SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION

Citation: *G.L.M. v T.D.*, 2018 NSSC 150

Date: 2018-06-20
Docket: *SFSNMCA* No. 78594
Registry: Sydney

Between:

G.L.M.

Applicant

v.

T.D.

Respondent

Judge:	The Honourable Justice Lee Anne MacLeod-Archer
Heard:	May 7 – 9, 2018, in Sydney, Nova Scotia
Written Release:	June 20, 2018
Counsel:	Candee J. McCarthy for the Applicant Stephen Jamael for the Respondent

By the Court:

Facts

[1] The parties shared a relationship for two years before their child, P.D. was born in 2009. In early 2011, they started living common law, but separated due to a domestic violence incident eleven months later.

[2] When the parties separated, G.L.M. and the child moved in with the maternal grandparents. T.D.'s access was initially supervised. He participated in a Parental Capacity Assessment which addressed his mental health and prior drug use, and made several recommendations for cooperative parenting between T.D. and G.L.M. Because T.D. had made positive lifestyle changes, G.L.M. agreed to unsupervised and eventually overnight access. These transitions are captured in a series of consent orders filed with the court.

[3] T.D. has re-partnered and has 2 young children with K.B. G.L.M. has also re-partnered and has another child.

[4] T.D. was formerly with the Canadian Armed Forces and served overseas. After leaving the Forces he worked out west and Labrador, but now runs his own construction company locally.

Issues

[5] The following are the issues to be decided:

1. What are the most appropriate parenting arrangements for the child ?
2. What is T.D.'s income for purposes of child support ?
3. What child support should T.D. pay (retroactively and/or prospectively) ?
4. Is a division of assets appropriate ?
5. Is spousal support payable and if so, in what amount ?

Issue #1 – What are the most appropriate parenting arrangements for the child?

[6] The parties currently have joint custody. P.D. spends every second weekend, plus a couple of weeknights during the school year, with her father. In the summer, she is with T.D. three days out of every week.

[7] G.L.M. wishes to maintain the *status quo*, with some refinement on the details. There are some grey areas in the current order which have led to conflict.

[8] T.D. seeks shared parenting on a week about basis. For the reasons that follow, I have determined that the appropriate arrangements reflect the *status quo* with refined parenting time as outlined.

[9] The **Parenting and Support Act** S.N.S. 2015, c.44, s.2 outlines the factors to be considered in determining the best interests of the child as follows:

> (6) In determining the best interests of the child, the court shall consider all relevant circumstances, including:
>
> (a) the child's physical, emotional, social and educational needs, including the child's need for stability and safety, taking into account the child's age and stage of development;
>
> (b) each parents' or guardian's willingness to support the development and maintenance of the child's relationship with the other parent or guardian;
>
> (c) the history of care for the child, having regard to the child's physical, emotional, social and educational needs;
>
> (d) the plans proposed by the child's care and upbringing, having regard to the child's physical, emotional, social and educational needs;
>
> (e) the child's cultural, linguistic, religious and spiritual upbringing and heritage;
>
> (f) the child's views and preferences, if the court considers it necessary and appropriate to ascertain them given the child's age and stage of development and if the views and preferences can reasonably be ascertained;
>
> (g) the nature, strength and stability of the relationship between the child and each parent or guardian;
>
> (h) the nature, strength and stability of the relationship between the child and each sibling, grandparent and other significant person in the child's life;

> (i) the ability of each parent, guardian or other person in respect of whom the order would apply to communicate and co-operate on issues affecting the child; and
>
> (j) the impact of any family violence, abuse or intimidation, regardless of whether the child has been directly exposed, including any impact on
>
> > (i) the ability of the person causing the family violence, abuse or intimidation to care for and meet the needs of the child, and
> >
> > (ii) the appropriateness of an arrangement that would require co-operation on issues affecting the child, including whether requiring such co-operation would threaten the safety or security of the child or of any other person.

[10] The child is 9 years of age. She has been in her mother's primary care for her entire life. For lengthy periods of time in her formative years, T.D. was either deployed, or working outside the local area. He also had a drug addiction that impacted his ability to play a significant role in P.D.'s life.

[11] G.L.M. describes P.D. as an exceptional little girl, who is well adjusted, and enjoys spending time with both parents. By all accounts, she also enjoys spending time with her younger siblings and extended family.

[12] T.D. argues that there are too many transitions in the current schedule. He argues that a week about schedule reduces the potential for conflict, and it suits P.D.'s needs best. He says the parties can cooperate and effectively communicate in a shared parenting arrangement.

[13] G.L.M. argues that the current arrangement works, so there is no reason to tinker with it. She says that P.D. has adjusted to the schedule, and she has no difficulty with the transitions.

[14] There are a number of transitions in the current schedule, but the back and forth likely poses more of a problem for the parties than P.D. They are working parents with other responsibilities and distances to travel. In particular, clause 2(c) of the current order allows T.D. to exercise access three days per week after school, if G.L.M. is working. That means that potentially, he could end up driving ½ hour to get P.D. and bring her to his home for a few hours, then ½ hour back to deliver her home again by 7 pm. I agree with T.D. that this does not serve P.D.'s interests.

