SUPREME COURT OF NOVA SCOTIA
(Family Division)
Citation: Richardson v. Underwood, 2018 NSSC 258

Date: 20181204
Docket: SFHPA 102057
Registry: Halifax

Between:

Thomas Lee Richardson, by his Power of Attorney Kelli Richardson

Applicant

and

Michelle Underwood

Respondent

LIBRARY HEADING

Judge:	The Honourable Associate Chief Justice Lawrence I. O'Neil
Hearing:	July 23 and 24, 2018 and September 5, 2018, in Halifax, Nova Scotia
Issues:	1. Is the *Partition Act* subject to a presumption of equal ownership of jointly held property? 2. If that presumption does exist, has it been rebutted?
Summary:	The parties were a common-law couple engaged in real estate projects involving small residential properties. They are currently joint owners of two properties. Mr. Richardson, through his power of attorney, seeks equal division of the properties and relies upon a claimed presumption of equal division and the *Partition Act*. Ms. Underwood says any presumption of equal division is rebutted, unjust enrichment of Mr. Richardson should be found and a constructive trust in her favour should be found. She says she should be found to be the beneficial owner of 100% of one property but agrees she and Mr. Richardson are equal owners of the second property. The Court found the presumption of equal division exists but was not rebutted by Ms. Underwood and the parties are equal owners of both properties.
Keywords:	Resulting trust; constructive trust; unjust enrichment; presumption of equal ownership; *Partition Act*
Legislation:	*Nova Scotia Hospitals Act*, *R.S., c. 208, s. 1* *Partition Act, R.S.N.S. c.333* *Matrimonial Property Act, R.S.N.S. 1989 c.275*
Cases Considered:	*Soubliere v. MacDonald, 2011 NSSC 98* *Peters v. Reginato, 2016 NSSC 345* *Braithwaite v. Turner, 2015 NSSC 221* *K.A.R. v. P.J.T., 2018 NSSC 4* *Darlington v. Moore, 2015 NSSC 124*

Salah v. Salah, 2013 NSSC 308
Kamermans v. Gabor (2018 CarswellOnt 14754)
Moore v. Sweet, 2018 SCC 52

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Counsel: Terrance Sheppard, Counsel for Thomas Richardson
John Shanks, Counsel for Michelle Underwood

By the Court:

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Introduction

[1] The parties began cohabitating around 2001-2002 as a common law couple following a period of dating. Since 2011, Ms. Underwood has lived in Florida. Mr. Richardson visited her there a number of times until February 2015, when he suffered a debilitating stroke.

[2] One of the effects of the stroke has been an impairment of his mental capabilities. On June 15, 2016 Mr. Richardson was declared not competent to administer his estate under Section 53 of the *Nova Scotia Hospitals Act,* R.S.N.S. 1989, c 208, s.1.

[3] Following his stroke and until early 2018, he split his time, staying with family members or at the Nova Scotia Rehabilitation Centre for Head and Brain Trauma and at Lister Drive on the weekends when "on a pass". He now "occupies" the Lister Drive property with the assistance of his family and does not live at other locations.

[4] The parties are "joint" owners of two properties in Halifax referred to herein as the North Street property and the Lister Drive property. This real estate is registered in their names as joint tenants.

[5] The North Street property is a triplex. Since 2005, Ms. Underwood has almost exclusively managed this property. She has claimed all rental income, paid the property taxes on the property and accepted responsibility for its upkeep and for overseeing tenants and resolving related issues. She continues in this role. Ms. Underwood has also received the revenue generated by renting the units in the North Street property.

[6] The parties disagree as to the right of each to an equal share of the value in both properties. In the case of Mr. Richardson, his claim is advanced through his sister, who holds his power of attorney. Mr. Richardson testified and took a different position than his sister. His evidence and this contradictory position will be commented upon later.

Partition Act

[7] The parties agree the *Partition Act, R.S.N.S. c.333* as interpreted by caselaw including the law of unjust enrichment and the remedy of resulting and

constructive trust will determine the ultimate share each has in the value of both properties. A review of sections 4, 5, 9, 15 and 17 of the *Partition Act* is helpful:

