

SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION

Citation: *Fudge v. Lettice*, 2017 NSSC 169

Date: 2017-06-20

Docket: *SFSNMCA* No. 100693

Registry: Sydney

Between:

Kimberley Anne Fudge

Applicant

v.

John Gregory Lettice

Respondent

Judge: The Honourable Justice Lee Anne MacLeod-Archer

Heard: April 21, 2017, in Sydney, Nova Scotia

Written Release: June 20, 2017

Counsel: Kimberley Anne Fudge, Self-represented Applicant
Damien Barry for the Respondent

By the Court:

Facts -

[1] The parties lived in a common-law relationship for 26 years and separated on February 14, 2016. They have one adult son.

[2] Both parties were young when they started living together - Mr. Lettice was twenty years old and Ms. Fudge was seventeen.

[3] After they moved in together, Ms. Fudge collected community services benefits which included a rent supplement. She enrolled in and graduated from university in 1996. She then obtained employment. She was also the primary caregiver for the parties' son, who was born premature and has a learning disability. At times she worked more than one job. Since their son graduated in 2015, she has upgraded her skills. Her income increased as a result.

[4] Mr. Lettice worked throughout the relationship, upgrading his skills to become a red seal carpenter, and later a red seal ironworker. In recent years, he worked as a long-haul truck driver in Alberta. He is now employed as a truck driver locally, on an on-call seasonal basis. His income has declined since leaving his job out west.

[5] Ms. Fudge brings this claim for a division of the common-law property. She seeks an interest in, or compensation for her contribution to, the home registered in Mr. Lettice's name in Sydney Mines. Mr. Lettice filed a response in which he seeks an unequal division of assets, as well as spousal support.

Issues -

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

1. What is the test to be met ?
2. Has Ms. Fudge met the test?
3. If so, what is the appropriate remedy?
4. Is Mr. Lettice entitled to spousal support, and if so, in what amount ?

ISSUE 1 – What is the test to be met?

[7] Ms. Fudge presents her claim under the equitable principles of unjust enrichment. The leading case is **Kerr v. Baranow**, 2011 SCC 10, in which Justice Cromwell stated the test to be met:

[31] At the heart of the doctrine of unjust enrichment is the notion of restoring a benefit which justice does not permit one to retain...

[32] ...[Unjust enrichment] permits recovery whenever the plaintiff can establish three elements: an enrichment of or benefit to the defendant, a corresponding deprivation of the plaintiff, and the absence of a juristic reason for the enrichment: Pettkus; Peel, at p. 784.

[8] Cromwell, J. noted that at the third step of the test:

[44] ...the court may take into account the legitimate expectations of the parties... and moral and policy-based arguments about whether particular enrichments are unjust....

ISSUE 2 – Has Ms. Fudge met the test?

[9] I will analyse Ms. Fudge's claim according to the three part test enunciated above:

1. Enrichment:

[10] Ms. Fudge argues that she enriched Mr. Lettice in a number of ways. She says she:

- paid the loan his parents took out to purchase their first home: that first home was sold to finance the purchase and renovation of the home held in Mr. Lettice's name.
- helped to improve and maintain the home: she says after the second home was purchased, she and Mr. Lettice's father completed renovations on it. She says she did some painting, sanded floors, and helped remove the old kitchen cabinets. She says she also purchased paint and other supplies.
- worked outside the home and paid household expenses from her income throughout the relationship.

- acted as the primary caregiver for their son while Mr. Lettice was away from home for work.
- acted as the primary homemaker, preparing meals, cleaning and maintaining the home.
- paid the property taxes on at least four occasions from her own account, without reimbursement.
- paid the water account for the home from her account on several occasions, without reimbursement.
- paid the home insurance after her income increased, without reimbursement.
- supported the family while Mr. Lettice took time off to be with his father, who was ill.

[11] Mr. Lettice denies that Ms. Fudge contributed to the acquisition or improvement of assets. He acknowledges that she did some painting when the home was renovated, but he says that:

- the home was purchased from the proceeds of sale from their earlier home, which he renovated by upgrading the rooms, the boiler, and the chimney.
- he alone signed the mortgage and assumed liability for the debt on the home.
- he paid the mortgage, insurance and taxes: he says that if Ms. Fudge ever paid the municipal taxes, he reimbursed her.
- he purchased all of the necessary building supplies, and he completed major renovations to the roof, patio, and windows himself.
- he built a two story garage on the property and he added a pool to the yard.

