Citation: Horch v Horch, 2017 MBCA 97 Date: 20171003
Docket: AF16-30-08569

# IN THE COURT OF APPEAL OF MANITOBA

*Coram:* Madam Justice Holly C. Beard
Madam Justice Diana M. Cameron
Mr. Justice Christopher J. Mainella

***B E T W E E N :***

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|---|---|---|
| | ) | ***R. A. Horton*** *and* |
| | ) | ***R. J. Hocken*** |
| ***FRANCES MARY HORCH*** | ) | *for the Appellant* |
| | ) | |
| *(Petitioner) Respondent* | ) | ***L. I. Z. Pinsky*** *and* |
| | ) | ***J. A. Schofield*** |
| *- and -* | ) | *for the Respondent* |
| | ) | |
| ***KENNETH EDWARD HORCH*** | ) | *Appeal heard:* |
| | ) | ***February 6, 2017*** |
| *(Respondent) Appellant* | ) | |
| | ) | *Judgment delivered:* |
| | ) | ***October 3, 2017*** |

On appeal from 2012 MBQB 343; 2014 MBQB 89; and 2015 MBQB 213

## MAINELLA JA

### Introduction and Issues

[1] The appeal and cross appeal raise issues regarding the equalization of family property on marriage breakdown, retroactive child support and costs.

*Family Property Issues*

[2] During their marriage, the parties made a decision to make an investment in publicly traded trust units (later to become shares) (generally hereafter the shares). These appreciated over time and also generated monthly income both before and after the separation. Once the parties separated, the shares engendered conflict and lengthy litigation because of disagreement over how to apportion the shares, the increase in their value and the monthly income.

[3] Both appeals challenge how the judge dealt with the petitioner's entitlement to the post-separation appreciation of the shares and the monthly income. The issues relate to the interplay between the law of unjust enrichment, the equitable remedy of a constructive trust and *The Family Property Act*, CCSM c F25 (the *FPA*). The relevant provisions of the *FPA* are attached as an appendix to my reasons.

[4] The judge found that the investment was a joint family venture resulting in an unjust enrichment to the respondent despite the respondent being the sole owner. To address the unjust enrichment from the post-separation appreciation of the shares, he granted the petitioner a statutory remedy under section 14(2) of the *FPA* in the form of an unequal division of the value. After the parties separated, the respondent equally shared the monthly income from the shares with the petitioner for three years. Thereafter, he kept all of the monthly income. The judge found that the respondent's decision to keep all of the monthly income was a second form of unjust enrichment. He ordered, pursuant to the law of unjust enrichment and restitution, a monetary award in the amount of one half of the total after-

tax value of the income from the shares in favour of the petitioner.

[5] In his appeal, the respondent argues that the judge erred in his exercise of discretion to order an unequal division under the *FPA*. As part of this submission, he questions whether an unequal division can occur in relation to only one asset. His position ultimately is that the petitioner is entitled to one half of the value of the shares as of the date of separation, plus interest. He also submits that the judge erred in finding that there was an unjust enrichment because he kept all of the monthly income beginning three years after the separation. He says that the petitioner had no entitlement to any share in the post-separation monthly income of the shares as he was the sole owner. He argues that the petitioner's family property rights were restricted to those set out in the *FPA* and, therefore, the monetary award based on the law of unjust enrichment and restitution was an error and, ironically, amounted to an unjust enrichment in favour of the petitioner.

[6] In her cross appeal, the petitioner says that the judge erred by not awarding her the equitable remedy of a constructive trust for a one-half beneficial interest in the shares for the unjust enrichment relating to their appreciation post-separation. She submits that the statutory remedy granted under the *FPA* is inadequate and that the respondent has been unjustly enriched again by the appreciation of the shares after the valuation date the judge used for determining the *FPA* equalization award. She has filed a motion in this Court asking to adduce further evidence as to the particulars of the sale of the shares which she asks be compelled from the respondent.

*Retroactive Child Support Issues*

[7] The petitioner claimed retroactive child support for the parties'

teenage daughter for the 37 months before she became an independent adult. The judge granted retroactive child support for only two months based on an agreement he held existed between the parties. The petitioner says that the judge erred in concluding there was an agreement to depart from the *Child Support Guidelines Regulation*, Man Reg 58/98 (the *Guidelines*).

*Costs Issues*

[8] The petitioner also challenges the judge's decisions as to costs and his application of the principle of proportionality. The judge was of the view that success was divided during matrimonial proceedings and his three costs orders reflected that conclusion. The petitioner says that this was an error. She argues that, over the course of the litigation, she was the successful party and, therefore, should have been awarded costs throughout. She submits that one of the reasons that the litigation dragged on for over five years, at great expense to her, is because the judge's conduct of the proceedings was disproportionate. She says that, if he had given greater attention to the principle of proportionality, there would have been a quicker outcome in this case with less expense to her.

[9] For the following reasons, I would dismiss the appeal of the respondent and the motion for further evidence of the petitioner and would allow the cross appeal of the petitioner, in part, on the issues of retroactive child support and costs.

Background

[10] The parties, both chartered accountants by profession, married in 1985 and separated in 2007. Their daughter was age 14 at the date of

separation and lived with the petitioner following the separation, until January 2011.

*History of the Family Property Dispute*

[11] The respondent worked for a Winnipeg-based aviation company. In 2004, he was given the opportunity as an employee to invest in the Exchange Industrial Income Fund (the fund) before its initial public offering. The fund had acquired the aviation company. The parties together made the decision to make the investment which was paid for using a joint bank account that was funded by a joint line of credit secured by the family home. The intention of the parties was to "make money" from the investment over the long term. The respondent believed that this was a "safe investment" because the family's earnings and the income the shares would generate would cover the cost of borrowing. He also believed that the shares would jump in price after the initial public offering.

[12] The investment was for 14,803 Class A trust units with a cost of $7.60 each for a total of $112,502.80. The respondent was the sole owner, and monthly distributions, later to become dividends (the monthly income), were paid in his name. The parties agree that the shares fall within the definition of a commercial asset under the *FPA* (see section 1(1)).

[13] The amount borrowed for the shares against the joint line of credit was paid off prior to their separation in 2007 using, in part, the monthly income from the shares and the parties' salaries. The judge found that, although the respondent had the higher salary, the proportion of contributions by each party towards paying off the investment loan could not be determined because the joint line of credit was used for multiple purposes.

[14] The fair market value of the shares at the date of separation in 2007 was $11.65 each for a total of $172,454.95.

[15] In 2009, the fund changed its structure from a business-income trust to a corporation. The trust units were converted into common shares, leaving the respondent owning 14,803 shares of the Exchange Industrial Corporation. The monthly income, now in the form of dividends, remained the same.

[16] The monthly income was 12.5¢ per share at the time of separation in 2007 and rose over time to 16¢ per share as of November 2015 when the shares were sold. The yearly income, without considering income tax consequences, was somewhere between approximately $22,000 and $28,000.

[17] For the tax years 2004 and 2007-2009 and for the first 11 months of 2010, the monthly income was claimed 50% each by the parties for income tax purposes. For the tax years 2005-2006, the petitioner claimed 100% of the monthly income to minimize taxes as her income was less than the respondent's. For December 2010 and for the tax years 2011-2014, the respondent claimed 100% of the monthly income.

*Claim of Retroactive Child Support*

[18] After the separation, the parties had a practice whereby the petitioner would receive the respondent's cheque for the monthly income from the shares, deposit it, keep half of the amount for herself and then pay the respondent the other half, less an amount she deducted for childcare expenses. The petitioner sent the respondent an itemized statement of the childcare expenses paid each month. These deductions totalled $20,879.48 over the course of 35 months starting in January 2008. In December 2010,

the respondent made the unilateral decision to retain all of the monthly income from the shares.

[19] The parties agree that, for the purposes of determining child support, the respondent's imputed income was $85,000 per year. Although the Manitoba table of the *Guidelines* prior to December 31, 2011, would have set child support at $721 per month based on the respondent's income, the petitioner claimed that the respondent should have been paying her $750 per month in table child support (37 months x $750.00 = $27,750). She argues that there were section 7 expenses under the *Guidelines* for the daughter relating to private school fees, counselling and medication/healthcare expenses. According to her figures, the respondent owes her $14,609.71 in retroactive child support, taking into account the monies she kept from his share of the monthly income from the shares.

[20] The respondent says that he has overpaid child support. He says that, because the petitioner had no entitlement to any of the monthly income from the shares after the separation, the portion of the monthly income she received for approximately three years exceeded his child support obligations under the *Guidelines*. Alternatively, he says that, if she were entitled to a half share of the monthly income, her figures are unreasonable because they inflate the amount of section 7 expenses. He says that, based on the *Guidelines*, after he is credited with the monies kept by the petitioner from his share of the monthly income, his outstanding child support obligation would be approximately half of what the petitioner is claiming.

*Relevant Events in Family Court*

[21] The petition for divorce and corollary relief was filed in the spring

of 2010. The petition included a request for child support under the *Divorce Act*, RSC 1985, c 3 (2nd Supp) and the *Guidelines*, as well as an equal division of assets under the *FPA*. There was no request for spousal support. After their family law trial, the parties ultimately reached an agreement with respect to the division of all of their other assets aside from the shares. Based on that settlement, the respondent paid the petitioner $507,706.18, plus interest of $54,306.84.

[22] Just prior to the commencement of the trial in 2011, the fair market value of the shares was $20.61 each for a total of $305,089.83. The position of the petitioner was that the respondent had been unjustly enriched by the appreciation of the shares since the separation and by his unilateral decision in December 2010 to keep all of the monthly income. She amended her petition to include a request for an accounting and a monetary award for one half of the monthly income of the shares, as well as a declaration that she was the beneficial owner of one half of the shares or, alternatively, an order transferring one half of the shares to her. The legal basis for this new relief was simply stated as "*The Law of Trusts*" in the pleading. The petition was not amended as to the relief sought under the *FPA*. The petitioner continued to request an equal division of the family property.

[23] The petitioner did not seek the statutory remedy of an unequal division (see section 14(2) of the *FPA*) in the amended petition because she says that her then counsel (not Mr. Pinsky or Ms Schofield) advised her that the *FPA* "did not provide an adequate remedy and was inappropriate to the factual situation." The petitioner claims that her counsel at the time advised her that seeking both an equitable and a statutory remedy for the alleged unjust enrichment of the respondent would "only muddy the waters".

[24] The family law trial took place over several days in the fall of 2011. During the trial, the judge granted the parties a divorce by a divorce judgment. He delivered his decision as to the family property and retroactive child support issues on December 21, 2012. On that date, the fair market value of the shares was $25.85 each for a total of $382,657.55.

[25] In terms of the family property dispute, the judge considered the factors relating to an action for unjust enrichment mentioned in *Kerr v Baranow*, 2011 SCC 10, in light of the evidence and then concluded that the respondent had been unjustly enriched in two ways (at para 35):

> The shares were acquired by the husband on May 6, 2004 as part of a "joint family venture". Both the husband and the wife contributed to the acquisition of the shares. These shares have appreciated in value since the date of separation. There is no juristic reason for the husband to receive the entire benefit of the appreciation in value of the EIC shares since the date of separation. Since December 1, 2010, the husband has received all the monthly dividends from the shares and the wife has received no dividends. There is also no juristic reason for the unequal distribution of dividends between the husband [and] the wife since December 1, 2010. In the circumstances, there are two forms of unjust enrichment that have benefitted the husband. It is unjust to allow the husband to receive the entire benefit from the post-separation appreciation in [the] value of the shares that were acquired as part of a "joint family venture". It is also unjust to allow the husband to enrich himself by retaining the entire ongoing income from the shares from December 1, 2010 to the current date. The issue that remains concerns the determination of the appropriate remedy for the unjust enrichment.

