

IN THE SUPREME COURT OF NOVA SCOTIA
Citation: *McAleese v. Buchanan*, 2006 NSSC 390

Date: 20061228
Docket: S.P. 259959
Registry: Pictou

Between:

Marina Lynn McAleese

Plaintiff

v.

Bryan Buchanan

Defendant

Judge: The Honourable Justice Walter R.E. Goodfellow

Heard: October 12, 2006, in New Glasgow, Nova Scotia

Final Written
Submissions: December 6th and December 12th, 2006

Written Decision: December 28, 2008

Counsel: Douglas J. Lloy, for the plaintiff
Christopher Boyd, for the Defendant

GOODFELLOW, J.:

Background

[1] Marina Lynn McAleese, born February 26, 1963, now 43 and Bryan Buchanan was born June 13, 1966 now 40 met on June 9, 2000.

[2] Mr. Buchanan was at the time of meeting employed with Humpty Dumpty and he was married with two young children, then two and four years of age and he indicated to Ms. McAleese that he was effectively separated with his wife still living in their home.

[3] Ms. McAleese had been married and divorced, from which marriage there are two children, now 24 and 23 and subsequent to that divorce she married again and that marriage produced two children, now 19 and 17 and at the time of meeting Mr. Buchanan, she was in the process of being divorced and negotiating a matrimonial property/spousal settlement.

[4] Shortly after meeting the parties began a personal relationship. Mr. Buchanan's wife moved out of their home and the parties started to spend

weekends together and this arrangement lasted until approximately June, 2001, when Mr. Buchanan indicated he wanted to see other women and after a couple of weeks' separation the parties got back together again. Ms. McAleese found herself pregnant in March, 2002, even though prior to the commencement of their relationship she had the surgical tying of her tubes. The parties separated and then got back together again and Ms. McAleese officially moved into Mr. Buchanan's home in August, 2002 and they resided together as man and wife until her final departure on October 24, 2005.

[5] They were blessed with a son, Isaiah Buchanan, born October 19, 2002.

[6] As to the nature of their relationship, financial and other contributions to that relationship, there are markedly different versions from each party.

Financial Position at June 9, 2000

[7] Ms. McAleese was negotiating a settlement in her divorce and on March 22, 2002 she received the first instalment of her lump sum matrimonial settlement. Her total settlement was approximately \$46,500.00 and the first instalment of

\$26,500 was received, less legal fees of \$1,667.50, a cash payment of \$24,832.50. Her Agreement called for the balance of \$20,000 to be paid by monthly instalments, by post-dated cheques running from March 2003 to June, 2007 in the amount of \$335 and the final payment in the amount of \$235. Ms. McAleese indicates that she made full disclosure of her financial situation and settlement to Mr. Buchanan and I accept her evidence in this regard, wherever it is in conflict with the evidence of Mr. Buchanan.

[8] Mr. Buchanan was the owner/operator of an IGA store and, through no fault of his managerial capacity, the store was lost primarily because of the entry into the market of Loblaws/Atlantic Superstores and Mr. Buchanan became bankrupt in 1999. He was able to leave bankruptcy retaining his home, which he had built, situate at 85 Millbrook Place, Central Caribou, N.S. The home was appraised on November 28, 2002 with a market value of \$125,000 with a notation, the author of which has not been identified, that the appraiser used 780 square feet and that the lower level was in fact 835 square feet and this would, according to the note, increase the value by \$6,600. Post this appraisal, Mr. Buchanan put in a rec room and also added a deck to the property. As of November 28, 2002 the mortgage on the property was approximately \$102,000. The Buchanan home was not at the

time Ms. McAleese became a common law occupant in 2002 fully furnished, probably a by-product of his divorce. Ms. McAleese had a relatively new refrigerator, stove, washer and dryer, however, they were not needed.

[9] Mr. Buchanan, on December 10, 2002 took out a loan with the New Glasgow Credit Union in the amount of \$5,717.11, which paid out the balance of at least \$5,000.00 owing on a settlement with his wife, Lisa which produced a Quit Claim Deed by her to him for the Millbrook property. The initial mortgage Mr. Buchanan and his former wife, Lisa took out was on the 22nd of April, 1996 in the amount of \$114,778.05.

[10] Mr. Buchanan became employed with Honda. His application for an increased mortgage on December 5, 2002 listed his monthly income at \$3,416, with an annual income of \$40,992. Ms. McAleese left her employment as an admitting clerk at the Pictou Hospital on September 14, 2001 and received a payout package of \$10,117.78. Initially, her evidence seemed to indicate that these funds were brought into the relationship. However, I am satisfied and find that they were substantially, if not entirely, utilized by her prior to the parties entering into co-habitation in August, 2002. Ms. McAleese, prior to the entry into

co-habitation had a new truck, but it was returned, because the cost of operation, etc. proved too onerous to her.