> **Land subject to partition**
>
> 4 All persons holding land as joint tenants, co-parceners or tenants in common, may be compelled to have such land partitioned, or to have the same sold and the proceeds of the sale distributed among the persons entitled, in the manner provided in this Act. *R.S., c. 333, s. 4.*
>
> **Right of action**
>
> 5 Any one or more of the persons so holding land may bring an action in the Trial Division of the Supreme Court for a partition of the same, or for a sale thereof, and a distribution of the proceeds among the persons entitled. *R.S., c. 333, s. 5.*
>
> **Statement of claim**
>
> 9 (1) The statement of claim shall set forth the rights and titles, so far as known to the plaintiff, of all persons interested in the land who would be bound by the partition, whether they have an estate of inheritance, or for life, or years, or whether it is an estate in possession, or in remainder, or reversion, and whether vested or contingent.
>
> (2) If the plaintiff holds an estate for life, or years, the person entitled to the remainder or reversion, after his estate, shall be considered as one of the persons so interested. *R.S., c. 333, s. 9.*
>
> PLEADINGS
>
> **Statement of defence**
>
> 15 The defendant, in his statement of defence, may plead any matter tending to show that the plaintiff ought not to have partition, either in whole or in part. *R.S., c. 333, s. 15.*
>
> ORDER FOR PARTITION
>
> **Order for partition**
>
> 17 If the defendant fails to appear or to deliver a defence, or if, after a trial, it appears that partition should be made, the Court or a judge shall make an order for the partition of the land, which shall specify the persons entitled to share in the partition ordered and the share to which each is respectively entitled. *R.S., c. 333, s. 17.*

Position of the Parties

[8] Mr. Richardson through his "attorney" wishes to retain the Lister Drive Property as a practicable outcome and proposes to release his interest in the North Street property to Ms. Underwood subject to the payment of any equalization payment. In support of his claim to a one-half interest in the value of each property Mr. Richardson relies on the presumption of equal division of the value of the properties as provided for by the *Partition Act* and associated caselaw.

[9] Ms. Underwood says she is entitled to one-hundred percent (100%) of the value of the North Street property and one-half the value of the Lister Drive property. She argues the evidence supports a rebuttal of the presumption of equal division of the value of the North Street property held jointly in their names.

[10] Ms. Underwood argues that the 'equal division' principle is subject to certain equities and after consideration of those equities, the presumption of equal division should be found to be rebutted, in the case of the North Street property.

[11] She says an unjust enrichment of Mr. Richardson should be found in the case of the North Street property and the appropriate relief to be granted to her is an unequal division of the value of the North Street property as described earlier i.e. she should be found to be entitled to all of the value of this property.

[12] Ms. Underwood asks the Court to look behind the parties' decision to put the properties in both their names. She asks the Court to look to the parties' underlying intention in doing so. She submits that much of the caselaw relied upon by Mr. Richardson, which is supportive of equal division of both properties, is based on a finding that there was an initial intent by the parties to jointly own and share the benefits of the subject properties, in which case the relative contributions of each co-owner becomes immaterial in displacing the parties' intent (paragraph 4 of the pre-hearing submission on behalf of Ms. Underwood).

Authorities

[13] There are a number of strong statements by Courts in this Province in support of equal sharing of the value(s) of jointly owned properties.

[14] Justice Jollimore, in *Soubliere v. MacDonald*, 2011 NSSC 98 described the presumption in favour of equal sharing and equal division when parties hold property as joint tenants as a strong presumption. At paragraphs 22-23 she said the presumption does not arise from how the purchase was financed or how improvements to the property were made:

> [22] Mr. MacDonald bears the burden of rebutting the presumption of equal division and he argues that the presumption is rebutted because the "home was purchased solely with monies" from him. He offers no authority for this argument and I've been unable to locate any case where the presumption has been rebutted on this basis. To the contrary, in Davis v. Munroe, 2011 NSSC 14 (CanLII), Mr. Davis owned a house for approximately seventeen years before beginning his relationship with Ms. Munroe. After living together for four years, Mr. Davis and Ms. Munroe moved into this house and, in the following year, Mr. Davis made Ms. Munroe a joint owner of the property. When the couple separated and a Partition Act application was litigated, Justice Ferguson said at paragraph 35, "Mr. Davis **correctly** acknowledges Ms. Munroe's initial entitlement to fifty percent of the net equity in their home." The emphasis is mine. Justice Ferguson's comment recognizes that when parties take title jointly this creates the presumption of equal interest.
>
> [23] Mr. MacDonald argues that "It is perhaps logical to presume equal sharing in a joint tenancy situation where both parties have substantially contributed to the purchase of the asset, or its improvement." I disagree. The presumption of equal sharing arises from the fact that the parties elected to take title to the property as joint tenants. The presumption does not arise from how the purchase was financed or how improvements to the property were made.