[26] On the question of a remedy for the unjust enrichment, the judge considered the interplay between the *FPA* and the law of constructive trusts in light of this Court's decision in *Gallant v Gallant*, 1998 CarswellMan 477 (CA), leave to appeal to SCC refused, 148 ManR (2d) 157 (note). He reasoned

that remedies regarding unjust enrichment in a family law context under the *FPA* and in equity are parallel; accordingly, based on *Gallant*, the *FPA* "provides the appropriate remedy to correct unjust enrichment where a spouse or common law partner does not share post-separation appreciation" (at para 46) of a commercial asset.

[27] The judge, however, refused to grant the petitioner relief for the respondent's unjust enrichment as to the appreciation of the shares because her pleadings were inadequate on the basis of r 70.31(3) of the Manitoba, *Court of Queen's Bench Rules*, Man Reg 553/88 (the *QB Rules*):

> **Relief to be claimed**
> 70.31(3) Subject to subsection 24.3(1) of the *Child Support Guidelines Regulation*, Manitoba Regulation 58/98, a court shall grant only relief that has been claimed in a pleading and shall deal with each claim for relief by granting an order
>
> (a) for the relief claimed;
>
> (b) dismissing the claim for relief;
>
> (c) adjourning the claim for relief; or
>
> (d) allowing the claim for relief to be withdrawn by a party.

[28] The judge concluded that, because the petitioner had not sought the correct statutory relief in her petition, as amended, in the form of an unequal division (see section 14(2) of the *FPA*), he could not deviate from her request in her petition for an equal division of the value of the shares.

[29] The judge did, however, remedy the unjust enrichment of the respondent keeping all of the monthly income from December 2010, by a restitutionary monetary award. He stated (at para 47):

> It has been determined that, taking into account that the EIC shares were acquired as part of a "joint family venture" and there is no juristic reason for the husband to retain all the dividends since December 1, 2010, there is a second form of unjust enrichment. The ***FPA***, and s. 14(2) in particular, does not provide a remedy to the wife with respect to this unjust enrichment. The remedy of constructive trust is an alternative to consider. However, this proprietary remedy is not required. Taking into account the dicta in ***Kerr v. Baronow***, it is apparent that a monetary award that measures the extent of the unjust enrichment retained by the husband is sufficient for remedying the unjust enrichment. In the circumstances, the wife is entitled to receive a monetary award equal to 50% of the total after-tax value of the dividends that have been received by the husband from December 1, 2010 to the current date.

[30] On the question of retroactive child support, the judge concluded that, until the respondent decided to keep all of the monthly income (December 2010), he had satisfied his child support obligations by allowing the petitioner to deduct childcare expenses from his share of the monthly income. He stated (at para 49):

> Taking a holistic approach to the facts of this case, there is no need to examine the issue of whether the husband underpaid or overpaid child support for the period from January 1, 2008 to November 2010. Although not without discord, the husband paid and the wife received monthly contributions that were paid out of the husband's share of the EIC dividend income in amounts that the parties explicitly or implicitly agreed upon.

[31] The judge limited his award of retroactive child support to two months in the table amount under the *Guidelines* for December 2010 and January 2011 ($721 per month for a total of $1,442).

[32] During the proceedings, the judge made three costs orders. The first costs order related to the trial. The judge declined to make an order of costs

for the trial because, in his view, there was "divided success" (at para 28). He reasoned that, while the petitioner was successful as to equal sharing of the monthly income post-separation, the respondent was successful, based on the defective pleading of the petitioner, that the date of separation be used to value the asset and there was mixed success as to the petitioner's claim to retroactive child support.

[33] In the spring of 2013, prior to the judgment being entered, the petitioner moved for an order to file a further amended petition to seek an unequal division pursuant to section 14(2) of the *FPA*. That motion was heard in December 2013, and the judge delivered his decision on April 30, 2014. On that date, the fair market value of the shares was $18.57 each for a total of $274,891.71.

[34] The judge granted the petitioner leave to amend her pleadings to claim an unequal division. He also ordered that no costs be awarded in relation to the motion to amend the petition. In his view, the petitioner was wholly responsible for the delay in seeking the correct relief relating to her claim. The judge noted that, had the petitioner accepted the respondent's submission at trial that unjust enrichment due to post-separation appreciation of any asset should be dealt with under the *FPA* instead of pursuing the equitable remedy of a constructive trust, the motion to amend the pleadings would have been unnecessary.

[35] In the spring of 2014, the petitioner filed her re-amended petition for divorce which sought unequal division pursuant to section 14(2) of the *FPA*. Proceedings as to the unequal division were delayed for approximately one year thereafter for several reasons. The petitioner's lawyer passed away in

the spring of 2014. Extensive negotiations between the parties to settle the dispute were unsuccessful. In January of 2015, the petitioner discharged her new lawyer and decided to act in person. Finally, the parties could not agree on the facts as to the tax consequences of the appreciation of the shares, necessitating a contested hearing with expert evidence from a chartered accountant. The judge decided that the contested hearing would proceed using a valuation date of June 30, 2015. On that date, the fair market value of the shares was $20.22 each for a total of $299,316.66.

[36] The hearing as to the unequal division occurred on November 12, 2015. The expert's evidence was unchallenged. His calculations are set out in detail at paras 21-26 of the judge's reasons. In summary, the judge concluded that, based on the record before him, the net after-tax value of the shares as of the date of separation in 2007 was $160,644.38 and it was $259,525.31 as of the 2015 valuation date. As part of his finding regarding the 2015 valuation, the judge used the historical effective tax rate for the respondent of 21.3% as opposed to a projected rate of 23.2% that the respondent wanted to use based on his expected 2015 income. The judge explained his decision to use the lower tax rate, which was favourable to the petitioner, by noting that the respondent has a "discretion" (at para 24) to manipulate the sources of his income each year. The expected 2015 income of the respondent was much higher than it had been historically. Accordingly, the judge concluded that the lower tax rate was "a more accurate measure of the contingent tax liability" (at para 25) for calculating the taxes owed for the capital gains.

[37] The parties came to an agreement that one half of the after-tax value of the monthly income from the shares for the period of December 2010 to

December 2015 was $58,748.45. Unfortunately, the final order the judge signed in 2016 as to the monetary award to compensate the petitioner for the respondent's retention of all of the monthly income after December 2010 is at odds with his reasons delivered in 2012 and 2015. The final order states:

> 7.0 THIS COURT ORDERS pursuant to the Law of Constructive Trusts that:
>
> 7.1 KENNETH EDWARD HORCH pay FRANCES MARY HORCH 50% of the total after-tax value of the dividends which KENNETH EDWARD HORCH received from the 14,803 EIC shares from December 1, 2010 to December 31, 2015 in the amount of $58,748.45.
>
> [emphasis added]

[38] As previously mentioned, in his reasons, the judge accepted that a claim of unjust enrichment had been made out and that a monetary award was the appropriate remedy. The judge rejected the equitable remedy of a constructive trust. Paragraph 7.0 of the final order should have read, "THIS COURT ORDERS pursuant to the Law of Unjust Enrichment and Restitution that: . . .".

[39] On November 12, 2015 (which was a Thursday), the judge was told that the shares were in the possession of the respondent's stock broker for the purpose of sale, but had not yet been sold. In an affidavit filed in this Court on the petitioner's motion for further evidence, the respondent deposes that the shares were sold "soon after" the November 12th hearing.

[40] On November 16, 2015, counsel for the respondent informed the petitioner that the shares had been sold. By way of letter to the petitioner dated November 19, 2015, counsel for the respondent confirmed that his firm

had received the sum of $100,000 from the sale of the shares on November 17, 2015, and that the petitioner picked up his firm's trust cheque payable to her in that sum on November 18, 2015, which represented an interim payment towards the marital assets still in dispute.

[41] On December 22, 2015, the judge delivered his decision as to the request for an unequal division. He determined that the almost $100,000 appreciation of the shares over the seven-and-one-half-year period after the separation was entirely the result of the stock market; the respondent had done nothing to contribute to the appreciation. Relying in particular on section 14(2)(g) of the *FPA*, he decided that it would be "clearly inequitable" (at para 37) to award the petitioner an equalization payment based on the 2007 net after-tax value of the shares with interest (which would have worked out to be $103,133.19). Rather, he decided that the petitioner's entitlement was one half of the after-tax value of the shares as of the 2015 valuation date. He determined that amount to be $129,762.66 (at para 38).

[42] In order to reach that result, the judge awarded the petitioner approximately 80.8% of the after-tax value as of the date of separation in 2007. The respondent was awarded approximately 19.2% of the after-tax value as of the date of separation, plus all of the post-separation appreciation to the current date of valuation in 2015. The judge explained, "The result is that the wife and the husband share equally in the value of the shares at the date of separation and their post-separation appreciation in value" (at para 40).

[43] As previously mentioned, the judge also set the monetary award for the petitioner's 50% share in the after-tax value of the monthly income for the period of December 2010 to December 2015 at $58,748.45.

[44] The parties again could not agree on costs and a contested hearing was held. The petitioner attempted to revisit the judge's previous two costs orders. She presented a proposed bill of costs for all of the litigation for costs, disbursements and taxes totalling $28,492.82.

[45] The judge declined to revisit his prior costs orders. He concluded that the petitioner was largely successful at the unequal division hearing but that the respondent had been prejudiced by the conduct of the litigation. In his third costs order, he set costs on the unequal division hearing in favour of the petitioner in the amount of $2,500 all inclusive.

[46] The final order concluding proceedings in family court was signed on March 14, 2016.

*Petitioner's Motion for Further Evidence on the Appeal*

[47] After the signing of the final order, the petitioner requested the respondent's 2015 income tax return and notice of assessment to determine the sale price of the shares in November 2015, the proceeds of the transaction and the tax owed. The respondent refused the request on the basis of relevance.

[48] Not surprisingly, this disagreement resulted in further litigation, but now in this Court. After the notices of appeal were filed, the petitioner filed a motion to introduce further evidence on the appeal. The notice of motion requests that this Court order the respondent to disclose his 2015 income tax return, his 2015 notice of assessment and the particulars as to the date on which he made an order to sell the shares and the actual sale date. The motion for further evidence was adjourned by a chambers judge to be decided by the

panel hearing the appeals.

[49] At the hearing of the appeals, counsel for the respondent advised the Court that there was a very small window based on the record in which the shares could have been sold on the Toronto Stock Exchange between November 12 and 16, 2015. Given that the high and low range of possible sale prices for shares is publicly available for that period of time, there is no mystery that the shares appreciated between valuation in June 2015 and sale in November 2015.

Standard of Review—Family Law Orders

[50] A family law order is entitled to "considerable deference" on appeal and is to be reviewed only for "material" error (*Hickey v Hickey*, [1999] 2 SCR 518 at para 10; and *Van de Perre v Edwards*, 2001 SCC 60 at para 15). Accordingly, the order appealed will be respected absent an error in principle, a significant misapprehension of the evidence, or where the award is clearly wrong (see *Hickey* at para 11; and *DBS v SRG; LJW v TAR; Henry v Henry; Hiemstra v Hiemstra*, 2006 SCC 37 at para 136). Harmless error will not result in the order being set aside. The appellate court also will not reconsider the evidence or interfere with the judge's findings of fact unless the reasons demonstrate palpable and overriding error or an omission that gives rise to a reasoned belief that the judge forgot, ignored or misconceived the evidence in a way that affected the result (see *Van de Perre* at para 15).

Family Property Issues

*Background—The FPA and the Law of Unjust Enrichment and Constructive Trusts*

Introduction

[51] Before turning to address the merits of the appeal and cross appeal on the family property issues, some background to the *FPA* and its interplay with the law relating to an action for unjust enrichment and the equitable remedy of a constructive trust is necessary, given the arguments made by the parties.