[15] Other than excess travel issues created by clause 2(c) of the order, I am not satisfied that the current schedule no longer works for P.D. It's a schedule reached by the parties by consent that has worked for several years. The fact that there are younger siblings in the picture now impacts the ability of each parent to juggle their responsibilities, but it does not mean the schedule no longer meets P.D.'s physical, emotional, social and educational needs.

[16] I am satisfied that P.D.'s need for stability and safety given her age and stage of development is currently being met. She has her own space within each parent's home and appears to enjoy being a big sister. Before T.D. built his new home, P.D.'s sleeping arrangements lacked permanency and a personal feel, but now she has a beautiful room of her own, with age appropriate furnishings and décor. That sends a strong message to P.D. that she belongs.

[17] As well, P.D. is included in family activities, and she features prominently in the family photos tendered in evidence by T.D. In those photos, she and K.B. clearly share a loving relationship, so the suggestion that K.B.'s decision to decorate P.D.'s room with her choice of colour signals to P.D. that she's only a visitor, and not part of the family, doesn't fly.

[18] Both parents assert a willingness to support the development and maintenance of P.D.'s relationship with the other. In particular, G.L.M. has been open to increased contact between P.D. and T.D. since he implemented lifestyle changes.

[19] While there is no evidence that T.D. tries to interfere with P.D.'s relationship with her mother, his decision to search her cell phone for evidence against G.L.M. is concerning. I am also concerned about comments made by K.B. to P.D. about G.L.M.'s parenting choices. K.B. has strong views as a parent, and she does not hesitate to express them. Whether conscious of the implications or not, her critical comments (on P.D.'s hair colour, for example) can erode P.D.'s confidence in her mother's choices and cause friction as P.D. grows older. If K.B. has concerns about G.L.M.'s parenting practices and their impact on P.D., she should voice them through T.D., not to the child.

[20] Historically, G.L.M. has provided primary care for the child, and has met all of her physical, emotional, social and educational needs. For a number of reasons, T.D. didn't play a large parental role in P.D.'s early years. Although he is now in a better position to do so, P.D. has become accustomed to her mother's primary care and there's no good reason to fix what isn't broken.

[21] The parties both support P.D.'s academic and social progress, though G.L.M. is more involved in those aspects of P.D.'s life. T.D. is paying into an education fund for P.D., so presumably the parties expect that she will continue her studies beyond high school.

[22] P.D.'s views and preferences are unknown. There was no evidence on her cultural, linguistic, religious and spiritual upbringing and heritage, though it appears the parties both tried at different times to have P.D. baptized. Through lack of communication (mostly at T.D.'s end) that didn't happen.

[23] P.D. shares a strong and loving bond with both parents. Her mother has provided her with a stable primary residence since birth, and her father is now in a position to provide her with a stable residence when P.D. is with him.

[24] The parties have been better able to communicate and cooperate on P.D.'s care lately, though there are still signs of tension. The baptism plans are an example. In addition, T.D.'s decision to search P.D.'s phone and use a video G.L.M. made of P.D. as evidence at the hearing, raises questions about his claim that they can cooperatively parent in a shared parenting arrangement. Instead of contacting G.L.M. to discuss his concerns with that video, T.D. opted to use the video as evidence.

[25] In addition, the tone of his replies to G.L.M.'s texts is often hostile. But that may be a response to G.L.M.'s inflexibility. She resisted P.D. being left in the care of K.B.'s mother because she hadn't met her, yet when she had the opportunity to meet M.B., she did not take the time to become acquainted. She has also resisted K.B.'s involvement with P.D., though given some of K.B.'s comments, she had reason for concern. Despite these difficulties, T.D. insists that they can cooperatively parent P.D. under the schedule he proposes. I am not convinced.

[26] G.L.M. and T.D. both need a refresher on cooperative parenting. Assuming that T.D. will continue to use K.B. for childcare when he's unavailable to care for P.D., she must also attend a cooperative parenting course. This will enhance T.D. and K.B.'s understanding of her role and limits in a blended family arrangement.

[27] There is no longer an issue of family violence which would impact the ability of either parent to provide care for P.D. However, T.D. still struggles with anger. This showed itself in some of his communications with G.L.M., and at times in presenting his evidence. He continues to address this through counselling, which is appropriate.

[28] The parents will have joint custody. G.L.M. will have primary care of P.D..

[29] T.D. will have parenting time with P.D.

[30] The parenting schedule which meets the best interests of the child, having regard to all of the circumstances noted above, is outlined in Schedule "A".

Issue #2 - What is T.D.'s income for purposes of child support?

[31] G.L.M. asks the court to impute income to T.D. for purposes of child support. She cites s.19 of the **Child Support Guidelines** as well as s. 21, 22 and 23 and says it is appropriate to impute income because:

- He unreasonably deducts expenses from not only his rental income but also to reduce his employment income;
- Because of the unreasonable deductions, he pays a lower tax than contemplated by the Guidelines on his income;
- He has not provided the required income information as required by the Child Support Guidelines.

Veteran's Affairs Canada (V.A.C.)

[32] T.D. receives V.A.C. benefits under a program which assists injured veterans in finding civilian employment. V.A.C. pays 85% of his salary, which will be scaled down as he earns income. T.D. previously worked in construction, so in late 2015 he established a construction business in an effort to become self-sufficient. He says the business hasn't made much income yet, because it's hard to break into the industry. He also says there is little work in this area, and he's had a few bad debts.