[15] In the more recent decision of Justice Forgeron in *Peters v. Reginato*, 2016 NSSC 345, the Court rejected a claim for unequal division and found the presumption was not rebutted. In that case, Mr. Peters advanced his claim for an unequal division arguing he was required to borrow from his parents holding company; dispose of other property he owned and to borrow from his mother all to ensure the family needs were met and the home acquired. A commercial mortgage of $217,624.41 was obtained. The home was valued at $320,000 (para 106) when constructed.

[16] The parties were unmarried, lived in the subject property for years and were raising two children.

[17] At paragraphs 141-142, Justice Forgeron explained:

[141] In ordering an equal division, I reject the other claims of the parties, including an unequal division claim advanced by Mr. Peters. My reasons for so doing include the following:

- The parties placed the Hills Road property in their joint names on two separate occasions. They could have chosen another route. By so doing, they expressed an intention of equal ownership.

- Mr. Peters did not inject all of the proceeds from the remortgage or sale of the McKinley Drive property into the purchase of the Hills Road property. He retained $4,066.71 from the remortgage and $8,093.06 from the sale proceeds.

- While Mr. Peters worked many hours assisting in the manual construction of the family home, Ms. Reginato spent many hours caring for Bella and the home, while traveling to stores and selecting materials and colors that would be used in the home's construction. The planning and construction of the home was very much a joint effort.

- I do not find that the work performed by Mr. Peters was any more valuable than the work performed by Ms. Reginato. Both worked tirelessly for the family, whether it was through the primary care of the children and the performance of the vast amount of housework or by assisting in the planning and construction of the home. Both parties assumed a role that was appropriate at the time based on the needs and demands of the family. Both work had equal value. The evidence to the contrary represents a fundamental misapprehension of the important social and economic value of work traditionally performed by women. I reject all evidence that states that Ms. Reginato's exemplary contribution was less valuable than Mr. Peters' contribution. It was not.

- I reject the evidence which minimizes Ms. Reginato's contributions and which inflates the characterization of Mr. Peters' efforts. Such evidence is not credible.

- Although there were a few errors in her evidence and Statement of Property, I nonetheless find Ms. Reginato credible. I find that she provided balanced evidence. Further, Ms. Reginato's errors paled in comparison to the many misrepresentations found in Mr. Peters' evidence.

- I reject the many attempts of Mr. Peters, his mother and sister to portray Ms. Reginato as a lazy, self-absorbed mother who did little for her family, and who orchestrated a plan to bleed the Peters dry. All such evidence is not credible and I specifically reject it.

- Although the parties kept separate finances, both nonetheless contributed to the operation of the family and household. I accept that Ms. Reginato was primarily responsible for buying the groceries, household supplies, clothing and Christmas

> gifts. She paid for her vehicle expenses, which vehicle was used to transport the children. She paid for the children's activity expenses. She paid the power bill. Ms. Reginato spent her money on the family just as Mr. Peters spent much of his money, and that gifted by his parents, on the family. Mr. Peters also enjoyed playing hockey several times a week as well as regularly drinking alcohol.
>
> [142] In summary, it is difficult for the court to discern, with precision, the exact input of each of the parties over the totality of their relationship. I am satisfied, however, on a balance of probabilities, that there was an approximate equal conferral of mutual benefits over the course of the relationship. Fairness and equitable principles support an equal division of the sale proceeds in the manner described.

[18] Two cases cited as examples of when the presumption of equal division is rebutted are *Braithwaite v. Turner*, 2015 NSSC 221, a decision of Justice D. Boudreau and *K.A.R. v. P.J.T.*, 2018 NSSC 4, a decision of Justice Muise. Both decisions called for a consideration of the *Partition Act* (common law) presumption in favour of equal division of properties held jointly.

[19] In *Braithwaite*, the Court found the presumption rebutted. In my view, the inequity the Court found which would result from an equal division of the subject property held jointly by the common law couple flowed from significant factual findings. Notwithstanding one party had three times the earnings of the other, that party contributed less to meeting the financial burden of the home. In addition, the party which had shouldered the bulk of the financial burden was also required to meet the bulk of the domestic responsibilities, including the rearing of children. Justice Boudreau found these circumstances combined to create an unjust enrichment in favour of one of the joint owners. She found the value of the home should be divided on a 70:30 basis in favour of the mother of the parties' children.