[52] In the absence of family property legislation, it is now well settled that issues as to financial and property rights arising from the breakdown of a marriage or other domestic relationship can be resolved by a common-law action in unjust enrichment (see *Pettkus v Becker*, [1980] 2 SCR 834 at 850-51; *Kerr* at para 30; and Donovan WM Waters, Mark Gillen & Lionel Smith, eds, *Waters' Law of Trusts in Canada*, 4th ed (Toronto: Thomson Reuters, 2012) at ch 10.II, G, 5, online: <https://nextcanada.westlaw.com/Browse/Home/TextsandAnnotations/EstatesTrustsSourceTextsandAnnotations/WatersLawofTrustsinCanada>). Older case law, such as *Murdoch v Murdoch*, [1975] 1 SCR 423 at 438-39, which suggested that a resulting trust could arise in a domestic situation where there was a common intention that the beneficial interest in property not belong solely to the owner, was laid to rest by *Kerr* (see paras 15, 24-29; and *Wills v Kennedy*, 2015 NBCA 31 at para 17). As Professor Waters explains, when dealing with disputes as to matrimonial and cohabitational property outside of a statutory scheme, "we are now in the age of unjust enrichment" (Waters at

chapter 10.II, G, 5).

[53] A successful unjust enrichment claim in the domestic context requires proof of: (1) an enrichment of the defendant; (2) a corresponding deprivation of the claimant; and (3) an absence of a juristic reason for the enrichment (see *Pettkus* at p 848; and *Kerr* at para 32). Liability is strict if the criteria are proven, absent the defendant establishing a bar or defence to eliminate or reduce his or her remedial obligation (see Mitchell McInnes, *The Canadian Law of Unjust Enrichment and Restitution* (Markham: LexisNexis, 2014) at 4, 24; and *Wilson v Fotsch*, 2010 BCCA 226 at paras 39-45). Remedies for unjust enrichment take the form of either a monetary award or a proprietary remedy (e.g. a trust, a lien or subrogation) (see *Kerr* at para 46; and AH Oosterhoff, Robert Chambers & Mitchell McInnes, *Oosterhoff on Trusts: Text, Commentary and Materials*, 8th ed (Toronto: Carswell, 2014) at 720-21).

[54] A cause of action for unjust enrichment is firmly rooted in the common law; it is not an equitable doctrine although equitable principles have affected its development (see *Peel (Regional Municipality) v Canada; Peel (Regional Municipality) v Ontario*, [1992] 3 SCR 762 at 786-88; Graham Virgo, *The Principles of the Law of Restitution*, 3rd ed (Oxford: Oxford University Press, 2015) at 45-51; Charles Mitchell, Paul Mitchell & Stephen Watterson, eds, *Goff & Jones The Law of Unjust Enrichment*, 8th ed (London, UK: Sweet & Maxwell, 2011) at paras 1-06 to 1-08; and McInnes at pp 31-45).

[55] The most obvious aspect of the relationship between the principles of equity and unjust enrichment lies in the question of the appropriateness of

a proprietary remedy, usually being a constructive trust (see *Peter v Beblow*, [1993] 1 SCR 980 at 995-97). According to the law of constructive trusts, an action for unjust enrichment is one situation where the equitable remedy of a constructive trust is available to prevent persons "from retaining property which in 'good conscience' they should not be permitted to retain" (*Soulos v Korkontzilas*, [1997] 2 SCR 217 at para 17; and Oosterhoff, Chambers & McInnes at p 711). Professor McInnes explains that sometimes an equitable remedy is necessary in a situation of unjust enrichment in the same way that an injunction may be granted in a tort claim, being that damages are an inadequate remedy in the particular circumstances (see McInnes at p 32).

[56] Manitoba has family property legislation in the form of the *FPA* that is designed, as my colleague, Beard JA, observed in *Stuart v Toth*, 2011 MBCA 42, "to treat all Manitobans fairly and equally in the family law context" (at para 19). (For a discussion of the Manitoba legislation and its history beginning with *The Marital Property Act*, RSM 1987, c M45, see the comments of Greenberg J in James G McLeod & Alfred A Mamo, eds, *Matrimonial Property Law in Canada* (Toronto: Thomson Reuters, 2016) vol 2 (loose-leaf updated 2010, release 7), at M-1 to M-3).

[57] The *FPA* is a comprehensive statute designed to settle family property disputes and to ultimately remedy financial and property inequities arising from marriages or common-law relationships. The central feature of the *FPA* is the right of each spouse or common-law partner to an accounting and equalization of assets (see section 13).

[58] Four other features of the legislation are noteworthy for the purposes of this appeal. First, sections 3-12 of the *FPA* set out a regime as to what

assets the *FPA* applies to, with the presumption being that it applies to "every asset" of a spouse or common-law partner except where exempted from the application of the *FPA* (section 3). Second, there is judicial discretion to order an unequal division of the value of assets (see section 14). Third, the *FPA* has clear rules as to how property rights are affected. Subject to specific listed exceptions, the *FPA* does not vest title to, or an interest by, one spouse or common-law partner in the property owned by the other (see section 6(1)). However, as part of an equalization award, a family court does have the power to affect property rights by ordering the transfer of property from one spouse to another to satisfy an equalization award (see section 17(b)). Finally, section 18 of the *FPA* provides a mechanism and a broad discretion for family judges to address questions or disputes as to the operation of the statute or breaches of it.

Equalization of Family Property under the *FPA*

[59] By virtue of the *FPA*, Manitoba is an equalization jurisdiction for the purpose of the sharing of family property on breakdown of a marriage or common-law relationship. Under the equalization model, it is the value of the property that is shared, as opposed to the property itself. The general intent of the *FPA* is that the value of family property be shared equally (see *Rotzetter v Rotzetter*, 1985 CarswellMan 192 at para 26 (CA)).

[60] After the process of accounting and valuation of each party's inventory of assets, there is a presumptive equal division of the total value of the assets, as opposed to a division of property or beneficial interests. Jointly owned assets are presumptively not part of the equalization calculation (see section 10 of the *FPA*; and *Lamont-Daneault v Daneault*, 2003 MBCA 111 at

paras 33-41, 78-83). At the end of the equalization process, a monetary debt is owed by the party with the higher value of assets to the other party for one half of the difference between the value of the two inventories of assets. The relationship is one of debtor/creditor. Satisfaction of the debt based on the accounting occurs by an order for payment of the amount (in lump sum or installments); a transfer, conveyance or delivery of assets; or a combination of the two (see section 17 of the *FPA*; and, generally, *Schreyer v Schreyer*, 2011 SCC 35 at paras 13-18).

[61] A party can seek relief from a perceived unfairness arising from the presumption of an equal division of the value of the assets by seeking an order under the *FPA* for an unequal division. Unlike Ontario's legislation (the *Family Law Act*, RSO 1990, c F3), the *FPA* creates two different standards for granting an unequal division which turn on the nature of the asset in dispute. If the asset is a "family asset" (section 1(1) of the *FPA*), the discretion of the court to order an unequal division is reserved for extraordinary circumstances (financial or otherwise), as the text of the statute refers to a "grossly unfair or unconscionable" threshold (section 14(1) of the *FPA*; see also *Rotzetter* at paras 22-25). Obviously, this language emphasizes the interests of certainty and predictability over those of flexibility. Similar statutory language in section 5(6) of the *Family Law Act* has been interpreted to mean that a family court will only order unequal division where an equal division of the value of the assets would produce a result that would "shock the conscience of the court" (*Serra v Serra*, 2009 ONCA 105 at para 47).

[62] In contrast, if the asset is a "commercial asset" (section 1(1) of the *FPA*), as is the case here, the discretion of the family court to order an unequal division is broader as the legislation uses the "clearly inequitable" threshold

(section 14(2) of the *FPA*). Judicial discretion is, however, not unfettered. The legislative presumption of equal sharing of a commercial asset should not be departed from lightly absent a compelling inequity that is manifest on the record (see *Gifford v Gifford*, 1981 CarswellMan 252 at para 4 (QB), varied on other grounds 1981 CarswellMan 195 (CA); and *Rotzetter* at para 26).

The Decisions of *Rawluk v Rawluk* and *Gallant v Gallant*

[63] Historically, the relationship between equity and other legal principles has been based on the premise that equitable doctrines cannot operate in plain inconsistency with other sources of law, such as statute or the common law. Equitable rules are of a "secondary or supplementary nature" (John McGhee, ed, with the contributions of Stuart Bridge et al, *Snell's Equity*, 33rd ed (London, UK: Sweet & Maxwell, 2015) at para 1-002). This theme has historically been captured by the expression, admittedly imprecise as it may be in practice, that "equity follows the law" (McGhee at para 5-005; and Eileen E Gillese, *The Law of Trusts*, 3rd ed (Toronto: Irwin Law, 2014) at 17).

[64] In *Rawluk v Rawluk*, [1990] 1 SCR 70, the Supreme Court of Canada discussed the interplay between equitable principles and family property legislation in Ontario. In *Rawluk*, farm properties owned by the husband rose in value between the date of separation and the date of trial. Like the *FPA*, the Ontario legislation set the date of separation as the default date of valuation for the purposes of equalization. As previously discussed, the discretion of an Ontario court under the legislation to order an unequal division of any type of asset is limited to situations of unconscionability (see pp 93-94).

[65] The Supreme Court of Canada was unanimous that the wording of Ontario's legislation did not oust the equitable remedy of a constructive trust in favour of the wife, so that she could participate in the gain in value of the properties to the date of trial. The Court, however, split deeply on what role the constructive trust plays in relation to an equalization claim under the Ontario legislation.

[66] In the majority decision, Cory J stated, "far from abolishing the constructive trust doctrine, the *Family Law Act, 1986* incorporates the constructive trust remedy as an integral part of the process of ownership determination and equalization established by that Act" (at pp 89-90). Before the equalization process can take place, ownership interests have to first be determined which can occur by way of imposing a constructive trust (see pp 90-94). If imposed, the beneficial interest in the property is considered to be owned by the claimant "from the time when the unjust enrichment first arose" (at p 91).

[67] In her dissenting judgment, McLachlin J (as she then was) questioned the necessity of resorting to equitable remedies when the legislation provided relief from an unjust enrichment of one spouse arising from the marriage. She raised three concerns. First, the Ontario legislation allowed for an unequal division of assets, thereby calling into question the necessity of equitable relief. Next, a constructive trust was not appropriate in the facts of *Rawluk* because there was no unjust enrichment post-separation. Finally, in her view, allowing parallel statutory and equitable remedies created uncertainty, promoted unnecessary litigation and might disrupt the interests of third parties (see pp 110-111).

[68] In *Gallant*, this Court discussed the implications of *Rawluk* as to the interplay between the equitable remedy of a constructive trust and Manitoba's family property legislation. The background in *Gallant* was that shares owned by the husband in a private corporation significantly declined in value between the date of separation and the date of trial. The husband sought the statutory remedy of an unequal division or, alternatively, that a constructive trust be imposed against his wife, making her the beneficial owner of half of his shares. This concept is referred to as a "reverse constructive trust" (see Waters at chapter 11.II, E).

[69] The majority of the Court of Appeal explained that the result in *Rawluk* was a function of the unique wording of the family property legislation in Ontario. The Court also agreed with the obiter in the dissenting decision in *Rawluk* that allowing the parallel remedy of a constructive trust opens up the odd debate of a reverse constructive trust, where a trust is imposed on a party who does not seek it because an asset owned by his or her spouse declines in value post-separation. The majority explained that *Rawluk* had a more limited impact on family law in Manitoba than Ontario because Manitoba's legislation provided broader remedies to address significant changes in asset values post-separation. Huband JA commented (at para 10):

> It is not for me to say that the majority decision was wrong and the minority reasons were correct in the *Rawluk* case with respect to the Ontario legislation. I do observe, however, that the existence of parallel remedies, each of a completely separate nature, creates uncertainty and promotes litigation. Moreover, the use of a remedial constructive trust seems out of joint when it is invoked to cure a decrease in the value of assets rather than an increase. That happened in a case which preceded *Rawluk*; namely, *McDonald v. McDonald* (1988), 11 R.F.L. (3d) 321 (Ont. H.C.), where the value of certain farm property and equipment owned by

> the husband diminished substantially between valuation date and trial. We see the strange spectrum of a constructive trust being declared not at the behest of the beneficiary wife, but on behalf of the trustee husband in order to deny the wife what (apart from a s. 5(6) argument) she would otherwise be entitled to under the *Family Law Act, 1986*.
>
> Given the broader discretionary power given to the court under s. 14(2) of *The Marital Property Act* in Manitoba, in my opinion we need not consider any alternative remedy, and the legal gymnastics of resort to an inappropriate parallel remedy can be avoided in this jurisdiction. Hence, the Court, at the outset of the hearing, indicated that the husband would be given a remedy under s. 14(2) or not at all.

