

SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: Fougere v. Jessome, 2010 NSSC 469

Date: 20101230

Docket: SFHMCA-063544

Registry: Halifax

Between:

Mary A. Fougere

Applicant

v.

Michael P. Jessome

Respondent

Judge:

The Honourable Justice Mona M. Lynch

Heard:

October 14, 2010 & November 10, 2010, in Halifax,
Nova Scotia

Counsel:

Angela Walker, counsel for the Applicant
Kim Johnson, counsel for the Respondent

By the Court:

BACKGROUND:

[1] The parties met in 2002 and commenced living together at the beginning of 2004. At the start of the common law relationship the Applicant, Mary Fougere, was 60 years old and the respondent Michael Jessome was 56 years old. The party's common law relationship ended in March of 2009.

[2] When the parties met Mary Fougere was living in a co-op apartment and supported herself with a small pension from her former employment as well as Canada Pension Plan Benefits. She also worked in a large retail store and continued to work there for the first year of the relationship. Michael Jessome worked throughout the relationship. He also earned money from working on computers and teaching dance. Michael Jessome has child support obligations to his children from a previous relationship.

[3] In January 2004, Mary Fougere moved in with Michael Jessome and they resided in the home owned by Michael Jessome. During the relationship Mary Fougere contributed money to the household expenses and Michael Jessome paid

all of the household bills. The parties kept separate bank accounts but they had privileges on the bank account of the other party. Mary Fougere had a small debt and virtually no assets when the parties started living together. During the relationship the parties shared equally in all of the household tasks. Michael Jessome placed Mary Fougere on his medical and dental plan from his employment.

[4] During the relationship Michael Jessome purchased two vehicles that were used by Mary Fougere. Michael Jessome provided Mary Fougere with a credit card for her use. In 2008 the parties purchased a time share in Florida which was registered in both their names. Michael Jessome paid the full price of the time share and Mary Fougere made monthly payments to him toward one-half of the purchase price of the timeshare. Mary Fougere obtained receipts from Michael Jessome for the amounts she paid toward the household expenses, the credit card, the timeshare and the vehicle.

[5] After living with Michael Jessome for about one year Mary Fougere stopped working at the retail store, but she continued to earn money selling crafts she created.

[6] In 2005 Michael Jessome purchased the property next door to where the parties were residing. The parties worked on the property to fix it up for resale. In exchange for Mary Fougere's work on the property, Michael Jessome promised to share the profit on the sale of the property. The renovations were not completed at the time the parties separated and the property was not sold.

[7] In March of 2009 the parties separated. At that time Michael Jessome provided Mary Fougere with a document he had prepared which set out the best case and worse case scenarios for her on separation. The best case included her continuing to reside with him until the fall of 2009, continued contributions to household and other expenses and continued medical and dental coverage through his plan. The worst case scenario included that she would be locked out, he would keep the vehicle she was using, he would sue her for money owed and she would immediately lose her medical and dental coverage.

[8] After separation Mary Fougere moved into an apartment and Michael Jessome began another common law relationship. There is an interim order which

requires Michael Jessome to pay spousal maintenance of \$400 a month commencing in April 2009.

ISSUES:

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

- (a) How should the conflicting evidence of the parties be resolved?
- (b) Should Michael Jessome's pension be divided for the years that the parties resided together?
- (c) Is Mary Fougere entitled to a share in the equity of the property purchased by Michael Jessome in 2005?
- (d) Is Mary Fougere entitled to spousal maintenance and if so in what amount and for what duration?

ANALYSIS:

(a) How should conflicting evidence of the parties be resolved?

[10] The evidence of the two parties conflicts on a number of points. When Mary Fougere began her cross examination, it became apparent that she did not have correct dates in her affidavit for things such as the commencement of cohabitation of the parties. When Mary Fougere was confronted on cross-examination with facts which differed from her evidence, she readily admitted that she was in error.