Co-habitation/Findings

[11] Ms. McAleese gives evidence that she made full disclosure as to her personal and financial situation, and in particular the extent of her anticipated divorce settlement and Mr. Buchanan takes a contrary view as to what transpired. On balance, I conclude that I prefer the evidence of Ms. McAleese and conclude that she did in fact apprise him of her financial situation, and in particular, the anticipated divorce and property settlement.

[12] A major area of variance is the question of whether or not Mr. Buchanan ever indicated an intention to get married to Ms. McAleese. Ms. McAleese's evidence includes at one point in time putting a \$100 deposit down on a wedding dress and reserving a chalet for their reception, but not for a specific date. Mr. Buchanan takes the view that it was pretty standard for Ms. McAleese to go out and make arrangements for matters, such as acquisition of furniture, the wedding, etc. without any consultation with him, and he goes so far as to say that there was

never any discussion of marriage. He does acknowledge that Ms. McAleese always wanted to get married and he points out that in addition to saying he did not want to get married, he was and still is married, has his own Will, never put her name on the deed, etc. What is of interest is that he does acknowledge that she was looking for security and made the suggestion of utilizing \$12,000 of her funds for payment on the mortgage. He further acknowledged that she wanted a home to live in and when they had a good relationship. Ms. McAleese was clearly looking for security. He acknowledged that he was looking forward to living with her as a family, a future together. It is my finding that the discussions did in fact take place with respect to marriage. I accept however the evidence of Mr. Buchanan that at no time did he clearly indicate such would take place, although the circumstances created the impression that this was the probable inevitable conclusion of their relationship during the period of time that they were co-habiting and things were working reasonably well between them.

[13] Ms. McAleese suggests in her evidence that she made a substantial contribution to their household with respect to the acquisition of furniture. However, the documentation from Tom Chediac Furniture & Appliances indicates what was acquired, and I accept the evidence from Mr. Buchanan that she made

this acquisition without telling him in advance and he agreed to co-sign for it to keep the peace and they were, after all, in a common law relationship. The invoice dated August 20, 2003 and it is clear that Ms. McAleese kept the sofa - \$1,199, chair - \$749 and entertainment centre - \$649, which were the major items acquired at a total cost, including HST, of \$4,379.99. I further find that Mr. Buchanan paid off this entire account when he re-financed the house.

[14] I noted earlier, Ms. McAleese had a fridge, stove, washer and dryer which were not needed in their household. Mr. Buchanan says that he received \$325 from the sale of the fridge and an undisclosed amount from the sale of the balance of the items. The fridge was purchased by Ms. McAleese initially at a substantially higher cost but it is the usual practice that on a second-hand disposal only a fraction of the original cost is ever recovered. It is difficult to determine what exactly happened with the proceeds from the sale of her items, but nevertheless it must be acknowledged that Mr. Buchanan is retaining comparable items and Ms. McAleese, by virtue of entering into co-habitation, suffers the departure or loss of these items and I conclude that she did not receive any financial remuneration, even at the very low likely second-hand sale price. The real significance is that she lost what was of considerable cost to her by virtue of

entering into the common law relationship. There is dispute as to the funds Ms. McAleese had in her bank account at the time of entering co-habitation and the bank deposit slip as of September 6, 2002 shows a balance of \$933.19. Ms. McAleese, sometime subsequent, put a notation to a figure which she had previously written of \$400.00, that she used this money before she moved in with Mr. Buchanan. Mr. Buchanan has no recollection specifically of a \$400.00 item listed and I am satisfied on a balance of probabilities that at or about the time of entering co-habitation, Ms. McAleese provided at least \$400.00 to Mr. Buchanan.

Law

[15] Ms. McAleese seeks an Order on the basis that Bryan Buchanan has been unjustly enriched by reason of her financial and other contributions to their household.

[16] In order to establish a constructive trust the party seeking such must establish the following three elements:

- (1) An enrichment
- (2) A corresponding deprivation; and
- (3) Absence of any juristic reason for the enrichment

[17] In *Oakley v. Sing*, [2000] N.S.J. No. 76 (S.C.), the Court held co-habitation did not give rise to a presumption of a constructive trust. Additionally, Ms. Oakley had made only minimal contributions to the household, which gave her the use and occupation of the home and resulted in her having a standard of living which she would not otherwise have enjoyed for such a minimal monthly contribution. There was no direct link or causal connection between her monthly contribution of \$400 and the improvements made to Mr. Sing's home, so that she failed to establish unjust enrichment on Mr. Sing's part.