[20] In *K.A.R.*, the Court ordered an 80:20 split of the value in the home. Critical to the conclusion that a balancing of the equities effected a rebuttal of the presumption of equal sharing was the fact the applicant made a mortgage payment of $75,775 six months prior to the parties' separation. Some of these funds were from a personal injury settlement following a motor vehicle accident and a retroactive Canada Pension Plan benefit received by one party, the applicant.

[21] In addition, the down payment of $30,709 made for the purchase of the home was derived from a property equalization payment the applicant received following dissolution of a prior relationship.

[22] Justice Muise (at paragraph 13) found the remaining equity in the home to be about $117,000, of which $76,000 was created "by the grossly disproportionate contribution" the applicant made near the end of the relationship.

[23] Although not expressed it is clear the decisions in *Braitwaite* and *K.A.R.* reflect the analytical path a court would follow when an unequal division of matrimonial assets is sought as provided by s.13 of the *Matrimonial Property Act* R.S.N.S. 1989 c. 275, the 'MPA'.

[24] In particular the following 'MPA' considerations appear to have influenced the courts as they wrestled with what they found to be an inequitable outcome should equal division of the subject properties be ordered:

> **Factors considered on division**
>
> **13** Upon an application pursuant to Section 12, the court may make a division of matrimonial assets that is not equal or may make a division of property that is not a matrimonial asset, where the court is satisfied that the division of matrimonial assets in equal shares would be unfair or unconscionable taking into account the following factors:
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> (d) the length of time that the spouses have cohabited with each other during their marriage;
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> ****
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> (e) the date and manner of acquisition of the assets;
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> ****
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> (h) the needs of a child who has not attained the age of majority;
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> ****
>
> (i) the contribution made by each spouse to the marriage and to the welfare of the family, including any contribution made as a homemaker or parent;
>
> ****
>
> (k) the proceeds of an insurance policy, or an award of damages in tort, intended to represent compensation for physical injuries or the cost of future maintenance of the injured spouse;

[25] After considering these principles the court, in both of these cases, found the *Partition Act* presumption in favour of equal division was rebutted.

Unjust Enrichment

[26] Ms. Underwood argues that allowing Mr. Richardson to have one half the value of the North Street property would result in his being unjustly enriched and this reality should be sufficient to rebut the presumption of equal division that arises because they have legal title to the North Street property in both their names as joint owners. She says he is therefore holding his 'legal' interest for her.

[27] In a recent decision, *Moore v. Sweet*, 2018 SCC 52, the Supreme Court restated the elements of a cause of action in unjust enrichment:

> [41] The first two elements of the cause of action in unjust enrichment require an enrichment of the defendant and a corresponding deprivation of the plaintiff. These two elements are closely related; a straightforward economic approach is taken to both of them, with moral and policy considerations instead coming into play at the juristic reason stage of the analysis (Kerr, at para. 37; Garland, at para. 31). To establish that the defendant was enriched and the plaintiff correspondingly deprived, it must be shown that something of value — a "tangible benefit" — passed from the latter to the former (Kerr, at para. 38; Garland, at para. 31; Peel, at p. 790; Pacific National Investments Ltd. v. Victoria (City), 2004 SCC 75 (CanLII), [2004] 3 S.C.R. 575, at para. 15). This Court has described the enrichment and detriment elements as being "the same thing from different perspectives" (Professional Institute of the Public Service of Canada v. Canada (Attorney General), 2012 SCC 71 (CanLII), [2012] 3 S.C.R. 660 ("PIPSC"), at para. 151) and thus as being "essentially two sides of the same coin" (Peter, at p. 1012).
>
> . . . . .
>
> [43] In addition to an enrichment of the defendant, a plaintiff asserting an unjust enrichment claim must also establish that he or she suffered a corresponding deprivation. According to Professor McInnes, this element serves the purpose of identifying the plaintiff as the person with standing to seek restitution against an unjustly enriched defendant (M. McInnes, The Canadian Law of Unjust Enrichment and Restitution (2014), at p. 149; see also Peel, at pp. 789-90, and Kleinwort Benson Ltd. v. Birmingham City Council, [1997] Q.B. 380 (C.A.), at pp. 393 and 400). Even if a defendant's retention of a benefit can be said to be unjust, a plaintiff has no right to recover against that defendant if he or she suffered no loss at all, or suffered a loss wholly unrelated to the defendant's gain. Instead, the plaintiff must demonstrate that the loss he or she incurred corresponds to the defendant's gain, in the sense that there is some causal connection between the two (Pettkus, at p. 852). Put simply, the transaction

> that enriched the defendant must also have caused the plaintiff's impoverishment, such that the defendant can be said to have been enriched at the plaintiff's expense (P. D. Maddaugh and J. D. McCamus, The Law of Restitution (loose-leaf ed.), at p. 3-24). While the nature of the correspondence between such gain and loss may vary from case to case, this correspondence is what grounds the plaintiff's entitlement to restitution as against an unjustly enriched defendant. Professor McInnes explains that "the Canadian conception of a 'corresponding deprivation' rightly emphasizes the crucial connection between the defendant's gain and the plaintiff's loss" (The Canadian Law of Unjust Enrichment and Restitution, at p. 149).