[11] In contrast on cross-examination it became painfully obvious that Michael Jessome had made significant errors in his financial documents. In his sworn statement of income prepared in April 2009 Michael Jessome included a union dues expense of \$611 a month. This was clearly an error when compared with his pay stubs. While it was clear to everyone else it was an error, Michael Jessome continued to insist on cross-examination that it was the correct number and his union dues were more than \$7,000 a year. The same occurred when questioned about his sworn statement of property which indicated that he did not have life insurance, disability insurance or a pension other than Canada Pension. His pay

stubs showed that he paid for life and disability insurance and into a pension, however he would not admit he had those assets. His evidence was unclear and conflicted when questioned on household expenses.

[12] Michael Jessome agreed that Mary Fougere had paid \$100 a month toward the timeshare for over a year but he tried to suggest that her payments only amounted to \$200 in US funds. He was unbelievable when he described his new romantic relationship which started during his relationship with Mary Fougere.

[13] Between the two parties Mary Fougere provided much clearer and more believable evidence. Michael Jessome was neither clear nor believable. Where the evidence of the two parties conflicts, I accept the evidence of Mary Fougere.

(b) Should Michael Jessome's pension be divided for the years that the parties resided together?

[14] Mary Fougere argues that the **Pension Benefits Act**, R.S.N.S. 1989, c.340 entitles her to a division of Michael Jessome's pension for the time they were in a common law relationship. She also asserts that there was an agreement that she would share in Michael Jessome's pension.

[15] The **Pension Benefits Act** provides a mechanism for division of pension benefits after a determination has been made to entitlement. It does not assist with the determination of entitlement.

[16] The parties lived together for a little more than five years in a common law relationship. The Supreme Court of Canada in **Nova Scotia (Attorney General) v. Walsh**, 2002 SCC 83 found that the decision to live together is not indicative of an intention to share in each other's assets and liabilities. In **Snow v. March**, 2004 NSCA 155 at paragraph 21 the court found that it was not an error for the trial judge to find that the parties' pensions should not be shared as they did not

contribute to the other party's pension and the pensions were not acquired by pooling of their net incomes.

[17] In the present case there was no direct or indirect contribution by Mary Fougere to Michael Jessome's pension. There is no evidence of a common intention to share in the pension. While the parties had some privileges on each other's bank accounts, they kept their finances separate. I cannot find that Michael Jessome would be unjustly enriched if he was to retain his full pension.

[18] Therefore, I find that Mary Fougere has not proven that she has an entitlement to share in Michael Jessome's pension.

(c) Is Mary Fougere entitled to a share in the equity of the property purchased by Michael Jessome in 2005?

[19] An outline for analysing a claim for unjust enrichment was set out by the British Columbia Court of Appeal in **Wilson v. Fotsch**, 2010 BCCA 226 at paragraph 11 as:

The basic outline for that analysis can be summarized this way:

1. Benefit/Enrichment
2. Detriment
3. Absence of a juristic reason for the enrichment
 - a. Established categories
 - i. Contract
 - ii. Disposition of law
 - iii. Donative intent
 - iv. Other valid common law, equitable, or statutory obligations
 - b. Reason to deny recovery
 - i. Public policy considerations
 - ii. Legitimate expectations
 - iii. Potential new category

Defences

Change of position; estoppel; statutory defences; laches and acquiescence; limitation periods; counter-restitution not possible

Choice of Remedy

- a. Is a monetary remedy sufficient?
- b. Is a constructive trust required (or equitable damages for the value of the trust interest)?

Quantification of the Remedy

- a. Value received (*quantum meruit* basis)
- b. Value survived (proportionate share basis)

Set-Off (equitable and legal)

Pre-judgment interest

[20] The house which Mary Fougere claims a share of is not the home in which they resided while they were together. In October of 2005 Michael Jessome purchased the house next door to the house in which the parties resided. Mary Fougere did not contribute to the purchase price of the property and the property is registered in Michael Jessome's name. I accept the evidence of Mary Fougere that prior to the time that the property in question was purchased she paid Michael Jessome \$400 a month toward household expenses. After the purchase of the property in 2005 she increased her contribution by \$100 a month in order to contribute to the new property. Michael Jessome testified that Mary Fougere

always paid \$500 a month. I do not accept his evidence on this point because of his poor credibility and because the “Best Case/Worst Case” document he provided to Mary Fougere on separation showed her monthly contribution to household expenses at \$400 a month.

