

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Citation: *Connolly v. Niet*, 2017 NSSM 100

Claim No: SCK 465973

BETWEEN:

Scott Connolly

Claimant

-and –

Maaike Niet

Defendant

Scott Connolly – Self Represented.

Maaike Niet – Self Represented.

Editorial Note: The electronic version of this judgment has been edited for grammar, punctuation and like errors, and addresses and phone numbers have been removed.

DECISION

(1) The parties are former common law spouses whose relationship ended in June 2015. The separation and subsequent court proceedings have been acrimonious, mostly taking place in Family Court, addressing custody, access and support of the parties' three children. This matter concerns the division of certain property left behind in the residence after Mr. Connolly left. He is seeking return of a number of personal items, many of them general in description, or \$25,000 in lieu. Ms. Niet defends the claim alleging Mr. Connolly had abandoned the items, or, in some cases, they did not belong to him in the first place.

Issues

(2) Has the Claimant, Scott Connolly, established ownership or some other form of legal claim to items remaining in the house? If so, what are those items?

The Evidence

(3) Before reviewing the evidence of each witness, it is important to note that this matter followed a successful claim by David Connolly, Scott Connolly's father, heard on June 21, 2017 before Adjudicator Jonathan Cuming. (SCK 463587). In an Order dated

July 10, 2017, Adjudicator Cuming directed certain property shown in "Exhibit #2" in that proceeding to be delivered or picked up by David Connolly. Anything remaining on that property was deemed abandoned by David Connolly. With the consent of both parties, I obtained a copy of the order which was filed on July 17, and Exhibit #2, which was a bundle of photographs. On July 24, 2017, one week after the Order was filed, this claim was filed by Scott Connolly for return of his personal items left in the house.

(4) Scott Connolly testified that he and Ms. Niet lived together for approximately 17 years until their relationship ended, which according to him, was June 15. He testified that he was not allowed into the house or on the property after that date. He prepared and submitted a list of items which he is seeking. They include vehicles, woodworking tools and equipment, books and furniture. There are also items which were given by David Connolly to Ms. Niet, such as a Ford Escort which Scott Connolly claims as his own. Ms. Niet alleges certain items belong to their children.

(5) Under cross examination, Mr. Connolly claims he is entitled to everything on the schedule which he introduced in court, which is too lengthy to set out herein. Mr. Connolly does not believe it includes anything addressed in the matter between Ms. Niet and his father. He acknowledged the white bookshelf he seeks was contained in his daughter's room. Most of the items were left behind. He was told not to return once he left. He testified that he left on his own on June 15, 2015, leaving the items behind.

(6) Anita Hudak has been a lawyer since 2006. She currently practises as a sole practitioner of family law from her office in Kentville. She has been Ms. Niet's solicitor for the proceedings in Family Court. She did not represent the Defendant in this matter. Nevertheless, the decision for Ms. Hudak to testify was unorthodox. It is most unusual to see a party's solicitor appearing as a witness in a series of matters arising from the breakdown of a relationship, particularly where the issues remain live with further litigation possible. The courts have expressed serious misgivings in receiving evidence of counsel, whether in person or by affidavit. (*Gillis v. BCE*, 2014 NSSC 279).

(7) In many respects, the evidence Ms. Hudak provided could have come from other sources such as a certified copy of the record of Family Court or the admission of certain documents by Ms. Niet. It is a risk for a lawyer to testify on behalf of her client as she may be cross examined on any relevant evidence she may give. I allowed her testimony which I found helped place the matter in its context, but note that it did not provide any weight to the main issue, the entitlement to the assets.

(8) Ms. Hudak's evidence was to the effect that she attempted to move the matter forward, but Mr. Connolly made that unsuccessful. Ms. Hudak described the early negotiations between the parties. The discussions between Ms. Hudak and Mr. Connolly eventually became heated. She told him that he had no claim to the house, which he disputed. Many of the dealings between the parties were contained in correspondence tendered into evidence, which as noted, could have been introduced by Ms. Niet personally rather than through her solicitor.

(9) At the hearing, I allowed the portion of Ms. Hudak's evidence providing context to the matter, essentially the history of the disputes to date. The remainder was disallowed.

(10) It is clear Mr. Connolly ought to have continued to retain legal advice, and should even consider doing so at this juncture. That said, his decision not to do so has no bearing on these reasons for judgment.

(11) Maaïke Niet testified that she and Scott Connolly never married but lived together for approximately 14 years. Ms. Niet was the only income earner, while Mr. Connolly stayed home with the children. They were together until, according to Ms. Niet, she asked Mr. Connolly to leave on June 14, 2015 and he and his father packed their items and left on June 21. On November 5, 2017, they returned and took additional items. The things he required were vaguely described. Many of them were not his but used for the children. Some were worn out and disposed of.

(12) She described several attempts to resolve the issue of property division. She considered after two years much of the property was abandoned. She testified that she continued to use the tools. The furniture left behind was used by the children. The vehicles which were registered in her name were sold.

(13) In rebuttal evidence, Mr. Connolly testified that the items were gifts from his family and friends and he now wants them back. He seriously doubts Ms. Niet has retained any of the tools as she does not do this type of work.

The Law

(14) The *Small Claims Court Act* has limited jurisdiction when addressing division of property. Specifically, s. 9 of that Act limits claims in the court to certain torts, breaches of contract and return of property. In order to establish a return of property, the Claimant must show better title than the Defendant.

