a three (3) year old home on 195 Monteith Avenue, in Westmount, Nova Scotia. Mr. Murphy had his own apartment. Over approximately a two (2) year period, Mr. Murphy began to stay overnight in Ms. Dunn's home, and by 1991 he lived with her full time. There were no cohabitation discussions between the parties. Their cohabitation just evolved to the stage until they became a common law couple. The parties separated on June 14th, 2008. Throughout their time together, both were employed on a full time basis. Mr. Murphy was employed with the Cape Breton Regional Municipality and, in 1991, earned approximately \$26,000. By 2007, his salary had increased to \$46,000. Ms. Dunn earned approximately \$80,000 throughout the same time period; she was a social worker with the Province of Nova Scotia. Her salary was not discussed in any detail during the hearing. Ms. Dunn's income is not relevant to the issues in this case.

[2] While living together, three (3) real properties and a number of chattels were acquired. These properties are:

1. A rental property located on Holyrood Drive, in Sydney, Nova Scotia, was purchased in 1992 for approximately \$57,000.00. It was

mortgaged for approximately \$65,000.00, and sold in 1994 for \$100,000.00. The monthly mortgage payment was \$600.00;

2. A second rental property located on Leonard Street, in Sydney, Nova Scotia. Mr. Murphy indicated that this property was purchased in 1995; although I note the mortgage relating to that property was dated in 1997. According to Mr. Murphy's evidence, and in keeping with his 2006 income tax return, he owned this property in 1996. The original price for that property was \$61,693.00. The mortgage principal and interest, according to the mortgage document dated in 1997 was \$398.96.
3. Approximately 5.5 acres were purchased in Grand Mira, Nova Scotia, in approximately 2000.
4. Two (2) sailboats were purchased. One sailboat was renovated and sold to buy the second sailboat. The current sailboat was purchased for approximately \$3,200.00 and was sold for approximately \$17,500.00, \$17,000.00 or \$17,100.00 depending on the witness.
5. A speedboat was purchased and sold for \$4,200.00.
6. A residential trailer was purchased in 2005 for \$12,000.00 and sold for \$3,000.00 in 2009.

7. There are a number of prams and a laser probably not yet sold. No value of these items was presented in evidence.

[3] Ms. Dunn lived on Monteith Avenue prior to the cohabitation. At the time she purchased the property, it was a three (3) year old house. She purchased and took title in her name only. She lived alone there for a period of time. She purchased the property with the proceeds from the sale of her former home in Sydney Mines; together with proceeds from an insurance policy received from the premature death of her husband. Ms. Dunn also acquired a \$40,000.00 mortgage in the purchasing of that property which she satisfied from her savings in 1995. The mortgage and deed associated with Monteith Avenue was in Ms. Dunn's name. Ms. Dunn paid the mortgage, all renovations and all improvements and maintenance on this property. The parties lived on Monteith Avenue throughout their 17-year relationship.

[4] The rental properties in issue were acquired during the cohabitation period, and disposed of shortly after the cohabitation period ceased. The rental properties were disposed of by Mr. Murphy without input from Ms. Dunn. Title to the two (2) rental properties was in Mr. Murphy's name only.

[5] 60 Holyrood Drive was the first property purchased in approximately 1992, for \$55,503.00 and sold for \$100,000.00 on April 15th, 2009. The equity in that

property was \$89,587.66. Mr. Murphy advised that he did not incur Capital Gains in relation to that property. At the date of closing, the property consisted of two (2) rental units and the rental income per month was \$1,000.00.

[6] The second property acquired was 31-33 Leonard Street, which was purchased in 1995. At the time of purchase, it contained two (2) rental units and it was subsequently renovated and expanded into three (3) rental units. It was sold on March 2nd, 2009, for \$100,000.00. The equity in that property was \$63,557.00. According to Mr. Murphy, he did not have to pay any Capital Gains in relation to the property. At the date of closing, the property consisted of three (3) rental units and the rental income per month was \$1,700.00.

[7] It is agreed between the parties that the proceeds that are in dispute are basically the sale of those two (2) rental properties by Mr. Murphy and the sum is \$153,145.35, the net proceeds of the sale of the properties.

[8] The two (2) rental properties were in Mr. Murphy's name only. The two (2) mortgages incurred to finance the rental properties were held only in Mr. Murphy's name. Mr. Murphy advised that these properties were purchased in lieu of a pension as he did not have a pension at the time of acquisition. According to the documents, he did not commence his employment pension until approximately 1997. Ms. Dunn stated that it was her motivation that

caused Mr. Murphy to get into the rental business. She wanted to help Mr. Murphy learn how to deal with money, how to be responsible with money, and to improve his credit rating. Also, she did not wish to have the jeopardy of two (2) rental mortgages that might have some liability to her in association with her own home. Mr. Murphy agrees that he and Ms. Dunn discussed the properties from the aspect of him becoming financially responsible.

[9] The piece of property in Mira is five (5) or five and a half (5 ½) acres. It is a piece of land on the Mira River, which was purchased by the parties in 1995 for \$25,000.00. This parcel was held in both parties' names, they paid for it through two (2) separate lines of credit of \$500.00 per month in the same manner they purchased the sailboats and the trailer. They agreed that the property in Mira, as of the time of hearing, was worth \$80,000.00. They also agree that Ms. Dunn should be entitled to purchase the property at that price. Notional costs were to include any Capital Gains incurred which was to be deducted from the purchase price if Ms. Dunn chooses to buy the Mira land. If Ms. Dunn does not purchase the property it was to be sold and the net proceeds divided on a 50/50 basis.

[10] In relation to the chattels:

### **The Sailboat**

[11] The parties purchased two (2) sailboats during their time together. They both worked on improving and maintaining the sailboats. The first sailboat was renamed by them and was called the “Partnership”. This boat was sold to buy a second 33-foot sailboat which was sold for approximately \$17,100.00. Proceeds from that sale have been held in Trust. The parties financed the boat through two (2) separate lines of credit held in their names separately. Both parties worked on improving and maintaining the sailboat. There is no disagreement as to the sale price of the boat. The only relevant point is that the parties worked to improve the boat together. The parties agreed to split the proceeds on a 50/50 basis. There is no disagreement as to the sale price of the sailboat, although the manner in which it was sold is an issue between the parties. The sale amount of the sailboat is \$17,100.00.

### **The Trailer**

[12] The trailer had some aspects in dispute. The parties purchased this 31-foot Dutchman 5-wheel trailer which they placed on their land in Mira. They paid for the trailer through two (2) separate lines of credit. Mr. Murphy’s line of credit was \$300.00 per month. The trailer was purchased for \$12,000.00 and sold, post separation, for \$3,000.00. The parties agreed that the trailer was

owned jointly but disagree on the sale price and the cost of storing. According to Mr. Murphy's testimony, his monthly contribution to the acquisition of the trailer and sailboat was at least \$500.00 per month. Elsewhere in his testimony, he advised the boat cost him \$500.00 per month, and to the trailer cost him \$300.00 per month.

[13] Judges must make a conclusion with conflicting testimony. This becomes needlessly complicated when no documents are provided to the Court. For that reason, I have taken the lower amount of monthly payments for the boat and trailer. I believe it is the fairer course. It would certainly have been easier for the Court if the actual lines of credit had been tendered for both parties.

### **Debts**

[14] The parties have two (2) debts that were in dispute. During the course of this hearing this issue was resolved. The parties agree that at the time of separation, Mr. Murphy left with a Visa bill owing in the amount of \$1,733.32. The Visa was in Ms. Dunn's name and Mr. Murphy had a companion card. As well, the parties agree that Mr. Murphy shall pay one half ( $\frac{1}{2}$ ) of the preparation cost of tax returns in the amount of \$150.00.



[15] The parties do not agree on sharing of the account of \$500.00 incurred to store and move the trailer. The parties do not agree with the manner in which the trailer was sold or the purchase price received. Ms. Dunn believes it was not in arms-length sale and that the trailer was worth a substantial amount more than the \$3,000.00 acquired; and in violation of a Supreme Court Order. Mr. Murphy sold the trailer to his uncle without her input.

[16] The parties never did discuss their properties or wishes at the time of separation and this certainly complicated their lives. All discussions were through legal counsel. Ms. Dunn advised that Mr. Murphy told her that he did not want any contact. Mr. Murphy says he did not have any contact because she presented him, through her counsel, a Protection of Property Notice issued against him on September 22<sup>nd</sup>, 2008. The Notice ordered him not to attend her premises. Mr. Murphy interpreted the Protection of Property Notice to mean that he could not speak to Ms. Dunn. Prior to the issuance of the Notice, he had gone to her office to speak to her unannounced, giving rise to the Notice. Ms. Dunn has a different interpretation of the Notice. In any event, Mr. Murphy took the Notice to mean that he could have absolutely no contact. Ms. Dunn does not accept this and indicated that through his numerous lawyers; he could

have spoken or responded to various correspondence sent to him by her counsel to deal with the properties, both the real property and the chattels.