The Business

[33] The business was incorporated in 2016 and had gross sales of $213,740.24 in 2017. Expenses deducted from gross sales include wages and salaries of $96,003.00, as well as motor vehicle expenses of $1,851.73, gas expenses of $5,452.51 and phone expenses of $731.00.

[34] T.D.'s common-law partner K.B. was one of the people paid through the company payroll in 2017. T.D. claims that she does costing, advertising, and

bookkeeping. However, in her evidence, K.B. described herself as a student and full-time mom. She made no reference to working with the company until questioned directly on it.

[35] T.D.'s brother is another paid employee. He manages the crew for T.D.

[36] T.D. says that the company cannot afford to pay him a salary.

The Duplex

[37] T.D. also holds title to a duplex, where he and G.L.M. lived together for about six months before separation. Since its completion, he has rented one of the units and lived in the other. He claims the income on his personal tax return, though he says that rental income is mostly offset by expenses.

[38] In 2017, T.D. claimed gross rent of $8,400.00 (or $700/m). He claimed expenses totalling $7,204.13, which includes insurance, interest and bank charges, property taxes, and utilities. The net income claimed was $1,195.87.

[39] T.D. did not provide his full tax return for 2016, so his rental income and expenses are not known. In 2015, his expenses were higher than his reported income, so he claimed a loss of $2,758.82.

[40] Until they moved into their new home, he and K.B. occupied the same unit which T.D. occupied with G.L.M. before December, 2011. That unit has since been rented; T.D. and K.B. moved into their new home in March, 2018.

[41] G.L.M. alleges that T.D. charges $900.00/month rent, not $700.00/month as he claims. She argues that the regular deposits of $900.00 cash at the end of the month to T.D.'s bank account represent rent payments for the following month. She also points to the appraisal report, which notes that rent is "$900 per month plus utilities, which is considered in line with market rents for similar units."

[42] T.D. denies this. He says that his father helps him out financially on occasion, and that these deposits may reflect money received from his father. He acknowledges that he collects rent in cash, and that he pays the mortgage and taxes in cash.

[43] G.L.M. requested particulars of T.D.'s rental income, including copies of all leases signed with tenants since 2015 and proof of expenses incurred. T.D. tendered copies of his mortgage on the rental property, two leases with what

appear to be his tenants' signatures, some tax and water bills, bank statements and an insurance certificate in his Exhibit book. He did not disclose the details of his maintenance or repair expenses. G.L.M. suspects that repairs and maintenance are done by his construction company.

[44] The leases produced by T.D. show a monthly rent of $700.00, but I'm not satisfied those documents reflect the actual agreement between T.D. and his tenants. I'm satisfied that he charges $900.00/month in rent.

[45] G.L.M. asks the court to draw an adverse inference from T.D.'s lack of disclosure, and to impute income based on the evidence at trial. She calculates T.D.'s income is as follows:

Year	Income	Breakdown
2017	$146,572.00	$62,236.00 Armed Forces $69,142.00 Conservative estimate of $40,000 self employment income plus gross up $15,194.00 Rental income (based on 2 rental units at $900.00 per unit) = $21,600.00 rent less $704.00 insurance, $2510.00 interest and $3,192.00 taxes
2016	$146,572.00	Same as above
2015	$122,755.76	$42,542.00 line 101 $27,019.76 line 104 $11,594.00 rental (at $900/month) $ 6,600.00 line 130 $35,000.00 self employment (half of current)
2014	$125,496.00	$97,869.00 line 101 $16,033.00 line 130 $11,594.00 rental (at $900/month)
2013	$ 48,802.57	$19,260.57 line 101 $11,439.00 line 104 $ 6,509.00 line 110 (EI) $11,594.00 rental (at $900/month)
2012	$ 61,428.57	$46,651.57 line 101 $ 5,199.00 line 119 (EI) $ 9,576.00 rental (at $800/month)

[46] I accept that T.D. has not been forthcoming with financial information and that his explanation for cash transactions lacks credibility.

Adjustments to Income

[47] Schedule III of the *Federal Child Support Guidelines* directs the court to adjust the income of payor spouses in certain circumstances. In particular, under clause 9 of Schedule III, the salary paid to non arms-length employees can be added back to the income earned by the payor. K.B. is not an "arms length" employee.

[48] T.D. testified that his company pays K.B. $20.00/hour. His evidence about what work she performs, what weeks she worked, and how long she was employed with the company in 2017 was vague, and satisfies me that K.B. is not a true employee whose contribution to the company is necessary in order for T.D. to earn income. This is supported by the fact that K.B. was equally vague about what she earns and when she works.

[49] From 2016 to 2017, company wages and salaries increased by about $42,000.00. T.D. claims that business is slow, so new hires and a significant increase in wages wouldn't be expected.

[50] At the same time, T.D. claims that his company doesn't make enough to pay him a salary. Yet in 2017, it paid K.B. a wage of $20/hour for an unknown period of time, to complete a vague list of duties for which there's no evidence she is qualified. No payroll documents were tendered to confirm the total paid to K.B. in 2017, and T.D. became combative and defensive when pressed on these details. Together with K.B.'s inability to quantify what she earned for what period in 2017, this satisfies me that the payments made to K.B. are an income diversion.