[70] The difference between the majority and the dissenting decision of Monnin JA in *Gallant* turned not on the impact of *Rawluk* to Manitoba family law, but on whether, on the facts of that case, the husband's situation was one where an order of an unequal division of the shares of the private corporation for the purposes of equalization was appropriate. The majority concluded that it was because the husband was not a controlling shareholder, there was no real market for the shares and, in the face of declining market conditions for the company, there was nothing he reasonably could do to sell his shares until many years after the separation with his wife. In his dissent, Monnin JA disagreed. He warned against rewarding "delay and [possible] scheming" (at para 56) by the spouse owning an asset by granting him or her an unequal division of an asset just because the asset declined in value after separation.

[71] In summary, *Gallant* accepted the applicability of the majority decision in *Rawluk* that the availability of a claim for a remedial constructive trust had not been foreclosed by *The Marital Property Act* (now the *FPA*). The Court found that, due to the differences between the Ontario family

property legislation under consideration in *Rawluk* and the Manitoba legislation, a claim for a remedial constructive trust was less likely to succeed in Manitoba than in Ontario. In the result, it determined that, on the facts in *Gallant*, the only available remedy was under the legislation. *Gallant*, interpreted in a manner consistent with the reasons in *Rawluk* and the later jurisprudence, as set out in paras 72-81 herein, remains the law in Manitoba and should be followed in this case.

What Does *Rawluk* Mean to Family Law in Manitoba Currently?

[72] One of the consequences of *Rawluk* is that, as occurred here, a litigant can attempt to circumvent family property legislation through a claim for the equitable remedy of a constructive trust or reverse constructive trust. The wording of the *FPA* does not prohibit a party from seeking a remedial constructive trust in a family property dispute; the only common-law jurisdiction in Canada where a legislature has taken that drastic step is Prince Edward Island (see the *Family Law Act*, RSPEI 1988, c F-2.1, section 15(1)). Given human nature, there is an obvious temptation to make such claims when there is a significant change in value one way or the other in family property post-separation. Since *Rawluk* was decided, the Supreme Court of Canada's decisions in *Peter* and *Kerr* have clarified further the role of the constructive trust on the breakdown of a domestic relationship.

[73] In *Peter*, McLachlin J (as she then was), in her majority decision, confirmed that, when resort is had to general legal or equitable principles to resolve a gap in family law, the principles of those other sources of law are to be respected, albeit with a degree of flexibility to meet the specific needs of the family law context (see *Peter* at pp 987, 996-97). This view was later

confirmed in *Kerr* (at para 34). McLachlin J also warned in *Peter* that general legal and equitable principles are not a tool for a family court to simply order whatever result it believes is fair in a given case (at p 988):

> There is a tendency on the part of some to view the action for unjust enrichment as a device for doing whatever may seem fair between the parties. In the rush to substantive justice, the principles are sometimes forgotten. Policy issues often assume a large role, infusing such straightforward discussions as whether there was a 'benefit' to the defendant or a 'detriment' to the plaintiff. On the remedies side, the requirements of the special proprietary remedy of constructive trust are sometimes minimized. As Professor Palmer has said: 'The constructive trust idea stirs the judicial imagination in ways that *assumpsit*, *quantum meruit* and other terms associated with quasi-contract have never quite succeeded in duplicating' (George E. Palmer, *The Law of Restitution*, vol. 1, at p. 16). Occasionally the remedial notion of constructive trust is even conflated with unjust enrichment itself, as though where one is found the other must follow.

See also *Peel (Regional Municipality*) at pp 802-3; and *Moore v Sweet*, 2017 ONCA 182 at para 92.

[74] Another consequence of *Peter* and *Kerr* is that the first remedy to be considered on a successful action for unjust enrichment is <u>always</u> a monetary award in restitution as opposed to an equitable remedy, such as a constructive trust. To obtain a constructive trust, a claimant must demonstrate that monetary compensation is inadequate <u>and</u> that there is a direct connection between the contribution that founds the claim of unjust enrichment, which must be substantial in nature, and the property in which the constructive trust is sought (see *Peter* at pp 988, 997, 999-1000; and *Kerr* at paras 47, 51).

[75] In *Peter* (at pp 987-88), the majority endorsed the comments of La Forest J in *Lac Minerals Ltd v International Corona Resources Ltd*, [1989]

2 SCR 574, regarding the remedy of a constructive trust. The comments made in *Lac Minerals* were in the context of claims of breach of confidence and fiduciary duty, not an unjust enrichment action. La Forest J concluded that the remedy of a constructive trust is reserved for only rare situations when a monetary award would not be adequate. He explained the inadequacy of a monetary award this way (at p 678): "[A] constructive trust should only be awarded if there is reason to grant to the plaintiff the additional rights that flow from recognition of a right of property."

[76] In *Lac Minerals*, a constructive trust was awarded in lieu of monetary compensation partly to address priority rights for bankruptcy purposes and also because the uniqueness of the property in question (a mining property) made valuation of it virtually impossible. In *Peter* (at p 999) and *Kerr* (at para 52), the Supreme Court of Canada also noted that, in addition to certain property rights that may arise in a given case, monetary compensation may be insufficient in a domestic situation of unjust enrichment where collection of the monetary award is unlikely.

[77] In *Kerr*, the Supreme Court of Canada also simplified the quantification of monetary awards in a case of unjust enrichment where one party retains a disproportionate share of an asset resulting from a joint family venture. In such cases, "[t]he monetary award for unjust enrichment should be assessed by determining the proportionate contribution of the claimant to the accumulation of the wealth" (at para 81). A monetary award for unjust enrichment is therefore not limited to a fee-for-services approach.

[78] The effect of this reasoning brings into doubt the utility of a constructive trust when the *FPA* can provide monetary compensation that

addresses inequities arising from a marriage or common-law relationship. Since *Rawluk* and *Gallant*, Manitoba family courts have accepted that the *FPA* is not a complete code that ousts common-law or equitable remedies; however, the approach that has been followed is that, if the *FPA* provides an adequate remedy in the particular circumstances, there is no reason to look to a parallel proceeding, such as an action for unjust enrichment seeking a constructive trust (see *Babcock v Babcock*, 1999 CarswellMan 315 at paras 16-17 (QB); *Lasko v Lasko*, 2009 MBQB 332 at paras 20, 22; and *Dubois v Dubois*, 2015 MBQB 13 at para 49).

[79] The principle arising from *Rawluk* that asset ownership must be established first before the equalization process can begin is a fair and uncontroversial point. The *FPA* recognizes that parties can have legal or equitable interests in property (see section 1(1)). It is not uncommon in complex cases for such problems to arise in relation to whether a beneficial interest is subject to equalization under the *FPA* (see, for example, *Spiring v Spiring*, 2004 MBQB 55). The idea is no different than saying the *FPA* does not apply to an asset because it falls within a statutory exemption despite the presumption in section 3 (e.g. a gift or inheritance). The *FPA* provides a judicial mechanism (section 18) and an onus provision (section 22) to govern such matters. In such proceedings, the family court makes a declaration regarding whether the party has an interest in an asset or whether the asset is exempt from the *FPA*, and the equalization process adjusts to the consequences of that determination.

[80] However, the suggestion that *Rawluk* also effectively gives claimants a choice of remedies between constructive trust and equalization, to suit their advantage, is not an accurate reflection of the current law. A

constructive trust is a discretionary remedy; it is not a substantive right (see Waters at chapter 11.1, B; and *Sorochan v Sorochan*, [1986] 2 SCR 38 at 47). As discussed, case law since *Rawluk* has placed limitations on when a constructive trust may be imposed in a claim for unjust enrichment. It is an error of law to impose a constructive trust without a determination that monetary compensation is inadequate in the given circumstances (see *Martin v Sansome*, 2014 ONCA 14 at paras 57-61). The difficulty for a family law claimant relying on *Rawluk* for the imposition of a constructive trust is that they will have no chance of success unless they can demonstrate that there are additional property rights at issue in relation to the asset that cannot be monetized, and that they made a direct and substantial contribution towards the asset tied to the unjust enrichment claim (see *Lac Minerals*; *Peter*; and *Kerr*). Such situations will be unusual, to say the least.

[81] In summary, the case law since *Rawluk* alleviates the fear of some that constructive trusts can be readily resorted to for "case by case 'palm tree' justice" (*Peel (Regional Municipality)* at p 802) instead of obtaining relief under the *FPA*. Constructive trusts play an important role in recognizing property rights in certain domestic circumstances; however, they can only be imposed on a principled basis, not simply because a claimant wants one or the family court believes it will provide a fair result in the given circumstances.

*The Respondent's Appeal*

Order of Unequal Division—Section 14(2) of the *FPA*

[82] The respondent has appealed the judge's order under section 14(2) of the *FPA* granting the petitioner an unequal division of the shares. The principles to consider in the exercise of discretion under section 14(2) of the

*FPA* when there is a change in value of a commercial asset between the date of separation and the date of trial were considered in detail in *Gallant*. Three factors are important to keep in mind.

[83] First, to meet the threshold of "clearly inequitable" in section 14(2) of the *FPA*, the change in value must be substantial; the presumption of equal division should not be departed from because of a "trivial [matter]" (*Gallant* at para 14). The *FPA* is designed to provide certain and predictable outcomes and dissuade the expense of litigation.

[84] A second consideration is the liquidity of the asset and the ability that the owning spouse or common-law partner had to dispose of it post-separation (see *Gallant* at paras 14, 29). While a party's "conduct" is not a factor to weigh on an unequal division (section 14(3) of the *FPA*), prudent financial decision making is expected by the owner of an asset. Financial decisions of one spouse or common-law partner should not unfairly impact the other's equalization claim under the *FPA*. By use of a clear formula in the *FPA* based, in default, on the date of separation (section 16 of the *FPA*), parties have a clear and reasonably predictable method of ascertaining their family property obligations (see *Gallant* at paras 49-55). Also, section 6(1) of the *FPA* gives the owner of an asset, subject to certain exceptions, broad powers to deal with or otherwise dispose of it even if the equalization process is not completed.

[85] Accordingly, if there is a realistic market for an asset, a family court may have little sympathy for a claim that an asset has substantially declined in value post-separation because of a risk its owner voluntarily assumed (see *Gutheil v Gutheil*, 1983 CarswellMan 47 at para 9 (QB); and *Nassar v Nassar*,

1984 CarswellMan 168 at paras 18-19 (QB)). In such circumstances, the family court is faced with the scenario of sharing the "reversal of fortune" with the innocent non-owning spouse or common-law partner (*LeVan v LeVan*, 2008 ONCA 388 at para 79). Care, however, must be taken as market forces can work against even prudent owners when market decline is as a result of systemic forces or a downturn in the economy generally (see *Serra* at para 65). A related caution for the family court is that it should not be quick to ignore the legislated date of valuation simply because assets have appreciated in line with market conditions over the course of lengthy family litigation. Valuation hindsight is an unattractive submission, no matter who makes it. I will say more about this on the cross appeal.

[86] A final consideration is whether the overall result is "just, fair and equitable in the circumstances" (*Serra* at para 71). The family judge must base his or her decision on a cumulative evaluation of the relevant circumstances in the particular case, as section 14(2) of the *FPA* requires. The weight the family judge assigns to a particular circumstance in coming to his or her decision will not lightly be interfered with on appeal (see *Housen v Nikolaisen*, 2002 SCC 33 at para 23).