(15) The Small Claims Court has addressed common law division of assets and liabilities. Adjudicator Eric Slone stated the following in *Cook v Orr*, 2008 NSSM 23:

"[4] It is a common misconception that property (as opposed to support) issues following separation of a common law couple may be dealt with in the same way as if the parties had been married. Issues of child and spousal support fall under the *Maintenance and Custody Act*, which provides relief for unmarried couples that have lived as spouses for two years. That Act does not deal with property. Only the *Matrimonial Property Act* does.

[5] The *Matrimonial Property Act* does not yet (any may never) apply to common law couples. As such, for unmarried couples property issues by and large fall to be determined under principles of basic contract and property law, with principles of unjust enrichment coming into play.

[6] If the amount involved exceeds the monetary jurisdiction of this Court, then clearly the Supreme Court would be the appropriate forum. However, where the amount is within the monetary jurisdiction of this court then there does not appear to be any reason why it cannot be brought in Small Claims Court. Indeed, this type of claim is fairly common.

[7] When a claim like this is brought, the threshold question to be asked is: what was the agreement or

contract that the spouses entered into, or the general understanding that they had?”

(16) Adjudicator Richardson then adds the following in *Rayner v. Smith*, 2010 NSSM 6:

[37] When people join together in a common law relationship they often merge their finances. The income and expenses of one become the income and expenses of both. As well, the way in which that common burden is shouldered varies from couple to couple. In one all income and expenses may be tracked and shared on a 50/50 basis; in another, on a pro-rated basis; and in a third, one partner may pay all the basic living expenses while the other contributes to the joint retirement savings. The fact then that a loan is taken out in the name of one does not mean necessarily that it is for the benefit of that person alone—it may be for and often is for the benefit of both.

[38] Specific agreements to share expenses or to contribute to the purchase or property are enforceable as contract. On the other hand, gifts of property that are made with no expectation of return or repayment cannot be turned into agreements to repay by subsequent regret in the event that the relationship falls apart: see, for e.g., *Cook v. Orr, supra*, at paras 8 and 14. The difficulty lies in distinguishing between the two. That task is not an easy one, especially given that contributions to the common good (what are, in effect, gifts) are “precisely the kind of thing people do for each other when they are in a caring relationship.” *Cook v. Orr*, per Adjudicator Slone at para.14.

(17) The cases do not discuss assets brought into the relationship. I had the opportunity to consider that in the case of *Johnstone v Helpard*, 2016 NSSM 66:

“On the other hand, a common law couple is generally free to dispose of any property they own during cohabitation without the consent of the other spouse. The spouse is afforded no guarantee of equal division on death or breakdown. The presumption is that each spouse owns what is in their respective names, free of any claim by the spouse. A spouse who seeks a share of their spouse’s property must prove unjust enrichment or constructive trust, legal remedies available in certain circumstances to address inequities where each spouse has contributed for the benefit of the other. This was confirmed by the Supreme Court of Canada in *Nova Scotia (Attorney General) v. Walsh*, 2002 SCC 83 and *Kerr v. Baranow*, 2011 SCC 10.”

(18) In other words, on the breakdown of a relationship, a common law couple owns what they brought into the relationship. Assets acquired during the relationship depend upon the circumstances of each asset.

(19) As for gifts from third parties, they are determined by who receives them, not who gives them. Depending upon the evidence, a consideration of who gave the assets might be relevant to help determine the donor’s intent.

(20) As always, when asserting a claim of entitlement to assets, the onus lies upon the party seeking to make the claim. In this case that is Mr. Connolly.

Findings on the Claims

(21) In his Notice of Claim, Mr. Connolly seeks \$25,000 or the return of all of his items. For the reasons set out below, with the exception of a few modestly valued items, I find he has not come close to discharging this onus. While I have reservations with Ms. Niet’s evidence as well, it is Mr. Connolly who bears the burden of proof which he has

not discharged.

(22) I find many of the items may have been shared by the parties. After a 14 year relationship, many of these items would have long since worn out and been discarded. In his evidence, Mr. Connolly testified that several of the items on his list were discarded by Ms. Niet while they lived together. I find he made no protest at that time. Furthermore, it is interesting that this claim is now being brought only after a successful claim by David Connolly. That fact affects the credibility of the claim.

(23) Based on the evidence of both parties, I find members of Scott Connolly's family gave items to Ms. Niet in her own name. An example of such a gift is the Ford Escort. In other cases, I find certain items of furniture were given to the parties' children and remain in the house with consent. Others may well have been converted (i.e. given away or sold), but I find the evidence vague and ambiguous.

(24) Thus, I do not find he has discharged the onus upon him to establish entitlement for the items he seeks.

(25) However, I am satisfied that some tools used by Mr. Connolly for woodworking or auto repair remain in the premises or were sold by Ms. Niet. I find Ms. Niet has no interest in that type of work. Like most of the assets sought, the tools were older and worn. No actual value was provided. The evidence was not sufficient to provide a proper description or a value. As a result, I am prepared to award Mr. Connolly \$500 to replace the used tools, books and woodworking equipment. The remainder of the Claim is disallowed.

Summary

(26) Based on the foregoing, I find the Defendant liable to the Claimant for \$500. There shall be no prejudgment interest. Each party shall bear their own costs.

(27) An order shall issue accordingly.

Dated at Halifax, NS,
on January 15, 2017;

Gregg W. Knudsen, Adjudicator

Original:	Court File
Copy:	Claimant(s)
Copy:	Defendant(s)