[18] In *Fairfax v. Linkletter* (1991), 100 N.S.R. (2d) 353 and [1991] N.S.J. No. 41 (S.C.). Here, as in the *Oakley v. Sing* above, there was no resulting trust as there was no common intention that there would be a sharing of established entitlement. Ms. Fairfax did establish the prerequisites for a constructive trust. The Court held constructive trust depends entirely upon an establishment of the degree of contribution that calls, in fairness, for a division of the spoils. Further, that it was possible in many situations for a relationship to be of relatively short duration and

still called for the doctrine of constructive trust. The evidence established entitlement of 20 percent of the net equity of the real property and trailer sale proceeds, combined which amounted to an entitlement of \$3,210.

Post-Hearing Submissions

[19] In the initial claim advanced on behalf of Ms. McAleese credit was sought for the payout package she received from leaving employment at the Pictou Hospital and for a furniture contribution. I dealt with both of these aspects and the only possible, very limited, element of contribution to their relationship would have been in relation to the furniture. I have already dealt with the furniture acquired from Tom Chediac Furniture and Appliance Ltd. and no credit is due to Ms. McAleese with respect to that furniture acquisition.

[20] Counsel for Ms. McAleese had indicated in her initial divorce settlement not only the lump sum payment but also the balance of \$20,000 entitlement was to be paid to her by post-dated cheques from March 2003 to June of 2007 in the amount of \$335 with a final payment of \$235. There was a dispute as to precisely

what transpired with these payments and subsequently counsel provided a second exhibit book detailing the disposition of these cheques.

[21] Mr. Buchanan's solicitor in his final representations of December 12th, 2006 indicates that Mr. Buchanan readily conceded that Ms. McAleese made a contribution of \$12,000 which went directly against the balance outstanding of his mortgage on his home. Mr. Buchanan's position is that he did not request this payment and made no promises directly or implicitly to Ms. McAleese. Further, he maintains that this contribution should not result in her being granted any share of the title in the home.

[22] With respect to the spousal support cheques, they are all accounted for except for the months of June, July and November 2005. The cheques that bear a New Glasgow Credit or Wells Fargo stamp, being the cheques accounted for, total \$5,025. The evidence is clear that Mr. Buchanan did not have an account at either the New Glasgow Credit Union or Wells Fargo although there was a loan outstanding at the Credit Union. I conclude that these cheques of Ms. McAleese went to pay down these loans. Three of the cheques in the total amount of \$1,050 were deposited at Wells Fargo. The evidence indicated that the Wells Fargo loan

was, in fact, initiated by Ms. McAleese to establish a “hobby farm”. There were some payments made to her nephews for clearing portions of the land for the hobby farm. While I conclude that indeed some of these funds went towards the hobby farm, I am unable to accept that Mr. Buchanan established that the nephews did a slipshod job leaving Mr. Buchanan with a property diminished in value. The investment in the hobby farm, I do conclude, did not provide any unjust enrichment. If anything, it was a somewhat reckless endeavour by Ms. McAleese.

[23] The unusual feature of this case is that while I conclude there was a capital contribution, the \$12,000 pay-down of the mortgage on Mr. Buchanan’s property and a \$5,025 established utilization of her settlement cheques, reduced by the three cheques to Wells Fargo relating to the hobby farm \$1,005 for a balance of \$4,075 and therefore a total capital contribution of \$16,020, at the end of the day Mr. Buchanan’s property has a higher level of indebtedness than when the parties entered cohabitation.

[24] I conclude that it is not necessary to have an actual increased value at the end of the day. Undoubtedly, Ms. McAleese’s capital contributions contributed to the asset base of the couple during their period of cohabitation and the resultant

mortgage indebtedness that existed at the time of the cessation of cohabitation would have otherwise been somewhat higher. Mr. Buchanan who had been a successful business man and I suspect has now recovered and has likely regained a measure of financial capacity was during this period of cohabitation going through the difficulties and withdrawal problems that follow bankruptcy.

[25] Overall, I am satisfied that Ms. McAleese made a capital contribution to their relationship and that if she is not given a level of return it would result in an unjust enrichment to Mr. Buchanan and that she would suffer a corresponding deprivation and further that there is no juristic reason for the enrichment to Mr. Buchanan.

[26] It would not be appropriate to give her recovery of her entire capital contribution because of the financial difficulties that arose during their cohabitation some of which, if not of her making, did have a contribution from her. She also had accommodation owned by Mr. Buchanan. On balance, it is appropriate that Ms. McAleese recover what I conclude and assess as the level of unjust enrichment the amount of \$13,000 payable forthwith.

Costs

[27] Counsel, if they are unable to agree on costs and disbursements, are entitled to be heard. Representations should be in writing.

J.