[87] After reviewing the judge's reasons as a whole in light of the record and the parties' submissions, I see no basis to disturb his decision to order an unequal division of the value of the shares under section 14(2) of the *FPA*. His finding that there was a compelling inequity in valuing the shares as of the date of separation was reasonably open to him on the record. The market value of the shares rose from $172,454.95 at the date of separation to $299,316.66 at the date of valuation, approximately seven and one-half years later. Such an increase in value can reasonably be said to be substantial in

light of the economic circumstances of the parties. The asset here was liquid and was at all times owned by the respondent. He did nothing post-separation to contribute to the increase in value of the shares, except to not dispose of them. Finally, I see no difficulty with the ultimate result here. The judge's reasons demonstrate that he took a careful and thoughtful look at the decision to purchase the shares in light of the circumstances of the marriage, financial and otherwise. What is important on the facts here is that the parties' dispute was limited to the change in value of only one publicly traded security, not the investment portfolios they each held. It cannot be said that the judge was being asked to ignore the statutory valuation date set by the *FPA* simply because the stock market generally rose between the time of separation and the completion of the trial.

[88] One point of clarification is necessary regarding the relevance of the judge's finding of unjust enrichment to his decision to impose an unequal division under section 14(2) of the *FPA*. A claimant for an unequal division does not have to frame his or her pleadings or submissions in light of the law of unjust enrichment as set out in *Pettkus* and *Kerr*. That is not the test (see *Halliwell v Halliwell*, 2017 ONCA 349 at para 66). Family judges applying the *FPA* should not engage in the joint-family-venture analysis discussed in *Kerr;* that analysis is reserved for family property claims falling outside the *FPA* that are being determined by the common law. The relevant standard is set out in either section 14(1) (grossly unfair or unconscionable) or section 14(2) (clearly inequitable) of the *FPA*, depending on the nature of the asset. In this case, the judge was faced with the unenviable task of sorting out principles of unjust enrichment, restitution, equity and family property legislation because of the manner in which the case was presented to him (a

point I will return to later in these reasons). When he was asked to decide whether to order an unequal division of the asset, he properly limited his analysis to section 14(2) of the *FPA*.

[89] The related submission of the respondent that an unequal division cannot be ordered in relation to only one asset, as opposed to all of the family property, is unpersuasive. The respondent's position is not supported by the wording of the *FPA*. The language of the *FPA* empowers the court to consider "any circumstances" it "deems relevant", including "the nature of the assets" (section 14(2)(g)) in making an order of unequal division. The situation here is that the parties simply could not reasonably settle the dispute as to the shares, despite efforts to do so, and their success in settling their remaining family property issues. The all-or-nothing argument of the respondent discourages settlement and would encourage needless litigation. Such a perspective is not consistent with the principle of proportionality or the intent of the *FPA*.

The Unjust Enrichment Claim—Monthly Income of the Shares

[90] As previously mentioned, the judge resolved the petitioner's claim of the alleged unjust enrichment resulting from the respondent keeping all of the monthly income of the shares after December 2010, by way of the law of unjust enrichment and a monetary award in restitution based on *Kerr*, having found that the *FPA* did not apply to this asset.

[91] As previously explained, the principle that emerges from *Gallant* and the later jurisprudence, and from the comprehensive nature of the *FPA*, is that family property disputes in Manitoba are to be determined by operation of the *FPA* except where the statute does not apply because the parties are not

married or in a common-law relationship, as defined by that legislation, or in the exceptional case in which the *FPA* does not provide an adequate remedy. To be clear, a claim in unjust enrichment is not to be used as an alternative to a claim under the *FPA*; rather, it is to be used when relief under the *FPA* is either not available or is not adequate. This will be a rare occurrence. I agree with the following statement in *McNamee v McNamee*, 2011 ONCA 533 (at para 66):

> [I]n the vast majority of cases, any unjust enrichment that arises as the result of a marriage will be fully addressed through the operation of the equalization provisions under the Family Law Act; the spouse who legally owns an asset will ordinarily share half its value with the other spouse as a result of the equalization provisions under the Act.

See also *Halliwell* at para 71.

[92] The judge explained that he took the unusual course of looking outside of the *FPA* in relation to the decision of the respondent to keep all of the monthly income of the shares after December 2010, because "the ***FPA***, and s. 14(2) in particular, does not provide a remedy to the [petitioner] with respect to this unjust enrichment" (at para 47). I agree.

[93] In this case, the relevant date, according to section 16 of the *FPA*, for the closing and valuation of the assets of the parties for the purposes of the equalization process was the date of separation in 2007. The *FPA* is of no assistance to the petitioner in relation to the monthly income from the shares received by the respondent after December 2010 because those assets were acquired by him while he was married to the petitioner but living separate and apart (see section 4(1)(a) of the *FPA*). Given that the *FPA* did not provide

any possibility of relief to the petitioner for this aspect of the family property dispute, I see no error in the judge turning to the law of unjust enrichment to decide this aspect of her claim.

[94] Resolution of unjust enrichment claims in the domestic context requires a family court to essentially undertake three broad areas of inquiry:

> (i) Entitlement—remedial obligation established by proof of the three elements of an unjust enrichment, subject to any bar or defence to the claim raised by the defendant;
>
> (ii) Choice of Remedy—monetary award or, if insufficient, appropriateness of imposing a constructive trust or other equitable remedy; and
>
> (iii) Quantification of the Monetary Award—method to be used is either fee-for-services approach or joint family venture model based on determining amount proportional to contribution.

See *Wilson* at para 11; *Kerr* at paras 31-125; and *Martin* at para 52.

[95] In his appeal, the respondent takes issue only with the question of entitlement as to whether there was an unjust enrichment. If it was properly established at the trial, he does not challenge the judge's choice of remedy or quantification of the monetary award.

[96] A review of the judge's reasons confirms that he turned his mind to each of the three elements of unjust enrichment. There are no bars or defences raised that would eliminate or reduce the respondent's remedial obligations. I see no errors in principle in the judge's approach or palpable and overriding

errors in his conclusions that there was an unjust enrichment by the respondent retaining all of the monthly income from the shares after December 2010, given his finding that the decision to acquire the shares in 2004 was a joint family venture.

[97] Not surprisingly, the judge focussed his attention on the "reasonable expectations of the parties" at the time the shares were purchased in 2004 (at para 28). It is noteworthy that the respondent is taking an opposite position as to his intention for purchasing the shares in family court than he took previously with the tax authorities. In family court, the respondent is saying that he is the sole owner and the petitioner is entitled to none of the monthly income of the shares. This contradicts his explanation of the arrangement for income tax purposes. He declared, before and after the separation, that one half of the income of the shares should be included in calculating the income of the petitioner for income tax purposes. The respondent's clear declaration of intention to the tax authorities fatally undermines his position in resisting the claim of unjust enrichment as to the monthly income (see *Dashevsky v Dashevsky*, 1986 CarswellMan 103 at paras 23-24 (QB); *Schroeder v Schroeder*, 2002 MBCA 1 at paras 19-21; and *Fehr v Fehr*, 2003 MBCA 68 at para 56). As Freedman JA explained in *Fehr*, "one cannot overlook what actually takes place, as it reflects what must be regarded as the true intention of the parties" (at para 56; see also *Kerr* at para 94).

[98] Finally, I see no merit in the remaining argument of the respondent that the petitioner has been unjustly enriched by receiving one half of the monthly income of the shares post-separation. The argument is largely rhetorical. The judge correctly applied the law to the circumstances regarding the purchase of the shares and made findings reasonably open to him as to the

respondent's legal obligations to the petitioner in relation to the monthly income upon their purchase in 2004, that finding being that the shares and the income constituted a joint family venture. The fact that the petitioner kept half of the monthly income until December 2010 and the respondent was ordered by the judge to pay half of the monthly income thereafter is of no moment. The respondent's legal obligation to the petitioner was the same over the entire period of time.

[99] As previously noted, one of the elements of a successful claim of unjust enrichment is an absence of juristic reason for the enrichment. In *Garland v Consumers' Gas Co*, 2004 SCC 25, the Supreme Court of Canada explained that "disposition[s] of law" and "other valid common law, equitable or statutory obligations" (at para 44) are established categories of juristic reasons that will bar a claim for unjust enrichment. See also *Kerr* at para 41.

[100] In *Hill Estate v Chevron Standard Ltd*, 1992 CarswellMan 153 (CA), Huband JA explained the importance of identifying an "explanation based upon law" that can justify the enrichment (at para 71):

> Decided cases are of little assistance in determining what is meant by "juristic reason." It simply comes down to this: if there is an explanation based upon law for the enrichment of one at the detriment of another, then the enrichment will not be considered unjust and no remedy, whether by constructive trust or otherwise, will be available. For example, there might be a contract between the parties under the terms of which an enrichment by one at the expense of the other is contemplated or justified.

See also *Gidney v Shank*, 1995 CarswellMan 446 at paras 17-18 (CA).

[101] A court's decision, order or judgment on a legal dispute that it is asked to decide and for which it has jurisdiction is a disposition of law. The

court's decision—in this case, the findings of a joint family venture regarding the shares in question, and that the respondent would be unjustly enriched by retaining the resulting dividends without accounting for them to the petitioner—is a "legal explanation" for why the petitioner is enriched at the expense of the respondent. Accordingly, until lawfully set aside, that decision is a juristic reason that defeats any claim of unjust enrichment by the respondent. To entertain an opposite view runs contrary to the doctrine of *res judicata* and would undermine the importance of having finality in litigation (see McInnes at p 962; Mitchell, Mitchell & Watterson at para 2-36; and Virgo at p 147). Therefore, unless the judge's decision as to the nature of the respondent's obligations to the petitioner over the monthly income of the shares is reversed on appeal, which is not the case, his ruling fully answers in the negative the suggestion that the petitioner was unjustly enriched by receiving any of the monthly income of the shares post-separation.

[102] The circular reasoning of the respondent can be addressed as follows. One could ask the following: how could the petitioner be unjustly enriched at the expense of the respondent by receiving assets or compensation paid to her by the respondent because he would have been unjustly enriched by keeping them? Given there is a juristic reason in this matter from an established category, it is unnecessary to consider whether there is another reason to deny recovery by looking at the reasonable expectations of the parties and public policy (see *Garland* at paras 45-46).

[103] Accordingly, I would dismiss the appeal of the respondent.

*The Petitioner's Cross Appeal and Motion for Further Evidence*

The Judge's Choice of Remedy for the Appreciation of the Asset

[104] There are two difficulties with the petitioner's argument that the judge erred in his choice of remedy and that she should have received the equitable remedy of a constructive trust in the shares to address the post-separation appreciation.

[105] First, the judge was correct that section 14(2) of the *FPA* provided an adequate remedy of unequal division to address the petitioner's complaint that valuing an asset at the date of separation, when it appreciates significantly by the time of trial, is unfair and amounts to an unjust enrichment of the title-holding spouse or common-law partner. Also, contrary to her submission, I have not been convinced that the judge's analysis was based on the idea that the *FPA* ousts all equitable remedies. That submission of the petitioner does not accurately reflect what the judge decided. His reasons were more nuanced. He stated (at para 46):

> In ***Gallant***, the value of shares that were subject to division had decreased in value between the date of separation and the date of trial. In a majority judgment written by Justice Huband, the Court disapproved of the use of the remedy of constructive trust to remedy unjust enrichment in this circumstance. The majority considered that, ". . . the existence of parallel remedies . . . creates uncertainty and promotes litigation". As a result, the court adopted the remedy offered by s. 14(2) of ***The Marital Property Act*** as being appropriate to remedy unjust enrichment. The approach and the reasoning adopted by the Court of Appeal in ***Gallant*** where shares had decreased in value between the date of separation and the date of trial applies equally to the circumstance where shares have increased in value between those dates. As a result, s. 14(2) of the ***FPA*** provides the appropriate remedy to correct unjust enrichment where a spouse or common

> law partner does not share post-separation appreciation in value of shares.

[106] The ultimate result here is that section 14(2) of the *FPA* provided the parties with an equal share in the value of the shares to the date of valuation in 2015, some seven and one-half years after separation, thereby addressing the question of asset appreciation post-separation. That order has been upheld on appeal despite the respondent's claim of error. Because the *FPA* provided an adequate remedy to resolve the family property dispute, there is no need to look to a substitute body of law to resolve the dispute when the legislature has provided a comprehensive regime that provides greater certainty than judge-made law (see *Gallant*).