[21] Along with the contribution of \$100 a month to the property, Mary Fougere also contributed \$200 in material and \$60 in oil. She contributed to the improvements made to and the upkeep of the property. I find that she contributed to the improvements and upkeep by interacting with tenants, painting, cleaning, mowing the lawn as well as assisting with the installation of the flooring and other improvements.

[22] In the present case the property was only in Michael Jessome’s name and he paid for the mortgage, taxes, insurance and all other expenses of the property. The parties disagree on the original intent for the purchase of the property. Michael Jessome says that he wanted to change the property line between the two properties and when he discovered he could not do that he intended to fix it up and sell it for a profit. Mary Fougere says that the parties had discussed living in the property, then the property was going to be rented out to provide income and eventually sold

with the profits shared. I accept the testimony of Mary Fougere and her sister who also testified that Michael Jessome said that the property was purchased as a rental and then to sell for the parties' future. The property was rented for a period of time while the parties were together.

[23] Both parties agree that Michael Jessome told Mary Fougere that if she assisted with the renovations to the property that she would share in the profit.

[24] It is clear from the evidence that Mary Fougere provided both a monetary contribution and services which were a benefit to and enriched the property which is held solely in the name of Michael Jessome. It is also clear that Mary Fougere suffered a detriment as she has nothing to show for her contributions.

[25] I do not find any evidence of any of the established categories of juristic reason for the enrichment. There is no evidence of a contract, disposition of law, donative intent or other valid common law, equitable or statutory obligation. I do not find any other public policy, legitimate expectation or new category reason to deny recovery by Mary Fougere.

[26] There are no defences to unjust enrichment which are established on the evidence.

[27] I find that Michael Jessome is unjustly enriched by the contributions made to the property which he purchased in October 2005.

[28] When considering the choice of remedy I have to decide if a monetary remedy is sufficient. In considering the choice of remedy I must consider:

After unjust enrichment has been established and any defences have been addressed, a court's next task is to determine whether a monetary award is adequate or whether a proprietary interest is merited. Only if a monetary award is inadequate and there is a "sufficiently substantial and direct" contribution to the acquisition, preservation, maintenance or improvement of the property in which the trust is claimed, may a proprietary interest be considered: *Pettkus* at 852. A minor or indirect contribution is insufficient: *Peter* at 997.

(**Wilson v. Fotsch**, *supra*, paragraph 46)

[29] It is clear that Mary Fougere made monetary and service contributions to the property in question. I find that her contributions were substantial and direct to the property and require I find there is a constructive trust. A monetary award would not be adequate.

[30] In **Snow v. Marsh**, at paragraph 11, the Nova Scotia Court of Appeal reiterated that the "value survived" approach was the more equitable method for

determining the quantum of a claimant's share in family cases particularly where a constructive trust is found. In the present case the property is appraised at \$142,000. According to the testimony of Michael Jessome the amount owing on the mortgage is approximately \$89,000. Capital Gains would cost a further \$7,734 according to the calculations provided by Michael Jessome. Other disposition costs for real estate, legal fees and HST would amount to approximately \$10,000. This leaves a net equity in the home of approximately \$35,266.

[31] Mary Fougere provided approximately \$4,260 in monetary contributions. This included her \$100 monthly payment, \$200 for supplies and \$60.00 for oil. Michael Jessome paid for the remainder of the expenses, supplies and carrying costs of the property including the mortgage, property taxes, insurance. With regard to the renovations it is clear that her contribution was substantial in relation to cleaning, painting and assisting with the other major renovations. I find that Mary Fougere is entitled to 25% of the net equity in the property or \$8,816.

[32] I must then consider the set-off both equitable and legal. It is clear that Mary Fougere contributed a set amount each month to the expenses of the home where she lived with Michael Jessome. If she was claiming a share of the value in

the property in which they resided. I would consider the benefit she received from living in the home while paying a lower amount toward the expenses and the benefit she received from that. However, Mary Fougere is not claiming a share of the property in which the couple resided, she is claiming a share of the property from which she received no benefit.