[12] The question of whether Mr. Lettice was enriched involves an economic analysis (**Kerr**, *supra*). I must ask: without Ms. Fudge's direct and tangible financial support to the home and family, would Mr. Lettice have been able to acquire assets and pay off debt? Ms. Fudge worked and brought in income, from which she paid half of the living expenses and helped pay some bills. She also took care of their son, cooked, cleaned and maintained the home. If Mr. Lettice

had raised his son alone, he would not have had that support and assistance. So, his net worth would not be the same today. I find that he was enriched by the tangible contributions and financial support of Ms. Fudge.

2. Deprivation:

[13] Ms. Fudge says she contributed money and support to Mr. Lettice throughout the relationship, for which she has not been compensated. She says that Mr. Lettice was able to accumulate a home with a garage/workshop, a pool, a sea-doo, his truck, carpentry tools, scuba gear, plowing equipment and cash because her income was used for household expenses, and she provided all of the homecare and childcare. And she says that she lost income, savings and advancement opportunities when she was raising their son, and during the year she supported Mr. Lettice through his father's illness.

[14] Mr. Lettice does not contest Ms. Fudge's claim that she provided primary care to their son, or that she supported the family while his father was ill, or that she paid household bills. However, he says that the parties agreed to split their living expenses, with her paying household bills from her account, and him paying the home expenses, such as mortgage, insurance and taxes, from his account. He denies that Ms. Fudge suffered any economic deprivation, as she left the relationship with an RRSP, a tax-free savings account, and monies in her chequing account.

[15] So the next questions is: if Ms. Fudge had not raised the parties' son and given up opportunities throughout the 26 year relationship, would she be better off economically today ? The answer is yes. There was a corresponding deprivation to Ms. Fudge. Although she left with some assets, she would likely have accumulated more had she not given her money, time and energy to the relationship and the family. She is smart and ambitious. She obtained her degree and worked several jobs at various times during the relationship. There was mutual conferral of benefits until their son was born, but thereafter, Ms. Fudge was disadvantaged until he flew the nest.

3. Absence of juristic reason:

[16] Ms. Fudge has proven that Mr. Lettice was enriched at her expense. The onus now shifts to Mr. Lettice to demonstrate that there is a juristic reason why he should not compensate Ms. Fudge for the deprivation she has suffered as a result of their relationship. The parties did not sign a cohabitation agreement. There is no

evidence that Ms. Fudge intended to gift money, supplies or labour to Mr. Lettice. And there is no evidence of any other legal reason why Mr. Lettice should be enriched at Ms. Fudge's expense without compensation.

[17] In this analysis, I have also considered the parties' intentions, and any moral or public policy reasons why Mr. Lettice should retain the benefit conferred by Ms. Fudge without compensation.

[18] Ms. Fudge says that Mr. Lettice gave her a diamond engagement ring on two occasions, and that they planned a wedding. He denies this, saying that he gave her a "promise ring" after their son was born, but that he never planned to marry her.

[19] Whether the ring Mr. Lettice gave Ms. Fudge after their son was born is considered a promise ring or an engagement ring, the implication is the same: it's a promise of a future together. While that ring was given very early in their relationship, when both parties were still quite young and elated with the birth of their son, it is a sign of commitment.

[20] But Ms. Fudge and Mr. Lettice never married. So I must look at their intentions in recent years to determine what impact that has on the analysis. Ms. Fudge says that Mr. Lettice gave her a second engagement ring and that they planned a wedding in 2015. Mr. Lettice denies this. He says he never intended to marry Ms. Fudge. And there is no evidence of wedding plans in the form of a marriage license, a hall booking, receipts for wedding expenses, etc.

[21] Considering all of the evidence, I conclude that while Ms. Fudge expected and wanted to get married, Mr. Lettice had no such intention.

[22] I must next consider moral and public policy considerations. There is certainly no moral or public policy against living common-law and sharing expenses. However, public policy does not support denial of compensation to a common-law partner of 26 years who spends her best years contributing to the family in the ways Ms. Fudge did. There is a basic unfairness about that arrangement which would offend a reasonable person's standards.