[28] The parties herein have not argued a joint family venture existed between them (*Darlington v. Moore*, 2015 NSSC 124).

[29] Mr. Richardson relies upon his status as a joint legal owner of both properties. Ms. Underwood seeks to defeat his claim on the basis of unjust enrichment i.e. to rebut the presumption of joint beneficial ownership on the basis that he holds his interest subject to a constructive trust in her favour.

[30] For Ms. Underwood to succeed with this claim, she must establish (a) Mr. Richardson received a benefit from her, i.e. she placed his name on the title for the North Street property; (b) that she has suffered a loss as a result; and (c) there is no reason in law or justice, i.e. no juristic reason for Mr. Richardson to retain the benefit conferred on him by Ms. Underwood.

The Properties: 47 North Street and 20 Lister Drive

- 47 North Street

[31] In 1999, Mr. Richardson and his then wife owned a triplex, referred to as 47 North Street and also a home on Shore Drive. Ms. Underwood sold her home with a plan to move in with Mr. Richardson. Soon thereafter, Ms. Underwood says when her plan to move in with Mr. Richardson and live in a property he had recently acquired on Shore Drive was not achievable, she financed the acquisition of 47 North Street from Mr. Richardson and his then wife (or former wife). This purchase was completed in 2000. The title to this property was placed in her name alone at the time. She says that thereafter, she paid all expenses, financed all renovations and managed all tenants who occupied this triplex.

[32] The parties did begin to cohabit sometime in the period 2001-2002 in the property Mr. Richardson owned on Shore Drive. They lived together in this property for a period of several years. Mr. Richardson sold this property on or about 2005 and he and Ms. Underwood shared the proceeds. The parties then moved into one of the North Street units.

[33] Ms. Underwood said Mr. Richardson's name was added to the title to the North Street property in 2005. The addition of Mr. Richardson's name generally coincided with a refinancing of this property and the sale of the Shore Drive property the parties had occupied but which had been acquired by Mr. Richardson solely.

[34] Over the years after 2005, the parties lived at 47 North Street for periods of time. Ms. Underwood says these times were not continuous because their 'need' to live there was related to their practice of buying properties; renovating them and reselling the properties. I infer they occupied other properties on occasion through this process of flipping homes.

[35] Ms. Underwood says with respect to the properties they flipped, Mr. Richardson would make the down payment and she would finance the renovation costs and they would be reimbursed for their respective costs, the mortgage on the property would be paid out and any profit would be equally shared.

[36] However, she says this arrangement did not apply to 47 North Street. She says they had this agreement with respect to the properties they flipped but not with respect to 47 North Street. Whether this assertion is supported by the evidence, is among the core questions to be answered by this court.

- 20 Lister Drive

[37] The parties purchased 20 Lister Drive in 2008 for $200,000 as joint tenants. Mr. Richardson obtained the financing in his name solely and provided $30-$40,000 as a down payment. Ms. Underwood says she financed some renovations. She says it was purchased for development and resale. The property was improved and rented between 2008 and 2011. The mortgage has remained solely in Mr. Richardson's name. After 2010, the parties began living at this location and moved out of 47 North Street. In 2011, Ms. Underwood says she funded $40,000 in renovations.

[38] Ms. Underwood moved to Florida for the first time in 2011 and has been principally resident there for most of the time since. Mr. Richardson visited her there periodically prior to his stroke in 2015. In December 2011, Ms. Underwood returned to live with Mr. Richardson at 20 Lister Drive, but they separated after a short period. Ms. Underwood moved into an apartment at 47 North Street. The parties subsequently reconciled, and Ms. Underwood claims she returned to Florida to continue her program of study in March of 2012.

[39] At some point Ms. Underwood obtained a 'green card', an immigration status that permitted her to remain in the United States and to work there. She says the green card expired in August 2017 although she now appears to have permanent resident status in the United States, a status which is superior.