[107] The other concern I have is that the nature of the asset here was not like the mine in *Lac Minerals*, where there was a limited market and an uncertain value. The shares were publicly traded and there was no evidence presented that there were any unique property rights attached to the shares that required special recognition by the imposition of a constructive trust instead of monetary compensation. Additionally, at trial, the petitioner did not suggest that a monetary judgment was unlikely to be enforceable.

[108] Ultimately, given the absence of <u>any</u> evidence that a monetary remedy was inadequate, there is simply no basis on the record here to impose a constructive trust (see *Peter* at pp 988, 997, 999; *Kerr* at para 47; and *Martin* at paras 57-61). A trial judge's choice in deciding whether to impose an equitable remedy is a discretionary decision that must be afforded great deference on appeal (see *Soulos* at para 54). I have not been persuaded that the judge made an error in principle, nor can I say that his decision as to his

choice of remedy is clearly wrong.

Claim of Unjust Enrichment Post-Valuation

[109] The question of valuing the appreciation of the shares for unequal division was canvassed at an appearance on June 12, 2015. As mentioned before, the parties had agreed that tax consequences needed to be taken into account in arriving at a value for the shares, but they could not agree on what those tax consequences were. The unequal division hearing was set for November 12, 2015. The judge noted that, because the matter had been in abeyance for a year, the figures related to the shares were out of date. He made the following comments as to the value of the shares for the purpose of an expert witness calculating the tax consequences:

> Now the issue just raised is the, the need to update the, the value of shares. But taking into account that we also need to be directing our minds to obtaining evidence with respect to the tax ramifications, and it, it only seems reasonable that at some point we have to stop the clock. So that when we're getting expert opinion, we're using the same value. And that seems reasonable. Now taking into account the hearing is in November, taking into account we need to give an opportunity for expert evidence to, to be prepared, it seems to me that in addition to the May 28th, 2015 value, taking into account this is a proceeding taking place in June, that the parties also come to agreement with respect to the value of the shares as of June the 30th, 2015.

[110] A careful review of the June 12, 2015 transcript confirms that neither party objected to the use of June 30, 2015, as the valuation date for the expert.

[111] During the course of her submissions at the unequal division hearing on November 12, 2015, the petitioner told the judge that the price of the shares

had risen to $24.52 each ($362,969.56). She asked him to use that figure to make his decision. The respondent objected, pointing out that the Court had decided that the unequal division hearing would proceed on the basis of the June 30, 2015 valuation date. The petitioner replied by saying the June 30, 2015 date was "arbitrary" and "prejudices [her] position" because "the shares have gone up". The judge commented that, "[w]ithout setting a date of, as it turned out, June 30th, there'd be no way that the expert could have completed a report."

[112] The submission of the petitioner that the June 30, 2015 valuation date of the shares was an error is based entirely on valuation hindsight. Wisely, the judge resisted the temptation to speculate on the market in his analysis. The history of these proceedings shows the inherent danger of valuation hindsight. The price of the shares moved tens of thousands of dollars in different directions throughout the litigation. Section 15(2) of the *FPA* required the family judge to use the fair market value of the shares for the purposes of equalization. He properly recognized that, given the dispute as to tax implications on the value of the shares and the outdated value of the shares, a figure had to be used to allow for the expert's opinion. While there was no special significance to June 30, 2015, it appears from the record that it was a normal market day for the shares. There were no systemic or share-specific events that momentarily distorted the value of the shares. I don't see an error in the approach taken by the judge. Despite its simplicity, what is important is that it was fair to both sides as nobody had an advantage.

[113] As Julien D Payne & Marilyn A Payne point out in *Canadian Family Law*, 6th ed (Toronto: Irwin Law, 2015), "[i]n determining fair market value as of the 'valuation date', . . . the court cannot invoke the benefit of hindsight"

(at p 678). The judge properly rejected the petitioner's submission to use the value of the shares on November 12, 2015. Reliance on hindsight evidence fosters great uncertainty in the litigation process and its use is circumscribed to challenging the weight to be given to a valuation opinion as opposed to being the basis for a separate opinion as to value all together (see *Ross v Ross*, 2006 CarswellOnt 7786 at para 39 (CA); and *Brown v Silvera*, 2011 ABCA 109 at para 84). I see no reversible error in the judge's decision regarding the selection of a valuation date for the purposes of deciding the question of unequal division under section 14(2) of the *FPA*.

[114] The related argument of the petitioner is that the respondent has been unjustly enriched by the judge's use of June 30, 2015, because the shares appreciated thereafter. That argument fails as there is a juristic reason to legally justify any benefit enjoyed by the respondent at the expense of the petitioner in relation to the June 30, 2015 valuation date for the shares.

[115] As previously mentioned, according to *Garland*, a disposition of law, which includes a judge's decision as to the parties' statutory obligations and entitlements, is an established category of juristic reason that defeats a claim for unjust enrichment. For similar reasons previously given, the judge's order settling the petitioner's entitlement to the value in the shares based on the *FPA* is a disposition of law that precludes her from making further claims against the respondent as to the appreciation in the value of the shares after separation. Unless the judge's order is set aside on appeal, the matter is at an end. The petitioner cannot invoke valuation hindsight. There is a need for finality in litigation. The operation of the *FPA* settles the entitlements and obligations of the parties as to the shares conclusively and for all time as of the valuation date of June 30, 2015. I would not accede to this ground of

appeal.

The Unaddressed Question of a Resulting Trust

[116] One final comment is necessary on the petitioner's cross appeal on the family property issues for completeness. As previously stated, the amended petition relied on "*The Law of Trusts*" as the basis for the prayer for relief. The law of trusts is a vast and sometimes esoteric area of law with important distinctions and complex subtleties. A pleading of such vagueness is of little value as it fails to meet the essential objectives of providing fair notice of the case to meet to the other party and defining the boundaries of the case (see *Lax Kw'alaams Indian Band v Canada (Attorney General)*, 2011 SCC 56 at para 43). While a family court may possess jurisdiction to grant certain relief, without proper pleadings, it should not exercise it (see *QB Rule* 70.31(3); *Aquila v Aquila*, 2016 MBCA 33 at para 27; and *Moore* at para 39).

[117] However, at trial and on appeal, the petitioner informally refined the claim through her submissions to be one of seeking a constructive trust based on the cause of action of unjust enrichment. For example, at p 9 of the petitioner's written argument at the trial, she referred to her case as one where "the necessary conditions of finding an unjust enrichment to be addressed by a constructive trust." At para 29 of her factum filed on her cross appeal, she states that, "the appropriate remedy at the time of the initial trial was the proprietary remedy of constructive trust." Throughout her materials, there is great reliance placed on *Kerr* which is the leading case on an unjust enrichment cause of action in domestic situations. The respondent also defended the claim as being one of unjust enrichment seeking a constructive

trust. I take pains to point out the record for the following reason.

[118] The petitioner never pursued a claim in this case of a resulting trust in the shares, which are personal property, nor was the respondent, the judge or this Court ever asked to address that issue and how that distinct equitable principle operates with the *FPA*.

[119] A resulting trust arises by operation of law. Unlike a constructive trust, a resulting trust is typically viewed not as a flexible discretionary remedy but, rather, as a "static legal concept" limited to a very narrow set of situations (Gillese at p 107; see also *Mehta Estate v Mehta Estate*, 1993 CarswellMan 118 at para 13 (CA); Oosterhoff, Chambers & McInnes at pp 592-94; and McLeod & Mamo, vol 1 at pp I-1 to I-2). Based on English influences, the classical formulation of a resulting trust is that it is a fixed property right as opposed to a remedy to address obligation restitution (see generally Donovan Waters, "Resulting Trusts, and the Canadian Remedial Constructive Trust: Reconciling the Two" (2014) 20:3 Trusts & Trustees 234 (QL); and *India Association of Manitoba Inc et al v India School of Dance, Music & Theatre Inc*, 2011 MBQB 292 at para 68).

[120] Given that there is conceptual overlap between these two types of trusts, it is possible that, on certain sets of facts, both may arise: one by presumption because equity presumes bargains—not gifts, and the other on the basis of proof of a claim of the unjust enrichment of the defendant (see *Reddin v Mills*, 1995 CarswellBC 3056 at para 129 (SC); *Nishi v Rascal Trucking Ltd*, 2013 SCC 33 at para 26; and Waters at chapter 10.I. How competing trust claims are rationalized in terms of differences between rights and discretionary remedies is for another day, on a case that is properly pled

and litigated on that basis.

[121] I will say nothing further on the point as the litigation is too advanced to consider the new issue of a resulting trust other than to note that, in *Kerr*, Cromwell J confirmed that, while the "common intention" resulting trust is dead, the classical understanding of a resulting trust can still arise in very narrow circumstances in a domestic context where there has been a gratuitous transfer involving property (paras 16-19, 23-24). Where such a claim is advanced, the "trial judge will commence his or her inquiry with the applicable presumption and will weigh all of the evidence in an attempt to ascertain, on a balance of probabilities, the transferor's actual intention" (*Pecore v Pecore*, 2007 SCC 17 at para 44; see also *Riley v Riley*, 1987 CarswellMan 120 (QB); *Mehta Estate* at paras 13, 26, 30-33; *Hamilton v Hamilton*, 1996 CarswellOnt 2421 at para 39 (CA); and *Nishi* at paras 21-22, 29-30).

[122] A lesson of this case is that the complexity of seeking remedies outside of the *FPA* in family property proceedings underscores the importance of the careful drafting of pleadings at the outset to ensure that the dispute is properly determined according to the relevant law and in an orderly manner that is fair to all parties. While there is greater informality as to the nature of pleadings in family proceedings, that does not mean that a certain and meaningful legal basis for relief sought should not be set out in the petition or answer (see *Welcher v Welcher*, 2001 MBCA 36 at para 23; and *Steele v Koppanyi*, 2002 MBCA 60 at para 65 per Twaddle JA).

[123] One of the objectives of the principle of proportionality is to husband finite judicial resources and to protect litigants from incurring

unnecessary costs. I agree with the comments of Lewison LJ in *The Prudential Assurance Company Ltd v HM Revenue and Customs*, [2016] EWCA Civ 376, that parties must guard against the practice of taking a "cavalier approach to pleadings" (at para 22).

Motion to Receive Further Evidence

[124] The *Palmer* test (*Palmer v The Queen*, [1980] 1 SCR 759 at 775), is applied to determine whether further evidence will be received on a family property appeal pursuant to section 26(3) of *The Court of Appeal Act*, CCSM c C240 (see *Spakowski v Smith*, 1999 CarswellMan 228 at para 3 (CA); and *Salehi v Tawoosi*, 2016 ONCA 986 at para 24).

[125] The petitioner argues that the financial and tax particulars that she seeks to be compelled from the respondent and admitted on the appeal will establish that the sale price for the shares in November 2015 was "substantially higher" than the value of the shares that the judge used based on the fair market value on June 30, 2015. At the hearing of the appeals and the motion, counsel for the respondent provided the requested information to the Court in a sealed envelope which has not been opened. The motion for fresh evidence was heard and reserved, along with the appeals.

[126] In my view, there is no need to open the sealed envelope in order to decide the motion for further evidence. Accordingly, the further written submissions from the parties that was discussed at the appeal if the envelope were opened will not be necessary. The motion cannot meet the second *Palmer* criterion, that "[t]he evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial" (at p 775).

[127] The value of the shares at the date of sale in November 2015 is irrelevant. The petitioner is attempting to admit hindsight evidence which, as previously explained, cannot be relied on for the purpose she wishes to use it for. Moreover, as previously stated, the judge's order regarding the petitioner's entitlement as it relates to the value of the shares ($129,762.66) is the respondent's obligation to her; no more and no less. The judge's order under the *FPA* is conclusive to the property dispute over the shares absent reason to set it aside, of which there is none.

[128] Accordingly, I would dismiss the cross appeal of the petitioner as to the family property issues and I would also dismiss the motion for further evidence.

