IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: MacLean v. Burke, 2005 NSSC 279

Date: 20051109
Docket: SFHOTH-033273
Registry: Halifax

Between:

Elizabeth MacLean

Applicant

v.

Kathryn Burke

Respondent

Judge: The Honourable Justice Kevin Coady

Heard: September 16, 2005, in Halifax, Nova Scotia

Written Decision: November 9, 2005

Counsel: Terrance G. Sheppard, for the Applicant

Sally Faught, for the Respondent

Coady, J.:

[1] Elizabeth MacLean and Kathryn Burke lived together in a common law relationship for 8 1/2 years. They separated in 2002. Their spousal union was not registered pursuant to the **Vital Statistics Act**. Throughout the relationship the parties resided in a home acquired by Ms. Burke prior to cohabitation. Ms. Burke was contributing to an employment pension both before and throughout cohabitation.

[2] Ms. MacLean seeks a return of the $23,650 that she paid to Ms. Burke during their cohabitation. Further, she seeks a division of Ms. Burke's employment pension accumulated during that time. She relies on the equitable principle of unjust enrichment as the legal foundation for her claims.

[3] I find as fact that the parties had a common law relationship that lasted for 8 1/2 years and that was subsequent to a 2 year exclusive intimate relationship. Theirs was never a business or tenancy relationship.

[4] There was evidence that Ms. Burke and Ms. MacLean experienced some spousal difficulties throughout their time together. I accept that there were some intimacy issues that resulted in counselling and short periods of separation. I do not accept that these factors in any way detract from the integrity of their common law relationship. Both, through good and bad times, strived to maintain a spousal union.

[5] I find that Ms. MacLean lived away from Ms. Burke's home for periods of time in the mid 1990's. She was involved in a family business in Pictou that ultimately failed. During these periods she continued to contribute to the running of Ms. Burke's home and she considered that property her home. The parties personal relationship survived these absences.

[6] Ms. MacLean owned her own home when she began to cohabit with Ms. Burke. She sold that home during the relationship. While Ms. Burke assisted in the improvement of that property, she did so without expectation of remuneration and she did not share in the sale proceeds.

[7] I find as fact that in 1993 Ms. MacLean inquired as to whether she could purchase an interest in Ms. Burke's home. Ms. Burke unequivocally refused this proposal. Ms. MacLean does not challenge this evidence either in her affidavits or oral testimony. Notwithstanding this refusal, Ms. MacLean decided to continue with the relationship, reside in the home and to financially contribute towards running the household.

[8] I find that Ms. MacLean performed some maintenance around the home. She performed considerable gardening, an activity she enjoyed. However, I have concluded that such contributions were limited. I accept that it was Ms. Burke who arranged for and paid for all the major improvements. I was provided with a list (Exhibit # 1) by Ms. Burke indicating what she spent on the home from 1994-2000. Ms. MacLean did not provide evidence that challenged these expenditures by Ms. Burke. Additionally she does not indicate any contributions beyond rent, taxes and insurance.

[9] The evidence clearly established that the parties never had discussions about sharing each others pensions. I also find that they never had discussions about sharing the equity in Ms. Burke's home.

[10] I accept that Ms. Burke's payments to Ms. MacLean between 1993 and 2000 amounted to $23,650 plus a sharing of utilities and groceries. I accept Ms. Burke's evidence that the monthly $225 to $250 payments were never earmarked as a contribution to the mortgage. I accept that Ms. Burke determined how these monies would be allocated. I find that these payments were meant to contribute to the cost of maintaining the home.

[11] The parties did not share any bank accounts. They maintained financial independence throughout their relationship. This is not unusual in this day and age and this fact is not probative of any issue in this case.

[12] The evidence does not persuade me that the parties discussed sharing a common future. I do accept that during the good years they shared that aspiration.

[13] The leading authority on unjust enrichment as applied to common law relations is *Peter v. Beblow*, [1993] 1 S.C.R. 980. McLachlin, J. stated at p.987:

> In recent decades, Canadian courts have adopted the equitable concept of unjust enrichment *inter alia* as the basis for remedying the injustice that occurs where

> one person makes a substantial contribution to the property of another person without compensation...
>
> The basic notions are simple enough. An action for unjust enrichment arises when three elements are satisfied: (1) an enrichment; (2) a corresponding deprivation; and (3) the absence of a juristic reason for the enrichment.

[14] In the event that the three requirements are met, the analysis moves on to the nature of the remedy. The first remedy is to award damages on a *quantum meruit* basis. Where a monetary award is sufficient, that is the end of the matter. Where damages are insufficient and/or impracticable a constructive trust is created to give the plaintiff an interest in the property which is the subject of the trust.

[15] I will deal with the pension claim separately from the home claim. I cannot conclude that Ms. Burke's pension was enriched as a result of any contribution by Ms. MacLean. I cannot conclude that Ms. MacLean suffered any deprivation as a result of Ms. Burke's contributions. I find as fact that all financial and non-financial contributions made by Ms. MacLean were tied to the sharing of the home and not the pension. There was no evidence that established either an obligation or agreement to share in Ms. Burke's pension.