- Shore Drive

[40] There is a reference in the evidence to Mr. Richardson and his wife owning the North Street triplex and a home on Shore Drive. That shore Drive property remains occupied by Mr. Richardson's former wife.

[41] Mr. Richardson moved from living with his wife in a home on Shore Drive to another home on Shore Drive in 2000 or so. He was the sole owner of this property before and while Ms. Underwood lived there with him.

Credibility and Reliably

[42] An assessment of Ms. Underwood's credibility is a critical issue to be addressed.

[43] Justice Beaton provides a helpful overview of the principles a court must follow when called upon to assess credibility of witnesses. As is the case here, Justice Beaton was called upon to assess the credibility of one of the parties and that was a critically important issue for the Court.

[44] In *Salah v. Salah 2013 NSSC 308* Justice Beaton wrote:

> [21] Much has been written in the case law about the exercise of assessing credibility. I could go on at some length about what Courts have had to say and how credibility assessment has, by times, been described as more of an art than a science. But

for the purposes of this hearing, I will explain to the parties that I am cognizant of discussions about credibility which are found in any number of Court of Appeal decisions in this province, not the least of which would be the discussion by Justice Cromwell in R. v. Mah, 2002 NSCA 99. It's a criminal case, but the discussion about the legal analysis of the credibility finding or credibility determination exercise as it relates to the burden of proof is one which is entirely apropos in the family law context, as well.

[22] Counsel for the Applicant had also referred me to the Court of Appeal decision in Hurst v. Gill, 2011 NSCA 100 which cites with approval from a decision of my colleague, Justice Forgeron in Baker-Warren v. Denault which is a 2009 decision reported at NSSC 59. I'm also cognizant of the case ... it's probably best described as the "old chesnut," Faryna v Chorney [1952] 2 D.L.R. 354. It's discussed in Baker-Warren v. Denault. Faryna v Chorney, goes back to 1952 and the principle enunciated there is still good law and still applies with respect to whether the evidence is in harmony with the preponderance of probabilities that a reasonable and informed person might expect in the circumstances.

[23] It may be helpful to the parties to reference a very succinct but useful list of factors taken into account when balancing credibility as enumerated by Justice Forgeron in Baker-Warren v. Denault. That list is found at paragraph 19 of the decision, wherein Justice Forgeron wrote:

> 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;
>
> (b) Did the witness have an interest in the outcome or was he or 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 or 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 recognize ... pardon me,

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 straightforward manner or was the witness evasive, strategic, hesitant, or biassed, and;

(i) Where appropriate, was the witness capable of making an admission against interest or was the witness self-serving?

[24] So this is a list of factors. It's not intended to be an exhaustive list, at least in my view, but it is certainly a helpful list when the Court is required to conduct a credibility assessment. I have employed these factors and others related to or similar to this list in assessing the evidence of the witnesses.

[25] I must, for the purpose of allowing you to understand my decision, speak about the evidence of the witnesses, but I would want the parties to understand that where I speak about the evidence of the witnesses and I use examples to explain my reasoning, I'm not intending that the examples be an exhaustive list of the illustrations that I have found in the evidence to support my conclusions. So, if I use an example, it is one among several or many that might be available to be looked to in the evidence.

[26] Further, it is my intention to focus only on certain aspects of the evidence and not to examine the evidence of each and every witness in depth or detail nor to examine each and every topic canvassed in the evidence in depth or in detail. If I did that, we would be here, undoubtedly, almost as long as it took to conduct the hearing itself.

Reliability

[45] Reliability is the ability of a witness to accurately recall the matters the witness is testifying to. A witness may give erroneous evidence because the witness is honestly mistaken. For example, that mistaken belief may be attributable to a range of factors including fatigue; a limited opportunity to observe; poor eye sight or a poor memory affected by the passage of time, by a disability or by the contamination of one’s recollection by intervening information.

- **Reliability, Credibility: Mr. Richardson**

[46] Mr. Richardson is characterized as an unreliable witness by those closest to him. They attribute his unreliability to the effects of the stroke he suffered in February 2015.

[47] In their affidavits, his family describe the lasting effects of the 2015 stroke on Mr. Richardson. He is described as suffering from memory loss, exhibiting irritable behavior, being unable to care for himself and easily lead to a conclusion.

[48] In the course of his evidence, Mr. Richardson exhibited all of these traits. I accept his evidence does not suffer from issues of credibility. Counsel agreed this was the case. However, his evidence is very unreliable.