[17] There is also concern expressed by Ms. Dunn, through her counsel, that Mr. Murphy failed to follow through on an Inter Partes Order relating to preservation and disposal of assets. The order was issued by Justice Goodfellow in May 2009. I note as well, in relation to letters sent by counsel, that on November 26<sup>th</sup>, 2008, Ms. Gibney wrote to Mr. Iannetti, Mr. Muphy's counsel, asking that no assets be sold. On February 19<sup>th</sup>, 2009, she referenced earlier correspondence and asked that no properties be sold until appraisals were prepared. In the letter of November 26<sup>th</sup>, 2008 Ms. Gibney writes to Mr. Iannetti:

Thank you for correspondence respecting the above noted manner which I have forwarded to my client for her review. In the meantime an issue has risen with respect to the Viking 33 Sailboat that Mr. Murphy had listed for sale. I previously wrote to Alfred Dinaut in respect to his attempts to sell the boat and requested that no assets be sold until the parties property issues have been resolved. Would you please speak to Mr. Murphy respecting this matter and confirm that he will not proceed with the sale of any assets until it is done by the consent of both parties. I look forward to hearing from you.

[18] The second letter from February 19<sup>th</sup>, 2009, reads:

Further to my correspondence of December 16th, 2008, please provide your clients reply as soon as possible. In particular we require immediate confirmation that there will be an immediate freeze on the parties personal and real property to avoid and unilateral sale of property by your client. As I explain to you in our

brief conversation at the court house, my client is very concerned that he's trying to sell the rental properties. She has been advised by 3rd parties that he has made such an arrangement. Would you kindly speak to Mr. Murphy in this regard as soon as possible and advise whether he is attempting to sell the property. In any event it will be necessary for my client, in such event it will be necessary for my client to make an application to the court of preservation of the property ordered. Mr. Murphy has been requested to pay the Visa credit card debt along with late fees and his share of the income tax invoice. We are also waiting your clients response as to whether he agrees with the proposed valuation of the real property in Grand Mira at \$39,200. In addition we require your clients purposed value for the rental property and if no arrangement can be made, appraisals will have to be performed. If you client is prepared to accept my client is entitled to an equal share is your client prepared to accept that my client is entitled to an equal share of the equity of these properties. We are also awaiting return of the safety deposit box. I look forward to hearing from you as soon as possible.

[19] Ms. Dunn filed an Originating Notice on March 13th, 2009, claiming that she lived in a common law relationship with Mr. Murphy from 1991 to June 2008, during which time he lived in her home on Monteith Avenue. She claimed Mr. Murphy was required to contribute little to the maintenance of the home. She alleges that he did not bring any assets to their union. Ms. Dunn claims that she gave Mr. Murphy a down payment of \$4,000.00 for his first rental purchase and she assisted Mr. Murphy in physically preparing this property for rental. When Mr. Murphy purchased the second property, she helped with the preparation and maintenance of that property as well. She claims that both properties required extensive repairs and renovations before they could be rented and that she and he worked side by side to affect these improvements. The plaintiff claims that she maintained all the records for the

two (2) rentals, plus she assisted in the preparation of receipts and compiled the documents necessary for income tax returns. She also prepared the documents necessary for the Tenancy Board hearings. Mr. Murphy was responsible to collect the monthly rents and to have the leases signed. He was responsible to do the interfacing with the tenants as Ms. Dunn felt that her position with the government may place her in conflict with some tenants or potential tenants.

[20] Ms. Dunn testified that she paid basically all the household expenses when the parties resided together with few exceptions. Her contribution allowed Mr. Dunn to finance the rental properties, as well as to purchase recreational items, such as the boat and trailer. Ms. Dunn claims that the real properties, that is the rental properties, produced rental income and equity upon sale. She seeks fifty percent (50%) of the sale proceeds of the rental properties as well as fifty percent (50%) of the sale proceeds of the boat and real sale value of the trailer.

[21] Mr. Murphy has filed a Statement of Defence and Counter Claim. Mr. Murphy agrees that the parties were in a common law union from 1991 to 2008. He agrees Ms. Dunn paid for Monteith Avenue without his help. He agrees that he brought no assets to their union. Mr. Murphy maintains that he paid equal amounts in the household expenses and the expenses of maintaining Monteith Avenue. He claims that Ms. Dunn's efforts to the rental properties was

classified as inconsequential and that she provided no time, money or labour to improve and maintain the rental units. In his Counter Claim, Mr. Murphy maintained he made various improvements and helped to maintain Ms. Dunn's home on Monteith Avenue. He states that he made significant renovations to Ms. Dunn's Monteith property both inside and outside. He believes his labours significantly improved the value of the home on Monteith Avenue. He seeks fifty percent (50%) of the total value of the home on Monteith Avenue.

[22] An Ex Parte Motion was filed on March 11<sup>th</sup>, 2009, by Ms. Dunn, seeking relief by way of preservation of the sale proceeds of the two (2) rental properties. The Motion came before Justice Edwards, who ruled that these proceeds would be held in Trust until March 16<sup>th</sup>, 2009, when the matter could be heard by Justice Goodfellow. Justice Goodfellow issued an order dated May 25<sup>th</sup>, 2009, on an Inter Partes basis, ordering that the proceeds of sale for both rental properties were to be held in Trust pending further order. \$10,000.00 of these proceeds was to be paid to each party on a Without Prejudice basis. Justice Goodfellow ordered Mr. Murphy to sell the sailboat and Ms. Dunn to sell the trailer. Both sale prices were to be agreed to between the parties. Justice Goodfellow ordered that the motorboat, two (2) prams and lasers be held until the matter was completed.

[23] After the proceedings before Justice Goodfellow, Mr. Murphy sold the sailboat, speedboat and the trailer. In relation to the sale of the chattels, based on the evidence presented, I find that none of Justice Goodfellow's instructions were followed by Mr. Murphy. In the relation to the sale of these three (3) items, Mr. Murphy inexplicably failed to follow Justice Goodfellow's order. I question Mr. Murphy on that point so I might understand why he took some of the steps he did; however, he was unable to assist me in finding understanding his manner of proceeding.

[24] In relation to the main issue before the Court, that being the sale of the rental properties, I have referenced the Statement of Adjustments, which indicates that Holyrood closed for \$100,000.00 netting \$89,587.00. The rental income at the time of sale was \$1,000.00 per month. According to Exhibit #12, a compilation of information from Elaine Gibney of behalf of Ms. Dunn, there is a note that the mortgage on that property was released in 2006. Mr. Murphy endorsed the use of Ms. Gibney's compilations. According to the Statement of Closing that at the time of closing, there was no mortgage on the Holyrood property.

[25] In relation to Leonard Street, the closing took place on March 2<sup>nd</sup>, 2009. The equity was \$63,557.00. The property had a mortgage of approximately

\$34,000.00 at the time of sale. According to the closing documents, the rental income was \$1,770.00 per month.

[26] The parties agreed that the sum in dispute for the two (2) rental properties is \$153,145.53, the equity from the two (2) properties. I would assume that this sum is less the \$20,000.00 (or the \$10,000.00 each) that both parties were granted to take by Justice Goodfellow. That was never clarified for me; so, if I use the figure \$153,145.53, and if the parties actually did take \$10,000 as Justice Goodfellow ordered, that sum should be adjusted.

[27] Ms. Dunn claims that she is entitled to fifty percent (50%) of the sale proceeds of the rental properties. She alleges that she worked as hard as Mr. Murphy on renovations and maintaining the properties. She maintains that she was the driving force behind improving the units to the level attained at the time of sale. Ms. Dunn also states that she was Mr. Murphy's personal banker. She advanced funds for him to purchase items as needed. She was also the record keeper. She would retrieve items if necessary from various stores for the renovations. She did all the interior designing for the two (2) houses; she set the standard for the two (2) units. Mr. Murphy agrees that she did set a standard. Her standard was that she would not rent a property unless it was in a state that she could live in herself.

[28] Ms. Dunn claims he sold the two (2) rental properties without notice to her.

She also maintains that Mr. Murphy did little to nothing to assist in maintaining the Monteith Avenue property and that he contributed very little to the monthly expenses.

[29] Mr. Murphy claims that her contributions to the rental properties were small.

The Statement of Defence states her contribution did not exist. Mr. Murphy seeks fifty percent (50%) of value of the Monteith Avenue property; not fifty percent (50%) of the enhanced value but fifty percent (50%) of the value itself.

[30] The actual value of Monteith Avenue property has been bantered about, the only thing I could say. The assessed value in Exhibit #10 was \$71,300.00. An untendered bank appraisal purported done, by Coldwell Bankers, set the amount at \$180,000.00. Again, no documentation was provided to the court.