[51] T.D. has an incentive not to pay himself a salary. V.A.C. will pay him as long as he is pursuing gainful employment. In order to qualify, he must attend regular medical and therapeutic appointments, and check in weekly with his V.A.C. representative. V.A.C. does not audit his books. It appears to accept that T.D. is pursuing self-sufficiency for purposes of their program. I am viewing the evidence through a different lens.

[52] It suits T.D. to be close to home. He was training for deployment and then worked overseas for several months. After his return he worked out west, and in Labrador. He missed much of P.D.'s early childhood, and he says he doesn't want to miss his younger children's early years. The V.A.C. program allows him that flexibility.

[53] I find it's reasonable to add back the sum of $42,000.00 to T.D.'s 2017 income. That sum includes wages, benefits and remittances paid on K.B.'s behalf. It reflects an amount that could have been drawn from the company as income by T.D.

Business Deductions

[54] T.D. testified that he has a personal cell phone, separate from his business cell phone. I accept that the deduction for business phone expenses provides him with no personal benefit.

[55] The company's fuel expenses of $5,452.51 in 2017 are high. The company truck is a 2002 Sierra half-ton. It no doubt uses a lot of fuel, but business is slow. T.D.'s evidence that he pays for employees' fuel to travel to work sites is not credible. Between T.D., the company and K.B., there are three half-ton trucks. No records were tendered to prove what amounts were spent on which vehicle, so I conclude that at least 1/3 of the fuel costs relate to personal vehicle use.

[56] Vehicle maintenance expenses of $1,851.73 also seem high, but T.D. says the 2002 Sierra is expensive to maintain. No repair bills or other documentary proof of maintenance expenses was tendered. Vehicle expenses normally include licensing and registration, tires, and routine maintenance. Given the age and use of the vehicle, I conclude that the maintenance expenses deducted are not unreasonable.

[57] The company was incorporated in 2016 – that year it had retained earnings of $7,615.00. T.D. says that money was left in the company to build the business, which is not unreasonable. I will not add back income for retained earnings.

[58] In 2016, the deductions included wages of $54,684.00, plus utilities, property taxes, vehicle expenses, fuel costs, phone costs, and meals. The business is run from T.D.'s home, so deduction of property taxes and utilities creates a personal benefit for T.D. I will therefore add back the sums of $804.00 and $861.00 in 2016.

[59] T.D. started his construction business in 2015. After expenses that year, T.D. reported a loss on his personal tax return. The expenses were not unreasonably high for a start-up. I therefore decline to add back expenses in 2015.

Rental Expenses

[60] While T.D. and K.B. occupied one of the units in the duplex, they did not pay rent. Rather, they paid the difference between the rental income and what was owed for mortgage, taxes, insurance and related costs. In effect, T.D. avoided paying tax on additional rental income. He also appears to have deducted expenses relating to both units for tax purposes. He enjoyed a personal benefit in that arrangement, so I will add back $3,600.00 (12 X $300) from 2012 -2017.

[61] I accept that T.D. rented the second unit he wasn't occupying in 2012 for $800.00/month. This means he had an extra $1,200.00 in unreported income that year.

[62] I also accept that from 2013-17, he rented the second unit for $900.00/month. So in each of those years, he had extra income of $2,400.00.

[63] His income for purposes of child support is therefore calculated as follows:

YEAR	REPORTED	ADD BACKS	TOTAL INCOME
2012	$46,651.00	$4,800.00	$51,451.00
2013	$29,553.00	$6,000.00	$35,553.00
2014	$109,662.00	$6,000.00	$115,662.00
2015	$71,766.00	$6,000.00	$77,766.00
2016	$56,611.00	$7,665.00	$64,276.00
2017	$63,432.50	$49,817.50	$113,250.00

Issue #3 - What child support should T.D. pay (retroactively and/or prospectively)?

[64] G.L.M. says T.D. owes retroactive child support of $38,064.00.

[65] T.D. acknowledges that he owes child support, but he calculates the figure differently. He used his reported income from January 2012 – May 2018 to come

up with a figure of $8,353.81. Included in this figure is credit for amounts he paid to G.L.M. through a joint bank account, the purpose of which is disputed. It also reflects amounts paid through M.E.P.

[66] In **D.B.S. v. S.R.G., [2006] S.C.J. No.37**, the Supreme Court of Canada outlined the factors to be considered in retroactive child support claims. These include:

1. The reasons why the payee delayed seeking support;
2. The conduct of the payor parent;
3. The circumstances of the child/ren (past and present); and
4. Any hardship a retroactive award might cause.

[67] G.L.M. did not delay in filing her claim for child support. She filed an application almost immediately after the parties separated. She consented to various interim orders and agreed to an interim child support figure, but she did not waive the right to pursue retroactive adjustment for the correct amount of support. T.D. has known since 2012 that G.L.M. was seeking child support.

[68] While T.D. paid money to G.L.M. on several occasions after separation, he has not paid support commensurate with his ability to pay, and in accordance with the Nova Scotia table. He diverted money to K.B. through the company in 2017, rather than claim that income himself. He resisted making disclosure of his rental income and expenses until trial. And he's failed to pay the appropriate amount of support in 2018. T.D. has exhibited blameworthy conduct.