[49] He said at one point that he believes he invested proceeds from the sale of his Shore Drive property in the North Street property. Later in his testimony, he stated he did not invest any funds in the North Street property. Mr. Richardson then testified that the North Street property belongs solely to Ms. Underwood and he has no interest in it.

[50] In fact, it is impossible to discern what Mr. Richardson believes and/or knows given his disability including his obvious penchant for being agreeable with suggestions made to him regardless of their accuracy. Absent corroboration, I am unable to accept what he says about his relationship with Ms. Underwood or his investment and involvement in the purchase of the subject properties including management of the properties after acquisition.

- **Reliability, Credibility: Ms. Underwood**

[51] Because a witness is untruthful some of the times does not mean a witness is untruthful all of the time. A court may accept some testimony of a witness as truthful and other evidence as untruthful. When the dishonesty occurs while a witness is under oath, it is particularly dangerous for a trier of fact to rely on the evidence of that witness.

[52] For the reasons that follow, I am unable to rely upon the evidence of Ms. Underwood. Her evidence suffers from both credibility issues and reliability issues.

[53] The three most obvious assertions of Ms. Underwood that cast her as a witness whose evidence cannot be trusted are her representations to the Court as to (a) her relationship with Mr. Richardson; (b) her description of her relationship with Mr. Mitchell; and (c) those assertions related to her immigration status in the United States.

[54] What Ms. Underwood's affidavits, filed in advance of this hearing, did not disclose is that she married someone in Florida in 2014. She now says the wedding was a sham, a successful effort to enhance her immigration status in the United States.

[55] It is clear from the evidence before me that Ms. Underwood was prepared to deceive this court and to not reveal her marriage to one Mr. Mitchell. She was initially coy about her relationship with Mr. Mitchell. The extent of her relationship with him was revealed as a result of cross examination.

[56] As stated, she said her "marriage" to Mr. Mitchell is a fraud. A "marriage" in name only to enhance her immigration application by having Mr. Mitchell sponsor her given his status as her American husband. She confirmed having undergone a marriage ceremony and having subsequently travelled to Miami from Naples, Florida where immigration officer(s) interviewed her and Mr. Mitchell and where together they persuaded that officer she and Mr. Mitchell were partners to a *bona fide* marriage and he was sponsoring her as an immigrant to the United States. Now she attempts to persuade this court of the contrary.

[57] Who knows what the truth is as far as that relationship is concerned. What I am satisfied of is accepting Ms. Underwood's evidence as to her relationship with Mr. Mitchell is an unsafe option.

[58] She characterized the marriage as a sham but at the same time, spoke loving of Mr. Mitchell.

[59] She professed that since moving to Florida in 2011, her plan has been to unite with Mr. Richardson. She would have the Court believe that her plan for her future has always been to retire with Mr. Richardson. Her actions are totally inconsistent with that objective. The claim does not survive scrutiny.

[60] Following Mr. Richardson's debilitating stroke in 2015, Ms. Underwood returned to Nova Scotia only once prior to this trial. She visited Mr. Richardson for a short period in 2015.

[61] Since 2015, Mr. Richardson has been under the care of his parents and sister and specialized health care professionals. He resided at the Nova Scotia Rehabilitation Centre until 2018. He has in recent years however, enjoyed weekend passes and lived at the Lister Drive property on the weekends with the assistance of his family.

[62] Ms. Underwood explains her absence from Nova Scotia as out of concern for the effect of visiting Canada on her pending immigration application in the United States and her opportunity to return to the United States. When pressed as to what a 'permanent resident card' permitted her to do in terms of travel outside the United states, she claimed ignorance.

[63] It is simply not believable that Ms. Underwood, a former business person determined to gain citizenship in the United States, would be uninformed about this issue. She offered no plan for how Mr. Richardson could get to live in the United States and be sponsored by her, given she is married to another man, Mr. Mitchell.

[64] One conclusion is inescapable. Ms. Underwood did not and does not have plans to retire with Mr. Richardson in Florida. Given his health issues, his stated lack of desire to live in Florida and her marriage to Mr. Mitchell, that goal was and is not realistically achievable. In coming to this conclusion, I have considered the wide range of relationships people establish and maintain. I am not judging what Ms. Underwood describes as her relationship with Mr. Richardson through a stereotypical view of romantic relationships. She articulates one ambition for the relationship but acts in a manner that is inconsistent with that objective. In my view, she knows Mr. Richardson has little or no prospect of living with her in Florida. She is also clear that her ambition is to continue living in Florida as a citizen of the United States.