[31] Mr. Murphy maintained that they had discussed eventually building a home on the Mira. The house on the Mira was to be built on the completion of the sale of Monteith Avenue property only, and not the sale of the rental properties which were for his use only. Ms. Dunn maintained that they were eventually to sell all three (3) properties including the rentals and Monteith to finance a retirement home or a home on the Mira, where they would continue to cohabit.



[32] Mr. Murphy agrees that when he moved in with Ms. Dunn, he believes that he had \$2,000.00 or \$3,000.00 in savings. He had no other assets except his car. He took no other assets with him when he moved into her property on a full time basis. Mr. Murphy agrees that at the time cohabitation started, he was basically living from paycheque to paycheque. He believes that he earned approximately \$25,000.00 a year and that his net disposal income at the time of cohabitation was \$350.00 per week, \$1,505.00 per month; approximately \$18,000.00 net income per year. When he moved from his apartment to Ms. Dunn's home on Monteith Avenue, he was paying \$350.00 for his rental unit, which included heat and lights.

[33] Ms. Dunn asserts that Mr. Murphy brought no asset to Monteith Avenue when cohabitation started. Any needed maintenance, including furniture, appliance replacement and materials for their years together was paid by Ms. Dunn.

[34] Ms. Dunn and Mr. Murphy agreed that they had no real agreement in place when he moved into the Monteith Avenue home. What he paid evolved over the years they were together. Mr. Murphy maintained in his initial testimony that he paid his fair share from the time he began cohabitation. Ms. Dunn advised that she paid all the bills relating to running the home at the start. After a while, Mr.

Murphy began to pay half of the groceries and half of the entertainment. After another undefined period of time, he began to pay half of the electric bill. The house was heated by electric heat.

[35] Mr. Murphy stated that he paid his own way, but towards the end of his evidence, he agrees that over time he began to pay part of the groceries, electrical bill and entertainment.

[36] Ms. Dunn advised that she wanted to see Mr. Murphy understand money and she wanted him to enjoy her good lifestyle. She wanted him to learn to be responsible about finances. Mr. Murphy agrees that there was discussion of that nature.

[37] The parties almost agree on their domestic record keeping. They had a form of bookkeeping in their early years; this was one piece of very worn note paper upon which both parties wrote down in a form of short hand that obviously meant something to them. This note paper appears to cover time periods in 1999 and 2000. The parties both wrote on this one sheet of paper. If Mr. Murphy bought something for the Monteith Avenue property, it was deducted from what he owed Ms. Dunn. It was an ongoing account. It appears to be a listing of items that each purchased and outlined who paid for the particular item. Eventually, the parties changed to using one Visa account for their

household and leisure expenses. Various Visa statements were tendered. This was one account. It was in Ms. Dunn's name but Mr. Murphy had his own companion card. When the bill arrived, each of them paid for their personal items and split the electric bill, cost of entertainment and vacation costs. In Exhibit #4, Mr. Murphy issued a cheque to Ms. Dunn where he outlined on the memo portion that he was paying his share of the Visa and electric bill. Their practice was to analyse the monthly Visa statement upon receipt and to initial what Mr. Murphy was responsible to pay for solely, what Ms. Dunn was responsible to pay for solely, and what they were to share. Mr. Murphy provided some cheques and Visa statements to show the manner in which he paid his share.

[38] The parties agree that they enjoyed a good lifestyle and that they travelled extensively during their time together.

[39] I have reviewed the exhibits in relation to the use of the Visa, their travel and lifestyle (Exhibits #3 to #9, inclusive). No one year provides for a 12-month period. Either of the parties could have provided those statements to the Court. Some of these exhibits contain a full Visa statement with initials and a cheque from Mr. Murphy to Ms. Dunn. Some are simply a Visa statement without any initialling as to who was responsible for what items and no cheques were

provided. From materials submitted, I accept that Exhibit #20 is correct as far as it goes. It was deemed by Mr. Murphy to be correct in cross examination of Exhibit #20. As page 152 of the Transcript stated, Ms. Gibney said to him:

Q: I'm going to give you Exhibit 20. These cheques are in the Exhibit Book. So, to be clear, these are the cheques that you paid to Ms. Dunn to reimburse her for your spending on the Visa?

A: Correct.

Q: You did not have your own Visa I take it?

A: I did not.

[40] From the materials submitted, I have indicated that both parties accept Exhibit #20 as a compilation of what they maintained as far as Visa statements and cheques were concerned. The source documents were never filed with the Court and there is not one year that is completely covered. I note that Exhibit #20 does not include 2005, although it included some cheques from Mr. Murphy paid to Ms. Dunn. I accepted Exhibit #20 as a form of what the parties did with the Visa and the companion card; and that the Visa was used for the household accounts and to collect points. I accept that the parties had a bookkeeping system whereby Mr. Murphy used his companion card for his own purposes and to buy items for the rentals. Ms. Dunn used her Visa card for her personal items and to buy items for the rentals, which Mr. Murphy would later reimburse her. Neither party has provided the Court with a complete one-year

statement of cheques and Visas so I do not have entire disclosure. I do have, at least, a grasp on the manner in which they dealt with their bills. A complete picture of their financial expenditures is not available. This is not unusual in domestic relationships.

[41] I am satisfied that the disclosure made provides me with themes upon which I can, on the balance of probabilities, make conclusions. However, I do find that during their happier times together and from the viva voce evidence, both parties had an established practice as to how they dealt with their debts and how Mr. Murphy would reimburse Ms. Dunn for half of some monthly bills and most of the supplies needed for the rental units. Ms. Dunn paid for the supplies for the Monteith Avenue home. I accept that Ms. Dunn did buy items for the rentals in relation to the renovations and the maintenance and Mr. Murphy reimbursed her at some point for these expenditures when he had the money.

[42] I am satisfied that both worked together to collect and maintain receipts for the cost of the renovations and the maintenance of the receipts for income tax purposes.

[43] I am satisfied that if Mr. Murphy purchased anything for the Monteith Avenue home, he was reimbursed by Ms. Dunn, or his outstanding indebtedness to her was reduced by the amount he paid for the item(s). Mr.

Murphy endorses this in cross examination (Transcript page 71), when he refers to an agreement between he and Ms. Dunn. He endorses Ms. Gibney's suggestion that he was effectively running a tab on these expenditures.

[44] I am satisfied that Ms. Dunn loaned Mr. Murphy money over the years as he needed it. She loaned him \$4,000.00 as a down payment on the Holyrood property. Mr. Murphy concurs that she did loan him money and he believes that he paid her back over approximately a 2-year period.

[45] I am satisfied that Ms. Dunn encouraged him to invest the maximum in his RRSPs; if he could not afford to she advanced on the funds needed. The parties agree that Mr. Murphy paid her back when he could afford. There was no firm arrangement as to when there would be any reimbursement, nor was there any discussion or expectation of interest payments. Over the years, the largest sum ever borrowed at any one time by Mr. Murphy from Ms. Dunn was \$9,000.00.

[46] Ms. Dunn maintains that she gave Mr. Murphy money for RRSPs as he needed to maximize them, but that she was reimbursed. She maintains that she did physical labour on the rental properties, plus she paid to run their home at Monteith Avenue with very little contribution from him. She did so because she believed they were a couple; she believed that they would have retirement together. She believed that they had a future together and that they would sell

all of their properties and retire in a home they hoped to build on the Mira. She believed since she paid the majority of the living expenses, Mr. Murphy was able to use his funds to improve the rental properties. Ms. Dunn believed these improved rentals were part of Ms. Dunn's and Mr. Murphy's retirement plans.

[47] Mr. Murphy provided a very different picture. He said he bought the properties to compensate for the fact that when he was employed, he initially had no pension. His company did not provide him with a pension until 1997 (Exhibit #2). He believes that they were planning to build a retirement home on the Mira at the time they were together, but that was to come only from the sale of the home on Monteith Avenue; the rental properties would be kept separate and remain his property solely. He maintained that any money he borrowed from Ms. Dunn was repaid. He maintained, until late in cross examination, that Ms. Dunn did very little work on the rentals. However, he did a substantial amount of work on the Monteith Avenue home. Furthermore, he claims that the deeds and mortgages for the rental properties are in his name only and that the parties have never discussed a change in the title to those properties.

**Issue #1: Were Mr. Murphy and Ms. Dunn in a common law union?**

[48] The answer to this issue is yes. This is stated in the Originating Notice and it is admitted to in the Defence and Counter Claim. The parties held themselves out as a couple and were perceived as one for 17 years. The briefs, pre and post-trial submitted by Mr. Iannetti and Ms. Gibney of behalf of the parties, all agree that they were in a common law relationship. Mr. Murphy's terminology points to a boyfriend/girlfriend situation. His terminology has no impact on this issue. I find both parties agree and I find that there was a cohabitation union for a 17-year period. However, a cohabitation, even for a long period of time, is not sufficient to afford Ms. Dunn any equitable relief by that fact alone.