[69] However, to his credit, T.D. increased the amount of child support he was paying through M.E.P. in 2014, because his income had increased. And in 2015 he started paying an extra $100.00/month towards arrears, which he knew were outstanding. He also continued to pay into an educational fund for P.D. Those efforts do not negate his failure to consistently pay the appropriate table amount of child support for P.D. since separation, but they mitigate his blameworthy conduct to some degree.

[70] G.L.M. lived with her parents after separation and pursued her degree. She is now qualified as a nurse. She has a new partner. There is no evidence that she fell into debt, or went without to meet P.D.'s needs. But it's likely she did. T.D. was not paying the table amount of child support, nor did he assist G.L.M. with her

childcare or educational expenses. G.L.M. was only working part-time and living with her parents.

[71] T.D. was able to enjoy access with P.D. after separation, even while facing criminal charges and later while on probation for assaulting G.L.M. She was flexible in allowing access. G.L.M. has prioritized P.D.'s interests to date, so I have no doubt she would use a retroactive award for the benefit of the child.

[72] T.D. will face challenges adjusting his budget to allow for payment of a retroactive award. He has a new family to support, including K.B. who plans to pursue her degree. But he has put his own interests ahead of P.D.'s in the past, and he must now reorganize his affairs accordingly. Paying a retroactive adjustment at a reasonable monthly rate will not occasion great hardship to T.D.

[73] T.D. will pay a retroactive adjustment in child support, based on the incomes I've imputed to him, as follows:

Year	Income	Table amount owed	Amount paid	Difference
2012	$51,451.00	$432 X 12 = $5,184.00	$2,400.00	
2013	$35,553.00	$298 X 12 = $3,576.00	$2,750.00	
2014	$115,662.00	960 X 12 = $11,520.00	$9,300.00	
2015	$77,766.00	658 X 12 = $7,896.00	$6,635.00	
2016	$64,276.00	$542 X 12 = $6,504.00	$6,780.00	
2017	$113,250.00	940 X 11 957 X 1 = $11,297.00	$5,650.00	
TOTAL		$45,977.00	$33,515.00	$12,462.00

[74] From this amount, I will deduct $3,600.00 paid through the joint account to G.L.M. That leaves a balance owing of $8,862.00 to be paid in monthly increments of $150.00 starting July 1, 2018 and continuing each month until paid in full.

[75] T.D. will also pay the monthly table amount, based on his 2017 income, in the amount of $957.00 /month, starting January 1, 2018 and continuing monthly until further order of the court.

Section 7 expenses

[76] G.L.M. also seeks a contribution to special and/or extraordinary expenses for P.D. She is currently enrolled in dance lessons, which cost $133.00/month, plus costumes and shoes, which cost about $500.00/year. T.D.'s proportionate share of those monthly costs is 65% or $113.50 /month. This is based on G.L.M.'s income of $68,127.00 in 2017 and his income of $113,250.00. T.D.'s contribution is payable January 1, 2018 and each month thereafter, until varied by the parties by agreement, or until further order of the court.

[77] T.D. was ordered to pay $64.00 /month toward dance expenses as of July 31, 2015. I included all amounts paid through M.E.P. when calculating the retroactive amount of child support, so arrears of s.7 expenses must be separately calculated. At $64.00/month for 29 months, T.D. owes an additional $1,856.00 to G.L.M. to the end of 2017. He will repay these arrears at the rate of $50.00/month until paid in full.

[78] All payments for retroactive and prospective child support (including section 7 expenses) will be made through, and enforceable by M.E.P.

Issue #4 - Is a division of assets appropriate ?

[79] G.L.M. seeks a declaration that she is entitled to compensation for half the value of the duplex, or that half the duplex is held in trust for her by T.D. She relies on principles of unjust enrichment and constructive and/or resulting trust. In support of her claim she cites the Nova Scotia Court of Appeal case of **Snow v. Marsh** (2004) NSCA 155:

> **8** … In Peter v. Beblow, [1993] 1 S.C.R. 980, in concurring opinions, the majority by McLachlin, J. (as she then was) and the minority by Cory, J., the

> Court summarized the test for unjust enrichment and constructive trust (per McLachlin, J.) at p. 987:
>
> > 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. ...
>
> **9** The establishment of unjust enrichment can give rise to a monetary judgment or a recognition of an interest in property through the vehicle of constructive trust. A constructive trust generally "... arises, where monetary damages are inadequate and where there is a link between the contribution that founds the action and the property in which the constructive trust is claimed." (per McLachlin J., Peter v. Beblow, above, at p. 988).

[80] The law on unjust enrichment was updated in the case of **Kerr v. Baranow** [2011] 1 S.C.R. 269, wherein Justice Cromwell stated that the use of "common intention" resulting trusts to address property division in common-law situations should be abandoned in favour of the more flexible doctrine of unjust enrichment, and its ability to adapt to current social realities. In that context, the joint family venture inquiry arises. Cromwell, J. stated at paragraph 87:

> **87** My view is that when the parties have been engaged in a joint family venture, and the claimant's contributions to it are linked to the generation of wealth, a monetary award for unjust enrichment should be calculated according to the share of the accumulated wealth proportionate to the claimant's contributions. In order to apply this approach, it is first necessary to identify whether the parties have, in fact, been engaged in a joint family venture.