[23] In addition to the living expenses that she paid, Ms. Fudge supported the family alone while Mr. Lettice focussed on his father's illness. She helped renovate the home and contributed to renovation costs. She was primarily responsible for the care and education of the parties' son while Mr. Lettice worked

away from home, and she gave up opportunities for income, savings, and self-advancement until after their son graduated.

[24] These contributions go beyond what a person would ordinarily do in a relationship in which both parties mutually confer benefits and expect to leave with what they brought into the relationship. So I find that Mr. Lettice was unjustly enriched as a result of Ms. Fudge's efforts. She is entitled to be compensated.

ISSUE 3 – If so, what is the appropriate remedy?

[25] In **Kerr**, *supra* the Supreme Court outlined two possible remedies where unjust enrichment is established: a monetary award or an interest in property. The Court further suggested that there are two ways to value a monetary award – on a *quantum meruit* (value received or fee-for-services) basis or on a value survived basis. This latter valuation approach is where the joint family venture analysis becomes relevant.

[26] It is only where a monetary award would not be appropriate that a court should consider granting a proprietary interest. In such cases, the person advancing the claim must demonstrate a substantial and direct causal connection between their contributions and the “acquisition, preservation, maintenance or improvement” of the disputed property (**Kerr**, *supra*). A minor or indirect contribution will not suffice.

[27] In this case, there is no evidentiary basis for a fee for services/value received award. Ms. Fudge says she paid the loan for their first home, which was sold to purchase the one in Sydney Mines. But there is no evidence of what she paid in total, or what that home was sold for.

[28] There is also no evidence of what sums Ms. Fudge paid for supplies, nor the number of hours she worked on painting and renovations to the home. The home was purchased for approximately \$26,000.00 in 2000 and was appraised in July, 2016 at \$116,000.00.

[29] I next turn to the “value survived” basis of her claim. Ms. Fudge must demonstrate that there is a link between her contributions to the family venture and the accumulation of wealth.

[30] Mr. Lettice says there was no joint venture. He points to the fact that he alone signed the mortgage and assumed liability for the mortgage debt. He says

there was no co-mingling of assets during the relationship, and that the parties each maintained their own bank accounts. There was no joint account, and although there was joint debt, Mr. Lettice says he only signed for the Visa cards with TD and Scotiabank because Ms. Fudge had poor credit.

[31] During the relationship, Ms. Fudge took care of Mr. Lettice, their child and the home. She worked and paid her share of the household expenses. She says that while her money went to the household, Mr. Lettice was free to use his income as he saw fit. She suggests this is how he acquired his garage/workshop and carpentry tools, scuba gear and snow-plowing equipment. She further argues that she lost income, savings and career opportunities while raising their son.

[32] In **Reiter v. Hollub**, 2017 ONCA 186 the court upheld the applications judge, who determined there was no joint family venture, in light of factors such as “the lack of integration of the parties’ finances, lack of combined contribution to a future together and lack of evidence of prioritizing family over individual interest”.

[33] In this case, the factors which negate a finding of joint family venture are outweighed by the factors which suggest there was one:

- The relationship was 26 years in length and neither party entered the relationship with assets – they were both very young
- The parties had a child together
- Ms. Fudge paid some of the real property costs such as taxes, water, and house insurance
- She paid for supplies and performed renovation work on the home
- Ms. Fudge took on the traditional role of homemaker and primary caregiver to their son
- She forfeited income, savings and career opportunities for the sake of their son and the relationship
- She paid premiums on a joint life insurance policy until Mr. Lettice cancelled it after separation, and she paid for family coverage under her health plan, which included Mr. Lettice

[34] I have considered the mutual efforts of the parties, including the fact that they both contributed to the acquisition and renovation of the home. Both parties upgraded their education and skills, and supported each other as they started new

careers and sought work in their respective vocations. They also raised their son together.

[35] I have also considered the fact that family was given priority throughout the relationship. The parties raised a special needs son. They assumed traditional roles in doing so. Ms. Fudge provided child and homecare, which allowed Mr. Lettice to focus on his work. She postponed her own career aspirations until their son graduated and established himself in his own career. And when Mr. Lettice's father became ill, they both pitched in. Ms. Fudge supported the family while Mr. Lettice took a year off work to spend time with his father.