[49] As stated by Justice Cromwell in **Kerr v. Baranow**, [2011] 1 S.C.R. 269, at para. 85, that fact alone neither gives Ms. Dunn any equitable relief to the rental properties nor does it give Mr. Murphy any equitable relief to Ms. Dunn's home on Monteith Avenue. Obviously, further examination is required. For Ms. Dunn to succeed in her case, she must establish that Mr. Murphy has been unjustly enriched at her expense, that the relationship constituted a joint family venture, and that her contributions were linked to the generation of wealth during their relationship. She must also show what proportion of the jointly accumulated wealth should be hers. When I say jointly accumulated wealth, I am referring to the amount of approximately \$153,000.00, the proceeds of sale of the rentals.



Mr. Murphy must prove these same elements if he is to be successful in his claim for fifty percent (50 %) of the value of Monteith Avenue.

**Issue #2: Did the parties acquire assets through a joint family venture?**

[50] During the term of this union, did the parties acquire assets through a joint family venture such that it would be unjust for one party to retain, “an inappropriately disproportionate amount of the wealth”, and is “denying the claimant a reasonable share of this wealth accumulated during the course of the relationship through their joint effort”? In **Kerr v. Baranow**, supra., Justice Cromwell wrote in the unanimous decision, at para. 81:

Irrespective of the status of legal title to particular assets, the parties in those circumstances are realistically viewed as "creating wealth in a common enterprise that will assist in sustaining their relationship, their well-being and their family life" (McCamus, at p. 366). The wealth created during the period of cohabitation will be treated as the fruit of their domestic and financial relationship, though not necessarily by the parties in equal measure. Since the spouses are domestic and financial partners, there is no need for "duelling quantum meruits". In such cases, the unjust enrichment is understood to arise because the party who leaves the relationship with a disproportionate share of the wealth is denying to the claimant a reasonable share of the wealth accumulated in the course of the relationship through their joint efforts. The monetary award for unjust enrichment should be assessed by determining the proportionate contribution of the claimant to the accumulation of the wealth.

Simply put, if I understand Justice Cromwell, the overall division of assets acquired during a common law union, where both parties worked to acquire an

asset, one party should not be permitted to leave with that asset entirely, as that is not fair. The parties are to share in the proceeds in proportion to their contribution.

[51] As required in para. 81 of **Kerr v. Baranow**, supra., there must be a clear link between the claimants contribution to the joint venture and the accumulation of wealth.

[52] Justice Cromwell outlined the elements to be examined in an unjustified enrichment claim.

**38** For the first requirement – (1) enrichment - the plaintiff must show that he or she gave something to the defendant which the defendant received and retained. The benefit need not be retained permanently, but there must be a benefit which has enriched the defendant and which can be restored to the plaintiff in specie or by money. Moreover, the benefit must be tangible. It may be positive or negative, the latter in the sense that the benefit conferred on the defendant spares him or her an expense he or she would have had to undertake (*Peel*, at pp. 788 and 790; *Garland*, at paras. 31 and 37).

**39** Turning to the second element – (2) a corresponding deprivation - the plaintiff's loss is material only if the defendant has gained a benefit or been enriched (*Peel*, at pp. 789-90). That is why the second requirement obligates the plaintiff to [page295] establish not simply that the defendant has been enriched, but also that the enrichment corresponds to a deprivation which the plaintiff has suffered (*Pettkus*, at p. 852; *Rathwell*, at p. 455).

This means if a defendant leaves with the asset, leaving with that particular asset must be shown to deprive the plaintiff of something the plaintiff ought to have had.

[53] The third element is one I had more difficulty analyzing, wherein Justice Cromwell found:

**40** The third element of an unjust enrichment claim is that the benefit and corresponding detriment must have occurred without a juristic reason. To put it simply, this means that there is no reason in law or justice for the defendant's retention of the benefit conferred by the plaintiff, making its retention "unjust" in the circumstances of the case: see *Pettkus*, at p. 848; *Rathwell*, at p. 456; *Sorochan*, at p. 44; *Peter*, at p. 987; *Peel*, at pp. 784 and 788; *Garland*, at para. 30.

[54] The first two elements, the benefit and detriment, are economic in nature.

The third element, juristic reason, is more of a moralistic or public policy issue, but it can also include contract where a person has agreed that this would be how things would be arranged between them. Perhaps a defendant could leave with more than what would seem to be his fair share if the parties had such a contract or arrangement.

[55] The three (3) elements – the enrichment, the detriment and absence of juristic reason must exist. The plaintiff has the burden in proving these elements based on clear and cogent evidence and on a balance of probabilities that it is more probable than not that Ms. Dunn worked towards having and/or improving these assets; and that she deserve that certain portion of the assets. She must prove Mr. Murphy has wrongly deprived her of her proportionate share.

[56] Murphy's claim, in relation to the Monteith Avenue property, requires him to prove those same three (3) elements.

[57] In this case, all three (3) elements are impacted by two (2) very important factors. These two (2) very important factors permeate all of the decision, all of the evidence and ultimately the conclusion itself. The first important observation I must make is that Mr. Murphy's evidence was uncorroborated and Ms. Dunn's evidence was corroborated. Secondly, Mr. Murphy's evidence in many aspects was not credible; Ms. Dunn's evidence was credible. A credibility finding is important as it has a significant impact on the burden of proof assessment. These factors and case law are reviewed in the case of **Baker-Warren v. Denault**, [2009] N.S.J. No. 209, a decision of Justice Forgeron. I reference paragraphs 18 to 20, where Justice Forgeron provided a compilation of a number of Supreme Court of Canada decisions on credibility assessments:

**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?

[58] In relation to corroboration, Ms. Dunn provided evidence from witnesses that she often appeared in coveralls working on the rentals. She worked side by side with Mr. Murphy in gutting the Leonard Street building and rebuilding the two (2) rental units into three (3) units. Ms. Burt, a former tenant, lived in the Leonard Street property during the time the parties bought and rebuilt the house. She had no association with the parties. She had no interest in their issues. She was just living there and watching them work. She gave her evidence in a straight forward manner corroborating Ms. Dunn's version.

[59] The plaintiff's sister indicated that she saw the plaintiff restoring hardwood floors and scraping windows during renovations of the two (2) rentals.

[60] Ms. Tobin, a close friend of the plaintiff, and Mr. Tobin saw Ms. Dunn stripping out old carpet. Ms. MacArthur, a tenant at Leonard Street, saw Ms. Dunn paint, whipper-snip, carry out logs onto a truck. She believed the parties worked nonstop at their task of renovating the rental property at Leonard St.

[61] Ms. Dunn advised the parties could never afford to restore these apartments, if not for their own talents. She indicated that she cleaned, fixed the yards, carted away debris to the dump, restored hardwood doors and floors, sanded and installed gyprock, stained and installed wainscoting, removed floor tiles, scrubbed nicotine off ceilings and worked in flea infested rooms. She indicated that she was also able to string electrical wires, wallpaper and paint. Her own home was left with needed repairs not done so that she and Mr. Murphy could spend their nights, weekends and vacation days getting the two (2) rental properties ready to be rented at her acceptable standard. Ms. Dunn had a standard of preparation for the rentals.

[62] Mr. Murphy agrees with Ms. Dunn that she would not rent a property that she could not live in herself. However, Mr. Murphy had a different recall as to division of labour. He described Ms. Dunn as "handy" in relation to chores and

he also agreed that they would not have been able to afford to pay contractors to do these renovations; but, at the same time, he indicated that the work she performed constituted only twenty percent (20%) of the renovations and those renovations were on the lighter labour scale. Towards the end of his cross examination, Mr. Murphy was less firm on minimizing her work. On cross examination, he agreed that he and she were partners in renovating these units. Mr. Murphy agreed, with some reluctance, that such work left her, at times, exhausted.

[63] Mr. Murphy denies the couple ever had a plan to use the rental properties as part of their retirement package. Ms. Dunn advised that she always believed the rentals were for retirement and she assumed that they would retire together. Ms. Tobin stated that, prior to separation, she was advised by Ms. Dunn that these properties were for their retirement. Mr. Lawless, a sailing friend of both parties, attended a dinner party where she was advised by both parties that these buildings were for their retirement. Mr. Lawless indicated these discussions with them occurred during social gatherings. I accept Ms. Dunn's corroborated evidence that future plans were made by the parties.