[81] The duplex sits on a lot of land acquired from G.L.M.'s brother. Title was initially registered in the parties' names jointly, but G.L.M. signed a Quit Claim deed in favour of T.D. in May, 2011.

[82] T.D. says that a Q.C. deed was necessary for financing purposes, as G.L.M. had no credit. He secured the mortgage in his name only. G.L.M. had no independent legal advice when she signed the deed.

[83] The parties were living common law when the deed was acquired and when the mortgage was signed. T.D. managed the build. G.L.M. chose the finishes. They lived in the duplex together for about six months before separation. After separation, T.D. stayed in the duplex. He lived there until he finished his new home in March, 2018. The duplex was appraised at $230,000.00 in November, 2016.

[84] The parties were clearly in a joint venture together when building the duplex, with plans for the future and a child together. It's doubtful G.L.M.'s brother would have sold them the land otherwise. G.L.M. provided childcare and household management, while working part time and taking courses towards her degree. T.D. worked full time to support the family in the meantime.

[85] I am satisfied that G.L.M. should be compensated for her interest in the duplex. It's not reasonable to grant her an equal interest, given the nature of her contribution and the relatively short-term relationship. As Justice Cromwell noted in **Kerr v. Baranow** (*supra*) at paragraph 62:

> **62** Unlike much matrimonial property legislation, the law of unjust enrichment does not mandate a presumption of equal sharing. However, the law of unjust enrichment can and should respond to the social reality identified by the legislature that many domestic relationships are more realistically viewed as a joint venture to which the parties jointly contribute.

[86] However, child and homecare contributions count. As noted by O'Neil, J. in **Darlington v. Moore**, 2015 NSSC 124:

> In the *Vanasse* appeal considered by the Supreme Court with the *Kerr v. Baranow* appeal, the contribution claimed was in the form of domestic and childcare services (paragraph 134). The trial Judge found that a link existed between wealth accumulated during a middle period of the parties' relationship when Ms. Vanasse was almost solely responsible for the home and children.

[87] Considering all of the evidence and caselaw, I have assessed G.L.M.'s interest at 25% of the equity in the duplex as of June 1, 2018. I exercise my discretion in choosing that date, rather than the date of separation, because G.L.M. was denied her interest until now, and T.D. has enjoyed the benefits of occupation, plus a rental income.

[88] T.D. is directed to obtain a mortgage payout statement for June 1, 2018. Along with notional disposition costs (5% realty fees plus HST, and legal fees of $500.00 plus HST), the mortgage payout figure (including penalties) will be deducted from the appraised value to determine the equity as of June 1, 2018. T.D. must pay G.L.M. her share of the equity within sixty days of this decision. Failing payment, G.L.M. may enter judgment and execute on it.

Contents

[89] G.L.M. says that when she left in December, 2011, she took very few items from the home. She tendered a list of contents she wishes to retrieve or be paid for, but no appraisal. She relies on her own estimate of values in asking for compensation.

[90] T.D. says that the contents were divided, and that G.L.M. has already retrieved a number of items on her list. He says the appliances were bought with the mortgage proceeds and stay with the home in any event.

[91] I cannot divide assets for which I have no appraisal, or for which values are not agreed. Nor am I clear on the equitable basis of G.L.M.'s claim. In the circumstances, neither party will be required to deliver contents to the other or compensate the other for items retained.

Vehicle

[92] T.D. says that he bought G.L.M. a used vehicle, for which he obtained a loan which he repaid after separation. He seeks compensation for half the value of that vehicle. I decline to make such an order. Even if there was an enrichment to G.L.M. by keeping the car while T.D. paid the loan, it was justified by her need. She required transportation with a young child, and while pursuing her degree. T.D. paid her no spousal support and insufficient child support. These factors weight against compensation to T.D. for the vehicle.

Engagement Ring

[93] T.D. also claims compensation for the diamond engagement ring he bought G.L.M., which he says cost $10,000.00 (Can). At equity, and under contractual principles, there is no basis for ordering a return of the ring or compensation. T.D. assaulted G.L.M. in December, 2011. That domestic violence incident precipitated their separation. G.L.M. had good reason not to complete the "transaction" for which the ring was given. If she was enriched at T.D.'s expense, there's a justiciable reason.

Land

[94] In addition to her claim to an interest in the duplex, G.L.M. claims compensation on behalf of her brother. She says he only ever received partial

payment for the land. T.D. says the purchase price of $10,500.00 was paid in full, and that the final payment was made in cash. He points to a withdrawal of $5,000.00 on December 23, 2010 from the joint account as evidence of this payment. This was around the time T.D. returned from overseas.

[95] G.L.M. acknowledges that T.D. controlled the money in their household. She was not privy to discussions with her brother about the land. Her brother did not testify, so his position on monies paid and whether there's a balance owing is unknown. There is no evidence of an agreement in writing, receipts for payments, or any other documentation to support either party's position.

[96] I accept that G.L.M.'s brother was paid in full. If he was still owed money, I would have expected evidence from him to confirm the debt.

Issue # 5 - Is spousal support payable and if so, in what amount ?

[97] G.L.M. says that when she and T.D. lived together, they discussed her plan to retrain as a nurse, and that he agreed to support her while she pursued her studies. She was taking courses when the parties separated in December, 2011. When she left the home, G.L.M. had only a part-time job with little income. She and P.D. moved in with her parents, and she continued to pursue her degree with their support.