[36] I have considered the fact that there was limited economic integration between the parties, but that is not determinative. Nor is the fact that title to the home was registered only in Mr. Lettice's name.

[37] I have also considered Mr. Lettice's denial that he ever intended to marry Ms. Fudge in the context of his actions. He gave Ms. Fudge a promise ring after their son was born, and more recently gave her a diamond ring that Ms. Fudge understood was an engagement ring. His actions are inconsistent with his words. I conclude that at one time, he either intended to marry Ms. Fudge, or he deliberately mislead her about his intentions.

[38] Without Ms. Fudge's contributions and support, it is doubtful that Mr. Lettice would own a home, with a pool and garage/workshop, worth \$116,000.00, or any of the other assets he's accumulated in the past 26 years, with little associated debt. I am therefore satisfied that there was a joint family venture and that family wealth accumulated directly as a result of her contributions.

[39] However, it does not follow that Ms. Fudge must receive an equal interest in the home (**Kerr**, *supra*). I must assess her claim in proportion to her contribution to the joint family venture.

[40] Before proceeding further, I note that if the home is taken out of the equation, and after deduction of the associated debt, Ms. Fudge has assets worth approximately \$56,000.00 and Mr. Lettice has assets worth at least \$55,481.00. If the home is added to Mr. Lettice's side of the ledger, he would leave the relationship with assets worth \$151,866.00 (net). The home is the only asset for which Ms. Fudge seeks compensation.

[41] At the time of separation, there was a line of credit (LOC) secured against the home in the amount of \$11,934.00. Although that debt has been paid, I have included it for purposes of this calculation. After deduction of the LOC notional disposition costs, the net value of the home for purposes of division is \$96,385.00.

[42] Ms. Fudge did not earn as much as Mr. Lettice throughout the relationship, but she supported him physically, emotionally and financially while he worked to earn a higher income.

[43] In determining Ms. Fudge's contribution to the family wealth, i.e. the home, I have considered what proportion of the monthly expenses she paid from her income, versus the amount Mr. Lettice paid. Adjusting the figures in his Statement of Expenses to allow for a mortgage payment and expenses for their son, it appears that Ms. Fudge's expenses were in the range of 40% of the total household expenses.

[44] In addition, she provided many unpaid services, including childcare, cooking, cleaning and home maintenance services. Her contributions were particularly important because Mr. Lettice worked away from home. In view of this, and her other significant contributions, her share of the family wealth should be set at 50%. She was an equal partner in this relationship and should receive an equal share of the family wealth.

[45] I am not satisfied that a monetary award is appropriate in this case. I do not know whether there have been any liens or security placed against the home since the LOC was paid off, in which case Ms. Fudge would not get priority as a judgment holder.

[46] Even if her judgment takes priority, it is unlikely Mr. Lettice will pay the judgment. He does not feel she is entitled to any compensation. He can clearly be petty. He refused to make several personal items available to her even after the court directed him to do so. He responded to her question about housekeeping by saying she kept the house "somewhat" clean. I conclude that he's unlikely to pay a judgment without incentive.

[47] I grant Ms. Fudge a 50% interest in the home located at 21 Amber Drive, Sydney Mines. Title to the home shall be conveyed forthwith to Mr. Lettice and Ms. Fudge as tenants in common. Should Mr. Lettice refuse to sign a deed, the local Sheriff shall be empowered as trustee to sign on his behalf, at his expense. Mr. Lettice will have thirty days from the date of this decision to decide whether

he wishes to buy out Ms. Fudge's interest and to arrange financing. He will have a further thirty days to conclude the buyout. Her interest is valued at \$48,417.50.