Retroactive Child Support Issues

*Relevant Legislative Provisions*

*Divorce Act*

**Definitions**
**2(1)** In this Act,

. . .
***child of the marriage*** means a child of two spouses or former spouses who, at the material time,

**(a)** is under the age of majority and who has not withdrawn from their charge, or

**(b**) is the age of majority or over and under their charge but unable by reason of illness, disability or other cause, to withdraw from their charge or to obtain the necessaries of life;

. . .

**Child support order**
**15.1(1)** A court of competent jurisdiction may, on application by either or both spouses, make an order requiring a spouse to pay for the support of any or all children of the marriage.

. . .
**Guidelines apply**
**15(3)** A court making an order under subsection (1) or an interim order under subsection (2) shall do so in accordance with the applicable guidelines.

. . .
**Court may take agreement, etc., into account**
**15(5)** Notwithstanding subsection (3), a court may award an amount that is different from the amount that would be determined in accordance with the applicable guidelines if the court is satisfied

**(a)** that special provisions in an order, a judgment or a written agreement respecting the financial obligations of the spouses, or the division or transfer of their property, directly or indirectly benefit a child, or that special provisions have otherwise been made for the benefit of a child; and

**(b)** that the application of the applicable guidelines would result in an amount of child support that is inequitable given those special provisions.

*Child Support Guidelines Regulation*

**Presumptive rule**
**3(1)** Unless otherwise provided under these Guidelines, the amount of a child support order for children under the age of majority is

**(a)** the amount set out in the applicable table, according to the number of children under the age of majority to whom the order relates and the income of the spouse against whom the order is sought; and

**(b)** the amount, if any, determined under section 7.

. . .
**Special or extraordinary expenses**
**7(1)** In a child support order the court may, on either spouse's request, provide for an amount to cover all or any portion of the following expenses, which expenses may be estimated, taking into account the necessity of the expense in relation to the child's best interests and the reasonableness of the expense in relation to the means of the spouses and those of the child and to the family's spending pattern prior to the separation:

**(a)** child care expenses incurred as a result of the custodial parent's employment, illness, disability or education or training for employment;

**(b)** that portion of the medical and dental insurance premiums attributable to the child;

**(c)** health-related expenses that exceed insurance reimbursement by at least $100 annually, including orthodontic treatment, professional counselling provided by a psychologist, social worker, psychiatrist or any other person, physiotherapy, occupational therapy, speech therapy and prescription drugs, hearing aids, glasses and contact lenses;

**(d)** extraordinary expenses for primary or secondary school education or for any other educational programs that meet the child's particular needs;

**(e)** expenses for post-secondary education; and

**(f)** extraordinary expenses for extracurricular activities.

*Analysis and Decision*

[129] At the core of a determination of a claim for retroactive child support is the need to fairly balance the interests of certainty and flexibility (see *DBS* at paras 2, 5). There are three separate inquiries on a determination for a claim for retroactive child support: jurisdiction, entitlement and quantum.

Jurisdiction

[130] It is not contentious that there was jurisdiction here for the judge to make an order of retroactive child support. The "material time" as to whether or not a child is a "child of the marriage" under the *Divorce Act* for the purposes of a claim for retroactive child support is the date on which an application for it is filed with the court (*DBS* at para 89). The other aspect of jurisdiction that is important to bear in mind is that an order of retroactive child support may be made for a period of time after separation, but prior to the commencement of divorce proceedings (see *DBS* at paras 81, 134). In this case, the respondent had both formal and effective notice of the retroactive child support claim at roughly the same time in the spring of 2010. At that time, the parties' daughter was age 17.

Entitlement

[131] A claim for retroactive child support is not reserved for exceptional circumstances (see *DBS* at para 5). In deciding the issue, the proper approach is to take "a holistic view of the matter and decide each case on the basis of its particular factual matrix" (*DBS* at para 99). Relevant factors to consider on entitlement include: whether there was a reasonable excuse in the delay of seeking child support; the conduct, blameworthy or otherwise, of the payor; the past and present circumstances of the child, including the child's needs at the time the support should have been paid; and whether the retroactive award might entail hardship (see *DBS* at paras 100-116). If an entitlement to retroactive child support is established, as a general rule, the entitlement should be limited to no more than three years before formal notice of the claim was given to the payor parent (see *DBS* at para 123).

[132] The judge addressed the petitioner's entitlement to retroactive child support by determining that the parties had "explicitly or implicitly agreed" (at para 49) to depart from the *Guidelines* for 35 of the 37 months in question because the petitioner kept a portion of the respondent's monthly income from the shares for the maintenance of the parties' daughter. Unfortunately, despite the great care the judge otherwise displayed in conducting these contentious and complicated proceedings, I am unable to find in the record evidence which could reasonably support his conclusion of a mutual agreement of the parties to depart from the *Guidelines* as to child support for the 35 months in question.

[133] To begin, the record is clear that the parties never had an express mutual agreement, written or otherwise, that the respondent would pay less child support than the *Guidelines*. There was also no interim court order to that effect. Finally, there is insufficient evidence to support the inference of an implicit mutual agreement that the respondent would pay less child support than the *Guidelines*.

[134] In his direct testimony at the trial, the respondent conceded there was no agreement as to child support. The pattern the parties followed as to child care expenses after the separation was simply a convenient way to temporarily address the issue until the matter could be properly resolved in their divorce proceedings. His evidence to that effect was as follows:

> Q So what do you mean by "it's the easiest way to do child support"? What do you mean by that expression?
>
> A Well, I knew that I had to pay something for [the parties' daughter] and there was no arrangement really set up and we weren't really talking that much, other than sometimes she would [be] yelling at me, I guess. But so she, she was happy with receiving those cheques and then deducting whatever she

> wanted from, for, for [the parties' daughter's] costs. And so I just let her go at that. And I knew that she keep, she keeps really good records, so at some point in time, we're going to get separated and divorced in the future and I had all confidence that Frances was not going to delete any of those records and so if we ever had to go back and see what was going on, we could easily do that. So there was never going to be information lost and she's meticulous at, at keeping records, and so I, I felt comfortable, even if I've given too much, then it's okay, I would get it back at the other end anyways.
>
> Q Well, the, the evidence of Ms. Horch is that she would look at what she thought was your half; correct?
>
> A That's how she termed it, yeah.
>
> Q And then she would deduct the expenses for [the parties' daughter] from that; correct?
>
> A Yes.
>
> Q Okay. And then she would send you a cheque for the difference between one-half of the total amount of the investment and Jennifer's expenses; correct?
>
> A Yes.
>
> Q Okay. Why it is you didn't make, take any issue with the other portion of the cheque?
>
> A Well, because I knew that if it was, wasn't supposed to be done that way, you can easily fix it, because Frances keeps the records. We know what the records were we'd know how much was in there. And it was just a, it was just a hassle free way of doing things.
>
> [emphasis added]

[135] Leaving aside the question of whether a particular agreement to deviate from the *Guidelines* is enforceable in a given case (see *Willick v Willick*, [1994] 3 SCR 670 at 727-29), the difficulty here is that I fail to see what motivation the petitioner would have to accept a lesser amount of child

support. The respondent had a legal obligation to contribute to the care and maintenance of his daughter, which he understood, and he had the means to pay child support. Also, this is not a case where the parties made a reasonable bargain as to child support as part of settlement of other issues, such as spousal support (see *DBS* at para 78). The petitioner never requested spousal support. To accept that the petitioner would voluntarily agree to less child support than the law presumes she would receive goes against the entire weight of the evidence. For example, her emails to the respondent prior to filing her petition were clear that he was not paying enough to her to address the day-to-day living expenses of their daughter.

[136] While it is appropriate, as a general rule, to give "considerable weight" to a mutual agreement of spouses as to child support (*DBS* at para 78), that does not mean that every temporary informal resolution of child support after separation must be afforded deference. A mutual agreement on child support requires a common intention of the parties as to the substance of the agreement and mutual manifestation of willingness to be bound by the agreement. Accordingly, it will be an error in principle to base a decision as to entitlement or quantum of retroactive child support on a mutual agreement of spouses where there is a lack of evidence of an agreement ever existing or insufficient evidence that both parties had a reasonable expectation that they had an agreement (see *Richards v Richards*, 2013 NSSC 127 at paras 22-38).

[137] The judge's decision to take into consideration a mutual agreement as to child support, which did not exist, was a material error because it affected his decision as to retroactive child support for 35 of the 37 months in question. Accordingly, it is necessary to consider the issue of retroactive child support afresh in light of the record.

[138] Consideration of the relevant factors discussed in *DBS* (excuse for the delay in seeking child support, conduct, circumstances of the child and hardship) all favour an entitlement to retroactive child support for the entire period claimed.

[139] The petitioner's delay in seeking child support is fully addressed by the blameworthy conduct of the respondent. After the separation, the record demonstrates that the petitioner took a proactive and civil approach to addressing the question of child support. When she unequivocally put the respondent on notice that he was not meeting his obligations as to their daughter's day-to-day expenses, his response was unseemly, to put it mildly. A sanitized version of his intemperate comments to the petitioner in an email dated July 7, 2010, was nothing less than an attempt to intimidate her to drop her claim for greater child support than what he was paying or face the prospect of him paying nothing voluntarily. Such behaviour is not only worthy of censure, but also fully excuses any concerns about the delay in the claim for retroactive child support (see *DBS* at para 124).

[140] The past and current circumstances of the daughter also favour the award. The petitioner is not seeking child support past the child's 18th birthday; the claim is simply to offset the regular day-to-day expenses of the daughter living with her, as well as certain section 7 expenses that have already been incurred, which I will deal with in a moment. Finally, there is no issue of hardship here. The respondent lives in comfortable retirement after a long professional career. He has considerable assets.

[141] In terms of the date for retroactive child support, the period sought (January 2008 to January 2011) is within the general rule of three years from

the date of formal notice. I see no concerns as to the period of requested retroactive child support.

Quantum

[142] On the question of quantum for retroactive child support, given the language of the *Divorce Act*, the starting point is the *Guidelines* (see *DBS* at para 127) so long as that result is fair in the circumstances. I see no unfairness to applying the *Guidelines* in this case. The petitioner did not unreasonably delay in seeking retroactive child support and an award in accordance with the *Guidelines* would not create hardship for the respondent. I see no reason to not award retroactive child support in the table amount applicable at the time for a period of 37 months ($721 x 37 = $26,677).

[143] The respondent's submission about the special or extraordinary expenses claimed under section 7 of the *Guidelines* being inflated has no merit. According to the unchallenged and well-documented evidence of the petitioner, the respondent's share of the expenses for those three categories of special or extraordinary expenses (private school fees, counselling fees and medication expenses) would be $3,764.29 for 2008; $2,328.26 for 2009; and $1,829.21 for 2010 for a total of $7,921.76. I also have no difficulty with entitlement to the special or extraordinary expenses claimed. The daughter had been attending private school during the marriage. Her expenses relating to physical and mental health issues are also reasonable in my review of the evidence.

[144] The total of the table amount child support and the special and extraordinary expenses is $34,598.76. The final sum owed, after deducting the amount of child support the respondent has already paid ($20,879.48), is

$13,719.28.

[145] Accordingly, I would set aside the order of the judge as to retroactive child support and order that the respondent pay the petitioner, forthwith and in full, retroactive child support in the amount of $13,719.28.

Costs and the Principle of Proportionality

[146] An order as to costs will not be lightly interfered with on appeal. It can only be set aside if it was arrived at by an error in principle or it is plainly wrong (see *Gabb v Gabb*, 2001 MBCA 19 at para 12; *Hamilton v Open Window Bakery Ltd*, 2004 SCC 9 at para 27; and *Johnson v Mayer*, 2016 MBCA 41 at paras 21-22).

[147] The principle of proportionality is a feature in all judicial decision making in family law (see *QB Rule* 70.02.1(2); *Aquila* at para 29; and *Manitoba (Director of Child and Family Services) v HH and CG*, 2017 MBCA 33 at para 70). The submission of the petitioner that she should have been awarded costs at every stage of proceedings because she was successful, and the delay and length of proceedings was due to the judge not properly applying the principle of proportionality, is unpersuasive. On my review of the record, the reason for the unnecessary length and complexity of the proceedings in family court was the petitioner's litigation strategy.