[98] T.D. denies that he agreed to support G.L.M. while she pursued her nursing degree. He points out that they only lived together for 11 months. He says G.L.M.'s need does not arise from their relationship, and that she'd pursued various courses over the years without commitment or success. Alternatively, he says that he supported her by paying her car loan after separation.

[99] The parties' daughter was born in 2009, two years after they started dating. They split up briefly a couple of times before P.D. was born. However, they were in a committed relationship when T.D. was deployed in 2010. While overseas, he supported G.L.M. and P.D. by transferring monies through a joint account. He also bought an expensive engagement ring before returning home.

[100] The parties' relationship was not long-term, but it was traditional in many ways. G.L.M. was the primary caregiver for P.D., even when T.D. returned home from deployment. T.D. was the main income earner. G.L.M. and P.D. were dependent on T.D. for financial support before and after December, 2011.

[101] G.L.M. is entitled to spousal support. The question is for what period and how much. G.L.M. seeks support while she completed her degree. Thereafter, she acknowledges that she was self-sufficient and able to support herself. She calculates the amount owing retroactively at $63,024.00 from 2012 – 2015, based on the **Spousal Support Advisory Guidelines**.

[102] T.D. says that if G.L.M. is entitled to spousal support, it should be limited to the period before she started living common-law with her current partner in 2012.

[103] The **D.B.S.** factors are relevant in retroactive spousal support claims. I accept that G.L.M. did not delay in advancing her claim, and that T.D. exhibited blameworthy conduct. Undoubtedly, G.L.M. had need of spousal support after separation, and T.D. had the means to pay. But there's no evidence that G.L.M. has a need now which must be addressed through a lump sum. And a large lump sum award on top of his other financial obligations would create hardship for T.D.

[104] Considering all of the evidence, and taking into account the parties' current circumstances, I award retroactive spousal support to G.L.M. in the amount of $250.00 /month, for two years post-separation. That equates to a lump sum of $6,000.00, which shall be paid through M.E.P. at the rate of $100.00 /month until paid in full.

Costs:

[105] Each party will bear their own costs, barring any offers which impact the issue. In that case, counsel may make written submission within thirty days.

MacLeod-Archer, J.

SCHEDULE "A"

Definitions -

(a) "After school" means the time when the child is normally discharged from school (approximately 2:30 pm at present).

(b) "Consecutive days" means from 10 am on the first day until 10 am on the 7th day, unless the parties otherwise agree in writing, in advance.

(c) "Important events" means events which fall outside the ordinary and routinely scheduled dates in the child's life.

(d) "In writing" means communication by text or email to the last number/address provided by the other party.

(e) "Return date" means the day T.D. returns home if he's working outside the Cape Breton Regional Municipality. An arrival after 6 pm will be deemed to be an arrival the next day for purposes of parenting time during rotation days.

(f) "Rotation days" means days off work spent in C.B.R.M.

(g) "School year" means the first day of school for P.D. (as established by the Department of Education yearly) until grading day.

(h) "Summer holidays" means the day after grading day until the day before Labour Day.

Parenting Time -

1. The summer schedule as contained in the most recent order will continue, meaning T.D. will have parenting time from Monday at 10:00 a.m. until Wednesday at 6:00 p.m. each week of the summer holidays (subject to #2 below).

2. Both parents may opt to exercise parenting time over a block of seven consecutive days during the summer holidays. T.D. must communicate his choice of dates in writing to G.L.M. no later than May 31st of each year, starting in 2019. G.L.M. will then have her choice of dates, not to coincide with T.D.'s dates. G.L.M. must communicate her choice of dates in writing to T.D. by June 15th of

each year. In the event a party fails to communicate dates by their deadline, that party will be deemed to have waived their block of time.

3. During the school year, T.D. will have parenting time on a four week rotating schedule, modelled on the current order, with clarifications to avoid conflict. Starting the first weekend of the school year, his parenting time will be as follows:

    - WEEK 1: T.D. will have parenting time with P.D. from Friday after school until Sunday at 5:00 p.m.;
    - WEEK 2: T.D. will have parenting time with P.D. on Wednesday from after school until 7:00 p.m.;
    - WEEK 3: T.D. will have parenting time with P.D. from Friday after school until Sunday at 5:00 p.m.;
    - WEEK 4: T.D. will have parenting time from Wednesday after school until Thursday morning.

4. T.D. will be responsible to retrieve the child at school and deliver her back to school in WEEK 4 or to G.L.M.'s home if there's no school.

5. T.D. may choose to have another licensed and insured driver over age 25 retrieve or return P.D. after parenting time.

6. The parent who has care of P.D. when an activity is scheduled will be responsible to bring her to that activity. This does not preclude the other parent and extended family from attending as well, but the parent who has care of P.D. that day will be responsible to prepare her, transport her, dress/equip her, and ensure her other needs are met during the scheduled activity.

7. In the event T.D. accepts work outside of Nova Scotia, he will notify G.L.M. within 48 hours. His parenting time will then be as follows:

    - On his rotation days, he will have parenting time with P.D. overnight for 3 consecutive nights, to start two calendar days after his return date. Parenting time will run from after school (or at 2 p.m. if there's no school that day) until 7:00 p.m. on the scheduled return date.