[48] In the event Mr. Lettice does not opt to purchase Ms. Fudge's interest, or he cannot arrange financing, the property shall be sold. The terms of that sale will be:

- The parties will list the property under the MLS system with a licensed realtor who is knowledgeable about property values in the Sydney Mines area, at a listing price to be set in consultation with the realtor. If they cannot agree on a realtor or list price, they may seek direction from the court on a motion by correspondence.
- The listing agreement will be signed immediately if Mr. Lettice opts not to buy out Ms. Fudge's interest or changes his mind. If he has not confirmed financing within thirty days, or the buyout is not concluded within thirty days thereafter, the listing will be signed and the property marketed for sale.
- Pending sale, Mr. Lettice will pay occupation rent monthly to Ms. Fudge, to be adjusted on closing from his share of the sale proceeds. Occupation rent will be \$300.00 per month. Mr. Lettice will be responsible for all occupation costs pending closing, including insurance, utilities, water, taxes, and any encumbrances placed on the home during his occupation.
- Taxes and water will be adjusted at closing to reflect Mr. Lettice's obligation to pay the taxes and water pending sale.
- No reasonable offer will be refused by either party. If the parties cannot agree on whether an offer is reasonable, one of them may seek the court's direction by filing a motion by correspondence. Generally, a reasonable offer will be any offer within 10% of the list price.
- Both parties will cooperate in the listing and sale of the property by signing whatever documentation may be required, or by performing such acts as may be required, including making the home presentable and available for showings.
- If the parties cannot agree on any issue that may arise during the sale or buy-out, either party may seek direction from the court by filing a motion by correspondence. Costs may be requested and granted if either party is determined to have acted unreasonably.

- When the property is sold, the net proceeds (after the realty fees, legal fees and HST are deducted) will be split equally between the parties, subject to adjustments for occupation rent, taxes, water and encumbrances owing by Mr. Lettice. The proceeds of the sale will be held in trust by counsel for Mr. Lettice pending agreement on the closing adjustments.⁴

ISSUE 4 – Is Mr. Lettice entitled to spousal support, and if so, in what amount?

[49] The parties lived in a common-law relationship for 26 years. Both were able to upgrade their skills during the relationship. Ms. Fudge earned her degree and Mr. Lettice acquired two trades. Mr. Lettice did not give up career opportunities for the family. He was able to travel and work in Alberta because Ms. Fudge assumed responsibility for childcare and the home, while working full-time herself. She gave up income-earning and savings opportunities for the benefit of their son, Mr. Lettice, and his family.

[50] The parties are not married, so the **Maintenance and Custody Act R.S.N.S. 1989, c. 160** applies. The applicable sections are:

Court order

3 (1) The court may, on application by either or both spouses, make an order requiring a spouse to secure or pay, or to secure and pay, such lump sum or periodic sums, or such lump sum and periodic sums, as the court thinks reasonable for the support of the other spouse or common-law partner.

Factors considered

4 In determining whether to order a person to pay support to that person's spouse and the amount of any support to be paid, the court shall consider

- (a) the division of function in their relationship;
- (b) the express or tacit agreement of the spouses that one will maintain the other;
- (c) the terms of a marriage contract or separation agreement between the spouses;
- (d) custodial arrangements made with respect to the children of the relationship;
- (e) the obligations of each spouse towards any children;
- (f) the physical or mental disability of either spouse;
- (g) the inability of a spouse to obtain gainful employment;
- (h) the contribution of a spouse to the education or career potential of the other;
- (i) the reasonable needs of the spouse with a right to support;
- (j) the reasonable needs of the spouse obliged to pay support;

- (k) the separate property of each spouse;
- (l) the ability to pay of the spouse who is obliged to pay support having regard to that spouse's obligation to pay child support in accordance with the Guidelines;
- (m) the ability of the spouse with the right to support to contribute to the spouse's own support. R.S., c. 160, s. 4; 1997 (2nd Sess.), c. 3, s. 3; 2000, c. 29, ss. 5, 8.

Obligation of maintained spouse or partner

5 A supported spouse has an obligation to assume responsibility for his or her own support unless, considering the ages of the spouses, the duration of the relationship, the nature of the needs of the supported spouse and the origin of those needs, it would be unreasonable to require the supported spouse to assume responsibility for his or her own support and it would be reasonable to require the other spouse to continue to bear this responsibility. (3) repealed 2000, c. 29, s. 6.