[16] Ms. MacLean did not, in any way, contribute to Ms. Burke's employment or pension. All contributions were made by Ms. Burke and her employer. There is no evidence that the parties discussed sharing Ms. Burke's pension. There is no evidence that the parties acted in such a way that Ms. MacLean could anticipate sharing the pension. I do not accept that Ms. MacLean would have invested more in RRSP's had she known she would not be entitled to a share of Ms. Burke's pension.

[17] I am aware that indirect contributions such as homemaking can support a finding of unjust enrichment. I find no such contributions in this case *vis-a-vis* the pension. These contributions in no way loosened up monies in Ms. Burke's hands thereby allowing her to increase the value of her pension, or any other asset for that matter.

[18] The choice to live in a spousal relationship is insufficient to indicate an intention to share employment pensions. In *Walsh v.Bona*, [2003] 32 R.F.L. (5th) 81 (S.C.C.), the Court stated at p. 115:

> 54 ... I cannot accept that the decision to live together, without more, is sufficient to indicate a positive intention to contribute to and to share in each other's assets and liabilities.

[19] The Supreme Court of Canada envisages in *Walsh v. Bona*, *supra,* that for common law relationships, there should be no presumption of equal sharing of assets. It is clear that this principle extends to no presumption of sharing of assets. Only a successful unjust enrichment claim can create an entitlement to share.

[20] I find a total absence of an express or implied common intent to share the ownership of Ms. Burke's employment pension.

[21] The case of *Barry v. MacDonald* (2003), 215 N.S.R. (2d) 142; N.S.J. No. 238 (Q.L.) (S.C.) was argued by both parties. That case stands for the proposition that with respect to a pension or pension benefit, equitable principles which apply to the division of real or personal property of common law couples does not apply in the same way to pensions or pension benefits.

[22] Legere-Sers, J. in *Barry v. MacDonald*, *supra*, stated that while the law of equity does not apply in the same manner to a division of pension benefits because the field is occupied by legislation, there is an implicit direction from *Walsh v.*

Bona to look to the facts of each case and determine as much as possible the intent of the parties as expressed implicitly and explicitly.

[23] Ms. MacLean challenges the authority of *Barry v. MacDonald*, *supra*, indicating that it is very much the exception to the otherwise overwhelming rule. In light of my conclusion that there has not been any unjust enrichment, I need not comment on the correctness of the conclusions reached by Justice Legere-Sers.

[24] I dismiss Ms. MacLean's claim for a division of Ms. Burke's employment pension.

[25] Ms. McLean seeks a share in the equity in Ms. Burke's home. The only evidence as to present value is Ms. Burke's statement of property which indicates a value of $61,500. That document does not disclose an existing mortgage. Ms. MacLean has not challenged the accuracy of either value or mortgage status. It is also not disputed that Ms. MacLean contributed $23,650 to Ms. Burke over their 8 1/2 years of cohabitation. Ms. MacLean argues that these payments increased the equity in Ms. Burke's home. She states that but for these payments, Ms. Burke would have $23,650 less equity. Further, that if Ms. MacLean had not made these

payments, she would have $23,650 more equity in her name. She is essentially claiming a return of all monies paid over the 8 1/2 year period save and excepting what she paid towards utilities and groceries.

[26] I have no evidence before me as to how much Ms. Burke's mortgage was reduced during the parties cohabitation. There is no evidence as to the size of the monthly mortgage payments. Ms. Burke does not disclose a present mortgage or when it was retired. While Ms. MacLean argues that her payment increased Ms. Burke's equity, she advances no evidence as to quantum.

[27] I find as speculative Ms. MacLean's position that she would be $23,650 better off if she had not paid this amount to Ms. Burke. This argument ignores the fact that Ms. Burke's home provided her with a residence. Ms. MacLean would have to pay for accommodations elsewhere. Throughout cohabitation Ms. Burke's home provided Ms. MacLean with all her residential needs.

[28] I find that the $23,650 paid by Ms. MacLean amounts to $2,782 per annum or an average of $231 per month. This was a very reasonable cost to reside in a single family dwelling. This is not a case of contributions that are clearly greater

than the cost of providing accommodation. This number does not disclose an effort to pay down the mortgage.

[29] I have already commented on Ms. MacLean's non-financial contributions to the subject property. The nature and frequency of these contributions does not indicate an intention to improve the property for their mutual benefit. The same can be said in relation to the expenditures made by Ms. Burke. The "payment" of these expenditures by Ms. Burke was not challenged by Ms. MacLean. Ms. Burke paid for a new roof, rain gutters, a furnace and chimney, windows, flooring, and the like, without contribution from Ms. MacLean. This does not indicate an intention to improve the home for their mutual benefit.

[30] I accept that in 1993 Ms. MacLean asked Ms. Burke if she could "buy into my home". This indicates a desire to share this asset by Ms. MacLean. The evidence is not disputed that Ms. Burke rejected this proposal. Ms. Burke's position never changed throughout the relationship. This fact, along with all of the other evidence, indicates to me that there was no agreement, implicit or explicit, that the parties agreed to share this asset into retirement.

[31] The evidence does not establish an enrichment or a deprivation. Ms. MacLean essentially paid rent to Ms. Burke for the entirety of their cohabitation. In light of these findings, Ms. MacLean's application must fail.

[32] I will accept written submissions on costs. Ms. Faught will prepare the Order.

J.