[64] On cross examination, Mr. Murphy agreed Ms. Dunn gave him start-up money for the first building purchased. He agreed she gave him money when

needed up to a maximum of \$9,000.00 on one occasion. She gave him a down payment of \$4,000.00 for Holyrood as he could not secure a mortgage without her help. He indicated that he could have secured money from his father, and he had sufficient funds for the down payment, but he could not access the funds. He could not remember why his own money was unavailable to him. He did accept that he was unaware that he had to come up with the down payment at the time that he bid on the Holyrood property. He was able to repay the down payment, without interest, over a two (2) year period. Mr. Murphy, as I have indicated, agreed with Ms. Gibney's suggestion that he could run a tab and write a cheque later to Ms. Dunn. Again, Ms. Dunn was able to corroborate her statements. Mr. Murphy could not. Mr. Murphy's evidence in relation to money is riddled with internal inconsistencies.

[65] On cross examination, Mr. Murphy admitted that he saved over \$70,000.00 by not having to contribute to the household. He based this on living for 17 years without paying rent of \$350.00 per month for a modest apartment. He agreed he was not required to contribute to the mortgage on Monteith Avenue, the taxes, the insurance, the water, the home repairs, or the appliance replacement during the 17 years he cohabitated with Ms. Dunn.



[66] I accept that Ms. Dunn corroborated evidence that the parties worked side by side in every aspect, except one - the mortgages. She worked side by side with Mr. Murphy in turning two (2) older homes into equity that they could share in their future. Mr. Murphy signed the mortgages; he was responsible for the mortgages. As a mortgage holder, he was at risk. However, I had difficulty dealing with this risk as real given that Ms. Dunn was there to help him in the event that he had any difficulty with the rentals' mortgages. I accept that Ms. Dunn was there to help him by allowing him to live virtually rent free in a very attractive home so that he could turn his attention to the rental units. He was able to turn his own funds to the rental units because of the small amount he contributed to month to month expenses on Monteith Avenue. I accept and find Ms. Dunn corroborated the facts in support of her case; Mr. Murphy did not.

[67] I find Mr. Murphy was not credible on several points within his own testimony. Credibility is not a science, it is an overall assessment of various items. On occasion an assertion may be stated inexactly because it is an error. However, one would not expect to have too many inexact comments in a case where there is a Defence and a Counter Claim. While the onus is on Ms. Dunn as the plaintiff, it is also necessary for Mr. Murphy in his position as the Counter Claimant to provide evidence in support of his Counter Claim as well

as his Defence and that was to prove that enrichment, deprivation and absence of juristic reason did not exist.

[68] Mr. Murphy's credibility suffered due to inconsistencies, denials and non-disclosure.

1. He failed to fully disclose his finances in any one year, and he failed to provide his 2005 and 2009 tax returns.
2. He failed to explain how he spent the money he did on sailboats, trailers, trucks, mortgage rentals, properties, Visas, the Mira and still meet the financial short fall over the years that he had the rental properties. There were financial short falls in 2005-2006.
3. He denied that Ms. Dunn helped him meet his rental short falls in any one year, but later on in cross examination and in re-direct, with some reluctance, admitted that she did assist him financially in the years; they owned the rental properties; due to renovations, the properties could not generate rental income.
4. He denied, as well, that Ms. Dunn's work efforts were substantial in relation to improvements in the rentals, but on cross examination, he retracted from his position to varying degrees where her assistance became more than "inconsequential".

5. His denial of her strong work ethic was contradicted by her witnesses who were there for other reasons; dropping in for lunch, dropping in to visit and happen to see the couple working. His evidence is that direct variance with those witnesses. Her witnesses confirm Ms. Dunn's evidence; that they were working side by side to make a 70 or 80-year old home, particularly Leonard Street, into a property generating rental income of \$1,770.00 a month.
6. Mr. Murphy was unable to weaken the corroborative witnesses' testimonies during their cross examination. On some material issues, such as finance and work effort, at the end of his cross examination, he was supporting Ms. Dunn's position to a degree.
7. Mr. Murphy appeared to have forgotten that he was in Court before Justice Goodfellow. When he did recall when questioned as to why he did not follow Justice Goodfellow's directions, he could not explain his conduct.
8. He originally denied ever receiving any letters from Elaine Gibney to sign over the trailer so that it could be sold as ordered by Justice Goodfellow. Instead, he registered the trailer in his own name and sold it. This was two (2) years after separation. These seem to have

no impact on Mr. Murphy, although he did indicate it would be unfair that Ms. Dunn only received one half ( $\frac{1}{2}$ ) of the \$3,000.00 that he received. He felt it would be unfair if she only got \$1,500.00 for the trailer. He presented as if he was just considering this issue for the first time. He did not provide any alternatives. He simply said it is not fair that she only have \$1,500.00. He was required by Justice Goodfellow to obtain Ms. Dunn's input on the sale and it was her job initially according to the Justice to sell the trailer; but, he made that impossible.

9. He denied that there were discussions of them ever retiring together and using funds from the rentals, but he retracted on cross examination.
10. He advised that he saved \$6,500.00 necessary for the down payment on Leonard Street and did not get any assistance from Ms. Dunn. However, he could not explain when Ms. Gibney confronted him with a mortgage document outlining that the property was fully financed so there was no need for the down payment
11. The next difficulty I had with Mr. Murphy's evidence is that he refused to advise Ms. Dunn of the sale of the rental property, when he

knew better than anyone else that she made the acquisitions of these assets possible; financially and physically. He did not discuss the sales with Ms. Dunn or her counsel.

12. I have examined his rental income cross referenced with the amount that he paid Ms. Dunn for his share of the Visa. I could only examine a cross section of his finances, as disclosure was not complete. Based on the evidence I examined, it is improbable he paid for all rental property bills from his income and the rental income of five (5) units. In 2006, his total net disposable income from employment and rentals was approximately \$26,000.00. His payment for Mira at \$500.00 a month and cost \$6,000.00 per annum. His payment for the boat and trailer at the lower amounts he gave is another \$6,000.00 per annum. Ten (10) months of his Visa repayments for 2006 (I do not have 12 months) is \$14,458.00. In addition to these figures, he had to pay the principal on two (2) mortgages. Unfortunately and inexplicably, the principal amount of those two (2) mortgages was never provided to the Court. In addition, Mr. Murphy had to pay half of the electrical bill, half of the grocery bill for Monteith Avenue, half of the entertainment, and he had to run his own car. I gather that he was able to do the maintenance on vehicles and so I accept that he did the

maintenance on his own car. I take the amount that he paid for Mira, boat, trailer and the ten (10) months of the Visa that totals \$26,458.00. That had to be paid from \$26,000. That leaves him with \$458 per year to pay principals on two (2) mortgages, his own car and half of the electric bill. He states he paid for all these items from his savings; without financial help from Ms. Dunn. To take his conclusion and put it back to back with his own income tax returns and the years of renovation and the years of low rental income makes his evidence factually impossible. There was no extra source of money provided. He provided no proof of his savings account used to pay the bills he states he paid. He simply did not answer Ms. Gibney when she put a very similar scenario to him as to how he could pay all these expenses from his own sources without Ms. Dunn's financial assistance.

13. In reference to his expenditures for the rental units, he indicated that he purchased most of the items for the rental units or if Ms. Dunn purchased items he paid her back. Examining 2006 again, the ten (10) months where he paid Visa \$14,458.00, and examining the Visas statements; there are very few of the Visas that contain references to building supplies or references to substantial amounts spent on building supplies. There are few references and the amounts are small.

The Visa was used for the most part for what the amounts to discretionary spending. Mr. Murphy does not disagree with this statement. When questioned by Ms. Gibney, the exchange was as follows:

Q: I'm going to give you Exhibit 20. Those cheques are all in the Exhibit Book so it is clear these are the cheques you paid to Ms. Dunn to reimburse her for your spending on her Visa?

A: Correct.

Q: And you did not have your own Visa I take it?

A: No I did not.

Q: And when I went through the Visas, Sir, it struck me that a lot of your spending was on restaurants, on entertainment, on gas, on the liquor store, food. Is it fair to say the Visa was used basically for your discretionary spending?

A: That was needed, yes.

Q: For things that you would enjoy, travelling and shopping that you did in Maine or when you vacationed, or wherever you vacationed? A: Correct.

Q: Because there's quite a bit of shopping purchases on there, isn't there?

A: There is.

Q: Quite a few hotel stays on those Visas?

A: Correct.

Q: Quite a few trips where you went to winter skiing resorts, things like that?

A: That's right.

Q: And all that went on the Visa?

A: Absolutely. The reason for that was it was a joint venture on both our parts.

Q: I didn't, I actually didn't ask you the reason for using the Visa, I just wanted to clarify the type of spending that was done on the Visa.

A: Absolutely.

Q: Discretionary spending is part of a very comfortable lifestyle?

A: Yes.

Q: And that lifestyle as evidenced in the Visa statements and your cheques that you issued to Ms. Dunn and we don't even have all the cheques for those months?

A: No.