[51] In **Snyder v. Pictou**, 2008 NSCA 19 the Court of Appeal stated:

26 This case is under Nova Scotia's Maintenance and Custody Act, not the Divorce Act. The factors in s. 4 of the Maintenance and Custody Act for spousal maintenance substantially overlap those in s. 15.2 of the Divorce Act and the case law for spousal support after divorce. The provincial and federal factors are consistent though not uniform: Payne and Payne, Canadian Family Law, 2nd ed. (Toronto: Irwin Law, 2006) p. 412; Boileau v. Spriggs, [1999] N.S.J. No. 510 (S.C.-F.D.) at para. 19; Nugent v. Nugent, [2005] N.S.J. No. 562 (S.C.-F.D.) at para. 18; Robicheau v. Earle, [2004] N.S.J. No. 161 (S.C.-F.D.) at para. 16. The principles in Moge and Bracklaw apply to a spousal maintenance award under s. 4 of the Maintenance and Custody Act. In particular, the court should address the economic consequences of the breakdown of the relationship. [emphasis added]

[52] In assessing Mr. Lettice's claim for support, I have considered the following factors:

- (a) the division of function in their relationship – the parties divided their responsibilities along traditional lines, with Ms. Fudge providing the childcare, housework and meal preparation;
- (b) the express or tacit agreement of the spouses that one will maintain the other – N/A
- (c) the terms of a marriage contract or separation agreement between the spouses – N/A
- (d) custodial arrangements made with respect to the children of the relationship – N/A

- (e) the obligations of each spouse towards any children – N/A
- (f) the physical or mental disability of either spouse – N/A
- (g) the inability of a spouse to obtain gainful employment – both are gainfully employed, though Mr. Lettice’s income has declined since he started working on-call seasonally in Cape Breton;
- (h) the contribution of a spouse to the education or career potential of the other – Mr. Lettice supported the family financially while Ms. Fudge took her degree; Ms. Fudge supported the family physically and financially while he pursued his trades, and while he was working away from home;
- (i) the reasonable needs of the spouse with a right to support – Mr. Lettice’s budget shows a deficit, but there are numerous discretionary items that impact this;
- (j) the reasonable needs of the spouse obliged to pay support – Ms. Fudge did not file a statement of expenses so her needs are unclear, but she does have a car loan and she co-signed her son’s car loan;
- (k) the separate property of each spouse – both left the relationship with assets;
- (l) the ability to pay of the spouse who is obliged to pay support having regard to that spouse’s obligation to pay child support in accordance with the Guidelines – N/A
- (m) the ability of the spouse with the right to support to contribute to the spouse’s own support – Mr. Lettice works seasonally, he provided no evidence to explain why he cannot earn more than he does currently; he also has the ability to supplement his income with carpentry work and plowing as he has done in the past.

[53] I have also considered **Moge v Moge** [1992] 3 S.C.R. 813 and the caselaw flowing from that decision. There is no evidence of a contractual entitlement to support in this case. I further find that Mr. Lettice is not entitled to compensatory support. He was the higher income earner during the relationship. Though his income declined after separation, there is no evidence that he cannot return to work in one of his trades or in long-haul trucking, earning more income. There is no evidence that he has health issues which impact his ability to work. He did not suspend his career aspirations to support Ms. Fudge, nor did he prioritize family over his career. In fact, the opposite is true.

[54] I also find that there is no basis for non-compensatory support. Mr. Lettice’s statement of expenses shows a number of discretionary expenses. If he reduces those expenses, he can meet his reasonable needs.

[55] His statement of expenses also shows a monthly payment of \$300.00 for the tractor loan and \$600.00 per month for gas. If he chooses to keep the tractor and run it, then it is only reasonable to expect him to earn income from plowing. His current job is seasonal, so he is available during the off-season to do plowing.

[56] Mr. Lettice can also supplement his income from carpentry work as he did in the past. Alternatively, he can return to more remunerative work out west. In any of these scenarios, he can easily meet his reasonable needs.

[57] The breakdown of the relationship has not disadvantaged him. I therefore dismiss Mr. Lettice's claim for spousal support.

Conclusion -

[58] Ms. Fudge's claim for compensation under the equitable doctrine of unjust enrichment is allowed. She is entitled to a 50% interest in the home. The parties will each retain any other assets registered in their names, or currently in their possession. Mr. Lettice's claim for spousal support is dismissed.

MacLeod-Archer, J.