    - In order to exercise such parenting time, he must notify G.L.M. in writing at least 7 days in advance of his return date.

- For every 7 days he's home on rotation, T.D. will have the same parenting time, to repeat weekly for a maximum of three weeks each rotation. Thereafter he will be deemed to be laid off, and the regular schedule will apply.

- In the event he is laid off and returns home, T.D.'s parenting time will revert to WEEK 1 of the regular schedule.

8. G.L.M. will consult T.D. on all major decisions affecting the child, including health, education, religious and social aspects of her life. If, after meaningful consultation, the parties cannot agree, G.L.M. shall make the final decision.

9. The child may not be enrolled in additional extra-curricular activities which impact T.D.'s parenting time without his written consent. At present, P.D. takes dance lessons. All clothing, shoes and items required by the child for dance class will travel with her for classes scheduled on the other parent's time. If dance class falls on T.D.'s parenting time, he will return those items to G.L.M. when he delivers P.D. home and *vice versa*. In the event one parent forgets to send these items with P.D., the parent who forgot will deliver the items before the child's next scheduled dance class.

10. In the event that either parent is working during the time they would have P.D. in their care, they shall make their own arrangements for child care, which may include grandparents, new partners or sitters of their choosing.

11. The child will have special occasion time with T.D. as set out in the interim consent order dated September 27, 2016 and issued December 19, 2016.

12. In addition, T.D. will have parenting time (should he not already be scheduled for parenting time) on the following special occasions:

    - On his birthday from after school until 7:00 p.m.;

    - On Father's Day from noon until 5:00 p.m.; and

    - On Halloween, from after school until 7:00 p.m., starting in 2018 and each even-numbered year thereafter;

- On Remembrance Day from 10:00 am until 2:00 p.m.;
- On grading day from 11:00 a.m. until 3:00 p.m.

13. Should T.D.'s parenting time on a Sunday fall on Mother's Day, he will return the child at noon instead of 5:00 p.m.

14. The parties will participate in counselling for parents in cooperative parenting arrangements, which may be in the form of a refresher program with Children and Family Services of Eastern Nova Scotia, or with a licensed and registered therapeutic counsellor who provides such services. They must take no less than 10 sessions and focus on civil and cooperative communications. K.B. must participate in the same programming should she wish to provide care for P.D. in T.D.'s absence.

15. The parties will refrain from making negative, critical, or disparaging remarks about the other parent to P.D., or within P.D.'s hearing. They will ensure others refrain from doing the same.

16. The parties will communicate about issues affecting P.D. respectfully, in writing, with copies of all exchanges to be retained for purposes of any future court hearings.

17. They will each provide the other with updated contact information should their phone or email address change, such information to be communicated within 24 hours of the change. Confirmation of receipt of the information must be provided within 24 hours, and a response to any inquiries must be sent within 24 hours. If a response is delayed, an explanation for the delay will accompany the response.

18. The party in whose care P.D. is in the time of any emergency will access emergency care for her and notify the other immediately. Both parties may attend routine and non-routine medical appointments for P.D.

19. Both parents are entitled to directly contact P.D.'s doctors, dentists, therapists, teachers, coaches and other third party service providers or professionals involved in the child's life, to request and receive information about P.D. and to consult about her care and progress. G.L.M. will notify T.D. of the contact information and names of P.D.'s doctors, dentists, therapists, teachers, coaches and other third

party service providers or professionals involved in the child's life from time to time, as the list changes.

20. T.D. will be responsible to keep himself informed on P.D.'s health, social development and general welfare through contact with P.D.'s doctors, dentists, therapists, teachers, coaches and other third party service providers or professionals involved in the child's life.

21. G.L.M. will notify T.D. of the dates for any important events in the child's life as soon as those dates are known. T.D. may not schedule important events for the child without G.L.M.'s consent in writing.

22. Both parents and their partners and families may attend important events, including dance recitals, sports games, special school events such as concerts, religious ceremonies and other special events in which the child is involved. They may both take photos and interact with the child, but may not monopolize her at such events. The parent who has care of the child that day will take P.D. to and from the event, unless otherwise agreed in writing between the parties.

23. T.D. will be listed as a second contact with P.D.'s doctors, dentists, therapists, teachers, coaches and other third party service providers or professionals involved in the child's life.

24. Each parent is permitted to travel within Nova Scotia with P.D. during the time she is in their care.

25. In the event either party wishes to travel outside of Nova Scotia with P.D., the other party will be provided with a contact number, destination, and return date at least 7 days before departure.

26. In the event either parent's travel plans include travel outside of the country, the travelling parent must provide no less than 60 days notice to the non travelling parent, who will cooperate and sign all documents required for purposes of travel, including a passport. The passport shall be the property of the child and shall be held by G.L.M., who must make it available to T.D. on his request in writing.

27. The parties may arrange additional parenting time, change the parenting schedule laid out above, or adjust retrieval/return times in writing by agreement, from time to time.

28. If the parties disagree about the interpretation or implementation of this parenting schedule, or if or they are unable to resolve disputes

arising from these parenting arrangements, they must participate in mediation to resolve the dispute before proceeding to court. The cost of mediation will be shared equally.