For Mr. Murphy to have paid for everything himself without assistance from Ms. Dunn in relation to the rentals is made even more unlikely when the actual credit card used does not have any substantial entries for building supplies that would actually have been spent to renovate the properties.

14. Furthermore, Mr. Murphy has no debt and he met any financial needs from his own income. When cross examined repeatedly on that point by Ms. Gibney, he made it clear that if ever there was a short fall it was paid from his savings or it came from his income. When this was shown too untenable, he maintained that it was paid by himself. He stated quite clearly in cross examination (Transcript page 98, line 12), "I didn't have to borrow any money off Ms. Dunn in order to keep those apartments going." After a rigorous cross examination on how unfeasible that was financially, how it simply did not add up, Mr. Murphy answered (Transcript page 202):

Q: Did she loan any money in these interim periods when you were under construction and renovating?



A: Yes.

It is difficult to find Mr. Murphy credible when his own evidence self-contradicts evidence all given in the same day.

[69] The serious voids in Mr. Murphy's testimony and documents caused me to find him not credible in relation to the acquisition, renovation, and maintenance of the rental properties.

[70] I find, on basic issues, Mr. Murphy was evasive and contradictory. It was impossible for him to do what he did without financial help from someone; even when he was living virtually expense free for a 17-year period.

[71] I find Ms. Dunn has proven on clear and cogent evidence on a balance of probabilities that she and Mr. Murphy worked side by side to build the equity of approximately \$153,000.00. I find that both parties agree they could never have afforded to renovate the houses if they were not able to perform the jobs themselves. I find that Ms. Dunn gave Mr. Murphy a thriving environment; an environment for him to learn about finances, to turn his money into equity and to do this without fear of financial difficulty or short fall. She required him to only share one half (1/2) of the electric bill, groceries and entertainment. She allowed him the sole use of his own funds for supplies to renovate the

properties. These funds did not allow the parties to hire workmen. So, she wore coveralls and worked with him side by side and at times in deplorable circumstances to a state where even Mr. Murphy agrees she was at times exhausted. I find, as well, that Ms. Dunn's largess enabled Mr. Murphy to become part owner of two (2) sailboats, a trailer, a speedboat, to take long vacations and become co-owner of real property on the Mira.

[72] Pursuant **Kerr v. Baranow**, supra., the third element that I am to examine is the element of absence of juristic reason. Ms. Dunn must show the absence of a reason to allow the defendant to retain the assets in question. Ms. Dunn, I find, has shown that there is no juristic reason to allow him to solely retain the proceeds of the sale of the rental properties.

[73] The next issue is the second step if absence of juristic reason is proven; that is whether or not Mr. Murphy can provide any new elements or any new categories that may exist that would justify him retaining proceeds of the sale of the rental units. Justice Cromwell advised a defendant is permitted to rebut the absence of juristic reason by providing a new category which would allow him to retain the assets or the majority of the assets. Mr. Murphy has not provided this Court with this evidence. Mr. Murphy has filed a Defence and Counter Claim outlining his contributions to Monteith Avenue. I find this crosses into

the issue of mutual exchange benefits, which I understand from **Kerr v. Baranow** (supra., at para.109), ought to be dealt with in the Defence and Counter Claim stage; which I address at that stage.

[74] I do acknowledge that Mr. Murphy signed both rental properties but I do not feel that that is the type of contract that the Supreme Court is addressing in the analysis of juristic reason.

[75] In summary, in relation to the third issue, juristic reason, I find Mr. Murphy provided no public policy reason, no contractual reason, and no new category to allow him to retain the funds in total.

[76] Among the factors to consider is whether or not an award is granted by the Court to Ms. Dunn ought to be monetary or a proprietorship in some asset. **Kerr v. Baranow**, supra., seems to express a preference to monetary awards if at all possible (para. 50). In this case, the rental properties were sold and so only a monetary award would be possible.

[77] I must now examine whether Ms. Dunn has established a clear link between the joint efforts of the parties and the accumulation of wealth. This relationship is referred as a joint family venture (**Kerr v. Baranow**, para. 60). I should reference very helpful articles by Berend Hovius, *Property Disputes Between*

*Common Law Partners*, as presented to the Law Society of Upper Canada on June 16, 2011, **Kerr v. Baranow**, supra., and *Initial Judicial Responses to Unanswered Questions*, by Justice Jennifer MacKinnon, Superior Court Justice, Ontario, 2012. As well as the decision of Justice Mona Lynch in **Darlington v. Moore**, [2011] N.S.J. No. 205.

[78] Justice Cromwell (**Kerr v. Baranow**, para.89) outlines the four (4) factors that the Court must examine in deciding whether or not a joint family venture exists. These are: (1) mutual effort; (2) economic integration; (3) actual intent; and (4) priority of the family. Justice Cromwell recognizes this analysis may involve an overlapping of the factors. I found this to be so in this case. Justice Cromwell indicated the list of factors is not closed.

[79] In the subcategory, mutual effort, the physical transformation of these two (2) properties was through the joint efforts of the parties working side by side. Ms. Dunn set a high standard for acceptable renovation. The parties agreed on this fact. Her standard was such that the properties had to be renovated to a stage where she would live there. The parties were fully employed on a full time basis. I accept the renovations had to be done on their weekends, after work and on vacation. I find the parties worked side by side and spent the physical effort necessary to upgrade these houses. Both could and did physical

work such as tearing up tiles, carpets, sanding, staining, restoring, working with hardwood, framing walls, gyprocking, scraping paint, removing wallpaper and hauling debris to the dump. Mr. Murphy, I find, was better skilled at the electrical and plumbing aspects. Final electrical work required licence electrician to inspect and pass on the actual inspection. Ms. Dunn could string wiring as well. She did all the interior decorating. She was the one who ran for supplies as needed. Ms. Dunn's witnesses confirmed that this couple was always together working as a couple doing the physical aspects of the renovations. These witnesses soundly contradict Mr. Murphy's evidence that he worked alone on the properties.

[80] I find that the renovations and the maintenance were achieved by working collaboratively. I accept Ms. Dunn's evidence that so much effort was spent on the rentals that necessary work on the Monteith Avenue home was neglected. I accept, as well, that this couple worked so intensely that their social life suffered. I find that they were engaged in this venture as a partnership.

[81] Mr. Murphy stated, he did eighty percent (80%) of the work and worked alone at times because he was on shift work so he had flexible hours. Towards the end of his cross examination he had this to say about joint family venture (Transcript pages 149 & 150):

Q: And I would suggest to you sir that you only you acquired those rental properties apartments and the ability to build that equity in them only after you embark in the joint venture with Ms. Dunn to improve and renovate those apartments.

A: Yes.

Q: Cause certainly you're familiar with the concept of teamwork?

A: Absolutely.

Q: And you and Ms. Dunn certainly worked together as a team on those apartments?

A: Yes, and as well as the Westmount property.

Q: Ok, I'm asking you about the apartments though Mr. Murphy.

A: Yes.

Q: Isn't it true that you combined your efforts when working on those apartments to make sure the job was done.

A: That's correct.

Q: And it's fair to say that you were not only partners with respect to those apartments, let me get back on track. Isn't it fair to say that you were partners with respect to those apartments.

A: Correct.

Q: And isn't it fair to say you considered yourself partners with respect to other assets you require together such as your boat.

A: Yes.

[82] The second subcategory to examine is economic integration. I accept Ms.

Dunn paid for almost all the costs of running the house on Monteith Avenue; as well as the cost of any improvements or maintenance on Monteith Avenue, so that Mr. Murphy could use his funds on the rental properties. Both parties used the same credit card and he reimbursed her for his own items which were to include supplies for the rentals. She paid for all of the items purchased for the Monteith Avenue house; and she provided some receipts in support. However,

it is not in dispute that she was reimbursed for the majority, if not all, of the items she purchased for the rentals, that he was reimbursed for any items that he purchased for Monteith, and that common items were split on a 50/50 basis. The bulk of the Visa charges, as indicated already, appear to be discretionary spending and maintaining a very comfortable lifestyle. The Visa statements Mr. Murphy tendered were incomplete but the Visas he did provide referenced very few outlets where one could buy building supplies, and the ones that do the charges are very small.

[83] Mr. Murphy was solely responsible for the two (2) mortgages on the property. The Holyrood mortgage was paid out in August 2006. He was able to declare the interest as a business expense. Ms. Dunn advised she did not want the jeopardy, and jeopardy is her word, of the two (2) mortgages. Also, she wanted Mr. Murphy to learn about business, how to handle money, and how to improve his credit rating.

[84] Mr. Murphy advised that if he had to contribute to the house, as he had when he was renting an apartment, the expense of that rental for 17 years would have been \$70,000.00. He assumed that to rent a property of the nature of Monteith Avenue would cost twice that amount which is \$650 to \$700 per month. The

arrangement the couple made had gone on for 17 years, where he paid only one half (1/2) of the electrical, groceries and entertainment.