[33] The parties had an agreement that Mary Fougere would contribute \$400 a month toward the household expenses. This is what they decided was fair for Mary Fougere's contribution to the household expenses. I will not deduct any benefit she received from that agreement from her entitlement to the other property.

[34] Mary Fougere also received benefit from the relationship in that Michael Jessome provided her with vehicles, trips, a timeshare in Florida, and a credit card. The vehicle and trips that Mary Fougere received during the relationship were part of the agreement that the parties came to about their relationship. At the end of the relationship Mary Fougere owed money on the credit card, the van and the timeshare.

[35] The parties reached an agreement with regard to the timeshare and the van. This agreement was signed by both of them in August of 2009. I will not interfere with the agreement that they reached which placed the title to the van in Mary Fougere's name and the title to the timeshare in Michael Jessome's name. The timeshare and the van will not be considered.

[36] At the end of the relationship Mary Fougere owed \$1,906 on a credit card which was provided to her by Michael Jessome. That will be deducted from the \$8,816 to leave \$6,910. With pre-judgment interest Michael Jessome shall pay Mary Fougere \$7,500 for her interest in the property.

(d) Is Mary Fougere entitled to spousal maintenance and if so in what amount and for what duration?

[37] Michael Jessome has been paying Mary Fougere \$400 a month in spousal maintenance since April 2009 as a result of an interim consent order.

[38] Mary Fougere's income is somewhere between \$20,000 and \$26,000 a year including Old Age Security and income from selling jewellery. Michael Jessome's income in 2009 was \$84,745. The relationship was a little more than five years long.

[39] The factors I am to consider and the obligations on Mary Fougere are set out in the **Maintenance and Custody Act**, R.S.N.S. 1989, c. 160, s. 4 and 5. During the relationship the parties divided the household chores. During the relationship Michael Jessome agreed to pay the larger share of the household expenses. Michael Jessome took Mary Fougere on trips. He gave her the use of a credit card as she was unable to obtain credit due to a prior bankruptcy. Michael Jessome supplied Mary Fougere with a vehicle, first with one free of charge and then the van for which she paid \$100 a month. Michael Jessome purchased a timeshare in Florida and placed it in both their names. Mary Fougere paid \$100 a month toward the timeshare. During the relationship Mary Fougere could use any extra money

for her own purposes. Mary Fougere had a much higher standard of living during the relationship than she could afford on her own.

[40] Prior to the relationship Mary Fougere was living in a co-op apartment with a reduced rent. Mary Fougere is currently paying a higher amount of rent than before the relationship. As a result of the end of the relationship Mary Fougere lost medical and dental benefits, which she received from Michael Jessome's employment plan.

[41] For the first year of the relationship Mary Fougere worked at a large retail store. After the first year, Mary stopped working at the store and made jewellery. Mary Fougere is now 66 years old and earns income from pensions, OAS and selling jewellery. I do not find, as was suggested by Michael Jessome, that she should be obtaining employment back at a large retail store. I accept her evidence that she can no longer stand for long periods of time due to arthritis in her back. Considering her age and health, Mary Fougere is doing all that she can to support herself.

[42] It is clear that there was an agreement either express or tacit that Michael Jessome would support Mary Fougere in the relationship. As a result of this agreement, Mary Fougere became dependant on Michael Jessome.

[43] Mary Fougere has a need for maintenance and Michael Jessome has the ability to pay. Despite the short length of the relationship, this is not a case where a short transitional amount of maintenance is warranted.

[44] The **Spousal Support Advisory Guidelines** shows a range of between \$380 and \$550 dollars with an indefinite duration.

[45] Michael Jessome shall pay spousal maintenance to Mary Fougere in the amount of \$450 per month commencing January 1, 2011 and continuing each month thereafter until varied.

CONCLUSION

[46] Where the evidence of the parties conflicts, I accept the evidence of Mary Fougere.

[47] Mary Fougere is not entitled to a share of Michael Jessome's pension.

[48] Michael Jessome shall pay Mary Fougere \$7,500 for her interest in the property which was purchased in 2005.

[49] Michael Jessome shall pay Mary Fougere \$450 a month in spousal maintenance commencing January 1, 2011.