[148] The root of the problems in this case was an inadequate pleading (see *Aquila* at para 27) and a refusal to alter the litigation strategy. The *QB Rules* do not allow for a remedy to be granted unless it is properly requested in the pleading. While the inadequate pleading could have been remedied at the trial, the decision to fix the problem was not pursued until after the judge

gave his decision, thereby precipitating a contested motion to amend the petition. It is important to note that the position the petitioner advanced at trial ran counter to well-settled law. This Court's interpretation of what is now the *FPA* in *Gallant*, that unfair changes in the value of a commercial asset post-separation be remedied by statutory remedies as opposed to a constructive trust, has been the law of this province for almost two decades. So, too, is the need to show the inadequacy of a monetary award as part of an unjust enrichment claim to obtain a constructive trust (see *Peter*). Despite the clarity of the jurisprudence and the wording of the *FPA*, the petitioner's then counsel made a tactical decision, based on the instructions of the petitioner, to pursue a different path and rely solely on equitable principles to address the alleged unjust enrichment claims relating to the appreciation of the shares after separation.

[149] In my view, the decision of the petitioner's then counsel complicated the litigation immensely up to and including this appeal. I do not make that comment to criticize the petitioner's then counsel, but to decide whether the judge erred, as the petitioner alleges in her cross appeal. Her previous counsel in family court was a very experienced family law practitioner who was well acquainted with the file and who acted with the knowledge and consent of the petitioner according to her affidavit filed on her motion to amend her petition after the trial. However, given the circumstances here, I see no reason to conclude that the delay and substantial costs incurred in these family proceedings were because the judge failed to apply the principle of proportionality. That argument is entirely meritless and borders on revisionist history.

[150] I also see no other basis to disturb the judge's exercise of discretion

regarding the three costs orders arising from the litigation relating to the shares. The judge was well aware that the petitioner was largely successful in the ultimate result and, while the general rule is that costs follow the result, it is entirely appropriate for judges to exercise their discretion to not award costs to a successful party when the manner in which that party conducted the litigation unnecessarily added to the complexity and length of proceedings (see *QB Rules* 57.01(1)(d)-(e); and *Gabb* at para 12). Discouraging unnecessary litigation is an appropriate purpose for a costs order (see *British Columbia (Minister of Forests) v Okanagan Indian Band*, 2003 SCC 71 at para 23). As Huband JA explained in *Western Finance Co v Tasker Enterprises Ltd*, 1979 CarswellMan 125 (CA), "[p]rotracted litigation is to be discouraged, not encouraged, by the sagacious exercise of discretion on costs" (at para 67).

[151] The situation on costs as to retroactive child support is another issue. The petitioner's success on her appeal as to retroactive child support is relevant as it relates to the review of the judge's order that no costs should be awarded regarding the family law trial in 2011. Hamilton JA explained the question of deference as to an order of costs when a party is successful on appeal in the following manner in *Rémillard v Rémillard*, 2015 MBCA 42 (at para 46):

> However, when a party is successful on appeal, the appeal court considers the question of costs at trial by undertaking a fresh assessment, subject to showing deference to findings of fact with respect to the parties' conduct. These findings are entitled to deference unless an error is demonstrated or they are no longer applicable because of this court's decision.

[152] In light of the judge's error in not ordering retroactive child support,

a fresh assessment of his order as to costs for the trial is required.

[153] What is important to note about this case is that the *FPA* and unjust enrichment issues relating to the shares are of no relevance to the questions of entitlement and quantum of retroactive child support. If the petitioner's claim as to both issues had been properly pleaded from the outset, I have no doubt that she would have been awarded costs of the trial. While it was well within the discretion of the judge to not award costs because of the unnecessary litigation over the appreciation of the shares, the ultimate costs order for the trial must be reasonable, fair and proportional in light of the circumstances of the case. Given that the petitioner has been entirely successful on appeal in relation to the issue of retroactive child support and her prosecution of that aspect of her claim did not involve unnecessary litigation, or some other "special reason" (*Gabb* at para 12) which could impact an award of costs, it would be unjust in the circumstances to not have some order in her favour as to costs of the trial.

[154] Accordingly, I would set aside the judge's order of costs of the trial (paragraph 8.1 of the final order) and substitute an order that the petitioner have costs of the trial proceeding in the tariff amount applicable to the amount of retroactive child support at issue, Class II. For the purposes of clarity, the judge's other orders as to costs of the motion to amend the pleadings and the unequal division hearing are unaffected by my decision.

Disposition

[155] The appeal of the respondent is dismissed.

[156] The cross appeal of the petitioner on the question of retroactive child

support and costs is allowed in accordance with these reasons, and the remainder of the cross appeal is dismissed. The petitioner's motion to introduce further evidence is dismissed.

[157] On balance, the petitioner is the more successful party in this Court. She will have costs in the amount of $2,000, plus reasonable disbursements.

Mainella JA

I agree: Beard JA

I agree: Cameron JA

## APPENDIX—*FPA* Provisions

**Definitions**

1(1) In this Act,

**"asset"** means any real or personal property or legal or equitable interest therein including, without restricting the generality of the foregoing, a chose in action, money, jewelry and a family home, but not including any article of personal apparel;

**"commercial asset"** means an asset that is not a family asset;

. . .

**"family asset"** means an asset owned by two spouses or common-law partners or either of them and used for shelter or transportation, or for household, educational, recreational, social or aesthetic purposes, including, without restricting the generality of the foregoing,

(a) a family home,

(b) money in a savings account, chequing account or current account with a bank, trust company, credit union or other financial institution where the account is ordinarily used for shelter or transportation or for household, educational, recreational, social or aesthetic purposes, and saving bonds and deposit receipts intended to be used for those purposes,

(c) where an asset owned by a corporation, partnership or trustee would, if it were owned by a spouse or common-law partner, be a family asset, shares in the corporation or an interest in the partnership or trust owned by the spouse or common-law partner having a market value equal to the value of the benefit the spouse or common-law partner has in respect of the asset,

(d) an asset over which a spouse or common-law partner has, either alone or in conjunction with another person, a power of appointment exercisable in favour of the spouse or common-law partner, if the asset would be a family asset if it were owned by the spouse or common-law partner, and

(e) an asset disposed of by a spouse or common-law partner but over which the spouse or common-law partner has, either alone or in conjunction

with another person, a power to revoke the disposition or a power to use or dispose of the asset, if the asset would be a family asset if it were owned by the spouse or common-law partner;

. . .

**Assets generally**

3 Where this Act applies to a spouse or common-law partner under section 2 or 2.1 it also applies to every asset of the spouse or common-law partner except as herein otherwise provided, and where this Act does not apply to a spouse or common-law partner by reason of any provision of section 2 or 2.1 it also does not apply to any asset of the spouse or common-law partner notwithstanding any other provision of the Act.

**Assets acquired during marriage and cohabitation**

4(1) This Act does not apply to any asset acquired by a spouse

(a) while married to but living separate and apart from the other spouse;

. . .

**Disposal of assets**

6(1) No provision of this Act, nor the giving of an accounting under this Act, vests any title to or interest in any asset of one spouse or common-law partner in the other spouse or common-law partner, and the spouse or common-law partner who owns the asset may, subject to subsections (7), (7.1), (8), (8.1), (9), (9.1) and (10) and to any order of the court under Part III or IV, sell, lease, mortgage, hypothecate, repair, improve, demolish, spend or otherwise deal with or dispose of the asset to all intents and purposes as if this Act had not been passed.

. . .

**Right to accounting and equalization of assets**

13 Each spouse and common-law partner has the right upon application to an accounting and, subject to section 14, an equalization of assets in accordance with this Part.

**Discretion to vary equal division of family assets**

14(1) The court upon the application of either spouse or common-law partner under Part III may order that, with respect to the family assets of the spouses or common-law partners, the amount shown by an accounting under section 15 to be payable by one spouse or common-law partner to the other be altered if the court is satisfied that equalization would be grossly unfair or unconscionable having regard to any extraordinary financial or other

circumstances of the spouses or common-law partners or the extraordinary nature or value of any of their assets.

**Discretion to vary equal division of commercial assets**

14(2) The court upon the application of either spouse or common-law partner under Part III may order that, with respect to the commercial assets of the spouses or common-law partners, the amount shown by an accounting under section 15 to be payable by one spouse or common-law partner to the other be altered if the court is satisfied that equalization would be clearly inequitable having regard to any circumstances the court deems relevant including

(a) the unreasonable impoverishment by either spouse or common-law partner of the family assets;

(b) the amount of the debts and liabilities of each spouse or common-law partner and the circumstances in which they were incurred;

(c) any spousal agreement between the spouses;

(c.1) any common-law relationship agreement between the common-law partners;

(d) the length of time that the spouses have cohabited with each other during their marriage and immediately before their marriage;

(d.1) the length of time that the common-law partners have cohabited during their common-law relationship;

(e) the length of time that the spouses have lived separate and apart from each other during their marriage;

(e.1) the length of time that the common-law partners have lived separate and apart from each other during their common-law relationship;

(f) whether either spouse or common-law partner has assets of an extraordinary value to which this Act does not apply by reason of their having been acquired by way of gift or inheritance;

(g) the nature of the assets; and

(h) the extent to which the financial means and earning capacity of each spouse or common-law partner has been affected by the responsibilities and other circumstances of the marriage or common-law relationship.

**Conduct not a factor**

14(3) In exercising its discretion under this section, no court shall have regard to conduct on the part of a spouse or common-law partner unless that conduct amounts to dissipation.

**Accounting and division**

15(1) In an accounting of assets between spouses or common-law partners under this Act, there shall be ascertained

(a) the value of the total inventory of assets of each spouse or common-law partner, after adding to or deducting from the inventory such amounts as are required under this Act to be added or deducted;

(b) the value of the share to which each spouse or common-law partner is entitled upon the division, to be determined by combining the values ascertained under clause (a) and dividing the total into two equal shares or, where the application for an accounting is not under Part IV, such other shares as the court may under section 14 order; and

(c) the amount payable by one spouse or common-law partner to the other in order to satisfy the share of each spouse or common-law partner as determined under clause (b).

**Fair market value**

15(2) The value of any asset for the purposes of subsection (1) shall be the amount that the asset might reasonably be expected to realize if sold in the open market by a willing seller to a willing buyer.

**Valuation of non-marketable assets**

15(3) Where an asset is by its nature not a marketable item, subsection (2) does not apply and the value of the asset for the purposes of subsection (1) shall be determined on such other basis or by such other means as is appropriate for assets of that nature.

**Closing and valuation dates**

16 In any accounting under section 15, the closing date for the inclusion of assets and liabilities in the accounting, and the valuation date for each asset

and liability shall be as the spouses or common-law partners may agree and, in the absence of agreement,

(a) the date when the spouses or common-law partners last cohabited with each other; or

(b) where the spouses or common-law partners continue to cohabit with each other, the date either of them makes an application to the court under Part III for an accounting of assets.

**Method of payment**

17 The amount shown by an accounting under section 15 to be payable by one spouse or common-law partner to the other may be satisfied

(a) by payment of the amount in a lump sum or by instalments; or

(b) by the transfer, conveyance or delivery of an asset or assets in lieu of the amount; or

(c) by any combination of clauses (a) and (b);

as the spouses or common-law partners may agree or, in the absence of agreement, as the court upon the application of either spouse or common-law partner under this Act may order, taking into account the effect of any interim order made under section 18.1.

**Applications to court**

18(1) In any question or dispute arising under this Act or where there is a breach of a provision of this Act, the spouses or common-law partners affected or either of them may apply to the Court of Queen's Bench and the court may make such order or give such judgment with respect to the application and the costs thereof as it thinks fit, or may direct the application to stand over from time to time and an inquiry or issue touching the matters raised in the application to be made or tried in such manner as it thinks fit.

. . .

**Burden of proof**

22 In any proceeding under section 18, the spouse or common-law partner claiming that this Act or a provision thereof does not apply to an asset has the onus of so proving.