[85] I accept that when he did run short on funds to renovate the apartments, Ms. Dunn gave him funds just as she did to enable him to maximize his RRSPs and to give him a down payment on the Holyrood property. He paid her back over time. I find that, while the parties did not share a joint account, they did purchase the Mira property together, they did buy sailboats together, they did buy the trailer together and they used the same credit card. They had the economic integration sufficient to satisfy the second element of the joint family venture.

[86] The third element to consider, which is probably the most important, is the actual intent. Justice Cromwell cautions that this factor carries considerable weight in the joint family venture analysis. Justice Cromwell stated at para. 94:

**94** Underpinning the law of unjust enrichment is an appropriate concern for the autonomy of the parties, and this is a particularly important consideration in relation to domestic partnerships. While domestic partners might not marry for a host of reasons, one of them may be the deliberate choice not to have their lives economically intertwined. Thus, in considering whether there is a joint family venture, the actual intentions of the parties must be given considerable weight. (emphasis added) Those intentions may have been expressed by the parties or may be inferred from their conduct. The important point, however, is that the quest is for their actual intent as expressed or inferred, not for what in the court's view "reasonable" parties ought to have intended in the same circumstances. Courts must be vigilant not to impose their own views, under the guise of inferred intent, in order to reach a certain result.



[87] The parties referred to themselves here as a couple for 17 years. The actual intent of acquiring the rental properties was to enable Mr. Murphy to thrive in business, initially to save up for his retirement, as he did not have a retirement plan until 1997, and to teach him about money was the short term goal of this couple. The long term goal was to prepare for retirement or to build a home before retirement on the Mira property. Ms. Dunn's witnesses support this point as already set out in my comments on corroboration. Towards the end of his cross examination, Mr. Murphy agreed that the rentals were for retirement purposes; for their retirement together. Mr. Murphy stated on cross examination (Transcript page 148, lines 4 to 12 (inclusive)):

Q: Is it true Mr. Murphy that you and Ms. Dunn discussed having those apartment buildings that one day there would finally be a pay off when they would be sold and monies put towards your retirement with her?

A: Yes, that was the whole point, my retirement.

Q: The whole point was your retirement together with Ms. Dunn, was it not?

A: That would have been the case at the time.

Q: Cause surely Ms. Dunn wouldn't have come home from work every evening and spend all those weekends working on an apartment for you to enjoy the fruit of her labours with someone else.

A: That's true and it works the same way the Westmount property.

Q: Isn't it true Mr. Murphy that the only reason you're making a claim against the Westmount property is because Ms. Dunn is making a claim against those apartments?

A: That's the way the claim went through, that's the way it was. She was claiming against me and I was claiming against her.

[88] The fourth element is priority of family. The parties had no children. They appeared to have no interest in being married. I heard no mention of wills or testamentary documents. They were a couple as confirmed by Ms. Dunn's witnesses and as agreed by the parties themselves. They spent their leisure time together, fixing up rentals, fixing up their sailboats, actually sailing in the sailboats, took trips and entertaining friends who were the corroborative witnesses of Ms. Dunn's evidence. They worked on joint projects together and as Mr. Lawless pointed out they were always working on a project or discussing what their next project would be. They travelled frequently on nice vacations. Mr. Murphy concedes that Ms. Dunn did subsidize him in his goals as only a family member would. During their 17 years together they appeared to treat each other and the outside world as if they were a family. Ms. Dunn subsidized Mr. Murphy without monetary interest or without any expectation of a special return. Ms. Dunn's assistance is conduct only seen in a family where one cares very much for someone else.

Q: Isn't it true, Sir, that in fact it was Ms. Dunn who subsidized your lifestyle and your ability to maintain those apartments?

A: She subsidized to the extent that we were fine with the arrangements that we were living under.

Q: I didn't ask you if you were fine with it or if she was fine with it but at the end of the day, the reality is sir that Ms. Dunn subsidized your ability to maintain these apartments and to have the lifestyle you enjoyed.

A: Yes.

[89] Ms. Dunn proved she gave priority to her family. Mr. Murphy throughout the latter part of his cross examination, conceded that the apartments were a joint family effort. In relation to income tax, he commented (Transcript page 102):

Q: And when you prepared, or was it Ms. Dunn that prepared your records for income tax purposes wasn't it?

A: It was a joint effort by both of us to go over the documentation that I have.

Q: Ok, so you went over with it then you're familiar with what you could deduct and not deduct, am I right?

A: Absolutely.

[90] I find they worked together as a family in relation to preparation for the tenancy hearings as confirmed in cross examination of Mr. Murphy (Transcript page 133):

Q: She did all administrative work and documenting the expenses for income tax purposes?

A: It was jointly done as well.

....

Q: Ok, but you can't deny that she did the necessary prep work for those hearings, that being the residential tenancy board?

A: That would be a joint effort again.

[91] Mr. Murphy agreed in relation to physical work and subsidizing of the apartments was a joint venture (Transcript page 149 to 150). Mr. Murphy advised:

Q: And I would suggest to you sir that you only acquired those rental apartments and the ability to build that equity in them only after you embarked on the joint venture with Ms. Dunn to improve and renovate those apartments?

A: Yes.

Q: Cause certainly you're familiar with the concept of team work?

A: Absolutely.

Q: And you and Ms. Dunn certainly worked together as a team on those apartments?

A: And as well as the Westmount property.

Q: O.K. I'm asking you about the apartments though Mr. Murphy?

A: Yes.

Q: And isn't it true that you combined your efforts when working on those apartments to make sure the job was done?

A: That's correct.

Q: And it's fair to say that you were not only partners with respect to those apartments.....well let me back track a sec. Isn't it fair to say that you were partners with respect to those apartments?

A: Correct.

Q: And isn't it fair to say that you considered yourself partners with respect to other assets that you acquired together, such as your boat?

A: That's correct.

[92] In relation to the sale proceeds, Mr. Murphy stated (Transcript page 151 to 152):

Q: You would walk away with \$153,000 and Ms. Dunn would walk away with the same house she purchased before she met you and before she moved in with you, is that right?

A: That's correct.

Q: Do you recognize sir the role that Ms. Dunn played in improving in life?

A: Yes.

Q: Do you recognize sir that the proceeds of sale, that approximately \$153,000 was wealth that was created during your cohabitation.

A: That's correct.

Q: And it was created as a result of your joint efforts.

A: Correct.

Q: And it's fair to say that you worked towards the common goal of improving and maintaining those apartments.

A: True.

Q: And that goal continued over 16 years 1992 to 2008.

A: Yes.

[93] In all of those examples and by their conduct, Ms. Dunn made Mr. Murphy her priority. Mr. Murphy appeared, until separation, according to the pictures and the corroborative evidence, to have enjoyed spending leisure time travelling with Ms. Dunn, sailing with Ms. Dunn, having dinner parties at home. The parties did treat each other as a family although it would appear that Ms. Dunn was firmer in that aspect than was he. While the parties did not have any children, I find that they lived and worked and acted as a couple; as a family unit. There is no presumption in favour of either party in this case as there would be with married couples. There is no presumption of equal sharing in common law relationships. There is no presumption in favour of joint family venture. There is no presumption that the Claimant's efforts had a clear causal connection to the accumulation of wealth or to the proportion of same.

[94] I find that Ms. Dunn has established on clear and cogent evidence that she and Mr. Murphy worked for most of their adult years together on acquiring improving and maintaining property that they would have for their retirement.

She has proven that these efforts resulted in the net profit of \$153,000.00; the direct result of their work together. They worked together as a unit. Mr. Murphy left with all the profit. Ms. Dunn's efforts were equal to Mr. Murphy's yet he claims he is entitled to a hundred (100%) percent of the profit, as well he claims in his defence he is entitled to fifty (50%) percent of the actual worth of her home, which could be amounted to \$180,000.

[95] I am next required to address, at the remedial stage, the existence and effect of mutually conferred benefits. This is covered in **Kerr v. Baranow**, supra., as Justice Cromwell stated at para. 101, "... a claimant cannot expect both to get back something given to the defendant and retain something received from him or her." As I understand Justice Cromwell's instructions that the mutual conferred benefit once established and quantified, a portion of the resulting sum is to be subtracted from the amount that may be paid to the successful claimant (**Kerr v. Baranow**, para.101 to 109).

**101** As discussed earlier, the unjust enrichment analysis in domestic situations is often complicated by the fact that there has been a mutual conferral of benefits; each party in almost all cases confers benefits on the other: Parkinson, at p. 222. Of course, a claimant cannot expect both to get back something given to the defendant and retain something received from him or her: Birks, at p. 415. The unjust enrichment analysis must take account of this common sense proposition. How and where in the analysis should this be done?