[65] These dishonest acts and representations are closely linked and in the view of the Court, exemplify the extent to which Ms. Underwood is prepared to go to advance her personal interests, not the least of which are her financial interests.

Conclusion

[66] I am satisfied the parties were romantically involved and at times, planned to share their futures. Those times included the periods when both of the subject properties were purchased and occupied by the parties.

[67] Mr. Richardson financed the purchase of the Lister Drive property and Ms. Underwood financed the purchase of the North Street property. These parties clearly made arrangement from time to time which reflected their assessments of what was fair and equitable in terms of ownership of these properties and other properties.

[68] Justice Heeney in *Kamermans v. Gabor* (2018 CarswellOnt 14754) discussed/ruled on the apportionment of the beneficial ownership of a property in the names of a former common law couple. The cost of acquisition of the property was borne disproportionately by one party.

[69] After finding a joint family venture, Justice Heeney concluded there was no juristic reason for one party to bear more of the acquisition cost than the other and the additional acquisition cost borne by that party should be returned to that party.

[70] The remaining equity was to be shared equally.

[71] There is no reference to Ontario legislation analogous to our *Partition Act* as factoring into the analysis.

[72] Of course, the parties herein were never married. They were a common-law couple engaged in real estate investment and in flipping properties as both a romantic and professional couple engaged in joint real estate projects.

[73] Ms. Underwood is a former real estate agent as is Mr. Richardson. Both are aware of the right of survivorship associated with their joint ownership of the two subject properties. There is no question each had a full appreciation of the effect of having title to real estate in their names as joint tenants.

[74] Having Mr. Richardson placed on the title to the North Street property was a benefit to him. I am unable to conclude that benefit was gratuitous. Given their personal and business interests and activities at the time this occurred I am

satisfied on a balance of probabilities the respective equities; merits and consequences of this decision were balanced by these parties and each accepted the financial benefit to each other of the decision to create joint ownership of the North Street property. That is how they conducted their business affairs and jointly managed the acquisition of other real estate.

[75] This would not be the only property acquired by one and from which both ultimately shared a benefit. The Shore Drive property disposed of by Mr. Richardson coincidental with the decision to have his name placed on the title to North Street is one example. The Lister Drive property is another. Clearly, the parties were very focused on equally sharing the costs and benefits of the properties they owned.

[76] The *Partition Act* creates a strong presumption in favour of the equal sharing of the value of properties held jointly. In my view, the challenge when attempting to rebut a presumption of equal division, is increased when the joint owners are a couple whose business relationship is characterized by equally sharing the benefits of joint real estate investments.

[77] The parties are entitled to an equal interest in both properties. The presumption of equal division is not rebutted. An equalization payment maybe owed by one to the other given the values of the properties and whether the parties agree to release one or both properties to the other. In addition an accounting for debt secured against each property may be necessary.

[78] In summary, I am satisfied Mr. Richardson became a joint owner of the North Street property on the same basis as he and Ms. Underwood shared other investment opportunities, that is they would equally share the value of that property. The registration of Mr. Richardson as a co-owner of the North Street property generally coincided with the sale of the Shore Drive property where they had been living. Mr. Richardson speculated that he put money into North Street at that time. In other evidence he moved away from that position. His evidence cannot be relied upon for a conclusion on this point. For the reasons that have been given Ms. Underwood's evidence cannot be accepted on this point. Her explanation that Mr. Richardson's name was put on the title to address a depression he was experiencing is not accepted. He could have simply retained the Shore Drive property if he 'needed' to own a residential property. In her statement

of defence, Ms. Underwood said the 2005 transfer to Mr. Richardson was because they were to spend their futures together.

[79] The parties retained both the North Street and Lister Drive properties and they were not flipped like other properties. The North Street property is a triplex and from time to time, when the parties were renovating other properties they intended to flip, it was a convenient place to live on an intermittent basis. It was and remains a source of cash.

[80] In her Statement of Defence at paragraph 11, Ms. Underwood conceded she views both the Lister Drive and the North Street residences as places where she and Mr. Richardson may eventually live together after Ms. Underwood returns to Nova Scotia. She clearly viewed these properties as having a similar place in their futures.

[81] I am not influenced by the fact Ms. Underwood was more active than Mr. Richardson in the management of the North Street property. This was a multi-unit property that produced cash and she kept the funds so generated. Her effort was compensated.

[82] I am satisfied the decision to have Mr. Richardson on title to the North Street property reflected their conclusion that he was in fact entitled to that status as a joint owner. He was not enriched. The presumption of equal ownership is not rebutted.

ACJ