**102** The answer is fairly straightforward when the essence of the unjust enrichment claim is that one party has emerged from the relationship with a disproportionate share of assets accumulated through their joint efforts. These are

the cases of a joint family venture in which the mutual efforts of the parties have resulted in an accumulation of wealth. The remedy is a share of that wealth [page321] proportionate to the claimant's contributions. Once the claimant has established his or her contribution to a joint family venture, and a link between that contribution and the accumulation of wealth, the respective contributions of the parties are taken into account in determining the claimant's proportionate share. While determining the proportionate contributions of the parties is not an exact science, it generally does not call for a minute examination of the give and take of daily life. It calls, rather, for the reasoned exercise of judgment in light of all of the evidence. (emphasis added)

....

**109** As I noted earlier, my view is that mutual benefit conferral can be taken into account at the juristic reason stage of the analysis, but only to the extent that it provides relevant evidence of the existence of a juristic reason for the enrichment. Otherwise, the mutual exchange of benefits should [page324] be taken into account at the defence and/or remedy stage. It is important to note that this can, and should, take place whether or not the defendant has made a formal counterclaim or pleaded set-off.

[96] Turning to the defendant's Statement of Defence and Counter Claim. He alleges that Ms. Dunn did little to enhance the value of the rentals, monetarily or physically. He alleges he did much to improve the Monteith Avenue and property. He claims in his defence that he paid equally "to all the household expenses". On that latter point, Mr. Murphy on cross examination admitted that he never paid for anything major or minor in relation to the maintenance of Monteith Avenue. He agrees he did not pay any rent nor did he contribute to the mortgage. I accept on the evidence that on a day to day basis Ms. Dunn paid for the ongoing running of Monteith Avenue as well as all the renovations

[97] Over the 17 years Mr. Murphy lived on Monteith Avenue, he stated that he did approximately forty (40) days of renovations. Mr. Murphy maintains he

probably did more work on Monteith Avenue, which he could relate it as he put it he “put my mind to it” (Transcript page 83). He lists the chores done in some detail and the time each took. I have some difficulty with his time allotment. For example, he allows three (3) to four (4) days to install a counter top and sink. He gives no hourly rate to quantify these chores. Mr. Murphy concedes that none of the work done could be considered major. Mr. Lawless describes that any changes the parties made to Monteith over their years together to be essentially cosmetic. This is a stark comparison to the work he described that was done to the rentals including the gutting of the Leonard Street property.

[98] If I accept Mr. Murphy’s estimate of forty (40) days of labour over 17 years, and where I have no evidence to help quantify his efforts; and, bearing in mind that quantifying need not be exact in domestic situation; 40 days labour over 17 years is less than 2.4 days a year. While this may be technically a mutually conferred benefit, I find that it is essentially too small to quantify. However, if I am wrong on this point and if there does exist some mutually conferred benefit over the 2.4 days over a 17 period, I find that it is well cancelled out or well compensated by Mr. Murphy’s ability to live rent free in a very attractive house in an environment that allows him to thrive; and to end his partnership



with substantial assets. I am therefore not prepared to make any subtraction for any contribution he made under the heading of mutually conferred benefit.

[99] There is one factor that must be examined, and that is that Mr. Murphy was responsible for both mortgages. I have considered this in great length. I had to consider whether or not this was a paper liability or an actual liability. It was an actual liability because the mortgages were there but Justice Cromwell counsels us that we must examine actual intent as opposed to perceived intent. The same must hold true in relation to perceived liability and actual liability. Was there ever any actual liability to Mr. Murphy stemming from the mortgages? Was there ever any risk of a potential claim or action, even in the lean years? There were long periods of no rental income during renovations so this could have been the time where the liability would have struck, when are the bankers would have been circling. That would have been most people's reality but Mr. Murphy's reality was different. His reality was that he had Ms. Dunn willing to pick up the short fall. At one time, as indicated, his indebtedness to her was \$9,000.00. I find her to be a benevolent banker who was repaid when Mr. Murphy could manage. For example, it took him two (2) years to repay the \$4,000.00 and at no time was interest discussed. There is no banking or lending institution that would provide such terms. However, I have to, at the same time,

weigh that there was potential of some risk to Mr. Murphy. And so, I have reduced Ms. Dunn's recovery from 50 percent by five (5%) percent.

[100] I find based on all the evidence and exhibits that the parties lived together for 17 years, worked as partners in acquiring, renovating, running and maintaining five (5) rental units and two (2) houses. Both did the physical work, Mr. Murphy had his strengths, Ms. Dunn had her strengths as already outlined. They both shared the paperwork associated with the rentals. Ms. Dunn financially subsidized Mr. Murphy, when required, over the 17 years, allowing him to develop equity in rentals, sailboats, the trailer, and property in Mira. I find there existed a clear family venture where the profit is directly connected to their efforts and they should be reimbursed on an equal basis with the exception of the five percent (5%) adjustment for the fact that Mr. Murphy alone was accountable to the bank for the mortgage payments on the rentals. I acknowledge Justice Cromwell cautions that in a case of equitable relief, the title on documents is not a definitive of the matter by any means. It follows that if title to property was definitive, there would be little room for equitable relief.

[101] I must now examine out what is the detriment. I have already found that there was profit, that it was connected to the joint family effort, but what was

the detriment? The detriment that Ms. Dunn experienced was she used money that she could have used for something else. She involved herself in physical work and heavy physical work sometimes unpleasant physical work. She used her leisure time doing physical labour when she could have been on the sailboat on the Bras D'or Lakes.

[102] I find that Ms. Dunn has proven her case clearly on a balance of probabilities and has corroborated all significant issues set out in **Kerr v. Baranow**, supra. Mr. Murphy's Defence and Counter Claim have failed, as he has not proven any of the elements of the relief claimed. The plaintiff, in conclusion, shall have forty-five percent (45%) of the \$153,145. Mr. Murphy shall have fifty-five percent (55%) of that same sum.

[103] It is important to examine the decision of the Nova Scotia Supreme Court Appeal Division in a case with some similarities; that case is **Goddard v. Hambleton**, [2005] N.S.J. No. 381. In that case, unlike this case, the Claimant had actually put money and labour into the joint family venture which was the home. As the Claimant was able to prove his case at trial and received judgement in the amount of \$16,400.00 for contribution to the purchase price and renovations. The Claimant proceeded to Court of Appeal to ask for the return of the mortgage payments as well. There, like here, the Court found that

he had not proven the essential elements of unjust enrichment. Justice Fichaud concluded with a statement that I find is fitting in this case. At para. 13 he said, “The cause of action for unjust enrichment is not an instrument of opportunism.”

[104] The final issue is the trailer. I accept that Mr. Murphy without reason or excuse failed to follow the Inter Parties Order of Justice Goodfellow. He failed to cooperate with disposal of this asset and others as directed. I accept Ms. Dunn was entitled, after two (2) years of trying to follow the direction of Justice Goodfellow and concerned about vandals, she paid to have the trailer stored. Eventually, she had the trailer moved to Mr. Murphy’s home. Mr. Murphy simply ignored Justice Goodfellow’s Order. Instead, he unilaterally registered the trailer in his name and sold it to his uncle for \$3,000.00. Mr. Murphy agreed he knew that it was unfair to expect Ms. Dunn to accept \$1,500.00 for her share of the trailer. He did not fix the damages to the trailer, although he told the Court he knew how. I fixed the value of the trailer in the amount of \$8,000.00, which is between the purchase price in 2005 and the amount Mr. Murphy received in the transaction, which I find to be not at arm’s length. Normally this amount would be split 50/50 which means Mr. Murphy would have \$4,000.00; but as a result of his own conduct, he will be in a position where he will have to

transfer \$4,000.00 to Ms. Dunn, which means the total value received for the trailer and kept in his own bank account (\$3,000.00) plus another \$1,000.00. As well, I find the cost of storage and transport \$500.00 (per Exhibit #15) are a direct result of his failure to follow reasonable requests to assist in the sale of the asset and his reluctance, almost defiance, to follow the court order which would have saved the parties from all the costly results.

[105] I find in relation to the Visa bill that Mr. Murphy knew that he owed money on the Visa but as he appears to do with things he does not like, he ignored it. He shall pay the Visa amount of \$1,733.32 which is his share of the Visa as of June 2008 and any interest since that time. He shall pay as well his share of the accountant's bill for the joint tax return in the amount of \$150.00. Ms. Dunn shall be entitled if she wishes to buy the Mira property at \$80,000.00, less notional and disposition costs, sixty (60) days as agreed, and that should be completed within sixty (60) days or property listed and sold. The small boats, pawns (unvalued) and speed boat valued at \$2,400.00 shall be sold by Ms. Dunn within sixty (60) days and the proceeds shall be split on a 50/50 basis.

[106] The client shall be entitled to costs upon receipt of submissions from Ms.

Gibney and Mr. Iannetti as to the quantum

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M. Clare MacLellan, J.