IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR

Citation: *G.M. v. J.F.*, 2025 NLCA 32
Date: September 5, 2025
Docket Number: 202201H0063 and 202401H0036

BETWEEN:

G. M. — APPELLANT/RESPONDENT BY CROSS-APPEAL

AND:

J. F. — RESPONDENT/APPELLANT BY CROSS-APPEAL

Coram: F.P. O'Brien, K.J. O'Brien and G.L.C. Noel JJ.A.

Court Appealed From:	Supreme Court of Newfoundland and Labrador, General Division, Corner Brook, 201904F0044
Appeal Heard:	February 19, 2025
Judgment Rendered:	September 5, 2025
Reasons for Judgment by:	F.P. O'Brien J.A.
Concurred in by:	K.J. O'Brien and G.L.C. Noel JJ.A.

Counsel for the Appellant/ Respondent by Cross-Appeal: T. James Bennett

Counsel for the Respondent/ Appellant by Cross-Appeal: Kathy P. Moulton

Authorities Cited:

CASES CITED: *Kerr v. Baranow*, 2011 SCC 10, [2011] 1 S.C.R. 269; *Kerr v. Baranow*, 2009 BCCA 111, rev'd in part 2011 SCC 10; *Vanasse v. Seguin*, 2009 ONCA 595, rev'd 2011 SCC 10; *Peter v. Beblow*, [1993] 1 S.C.R. 980; *Pettkus v. Becker*, [1980] 2 S.C.R. 834; *Rathwell v. Rathwell*, [1978] 2 S.C.R. 436; *Thew v. Nichol*, 2015 ABQB 556; *Hillier Estate v. McLean*, 2011 NLTD(G) 86; *Churchill v. Churchill*, 1981 CarswellNfld 132 (NF Dist Ct); *Franey v. Franey*, 1997 CanLII 14632 (NLCA).

STATUTES CONSIDERED: *Family Law Act*, RSNL 1990, c. F-2.

RULES CONSIDERED: *Supreme Court Family Rules*, being Part IV of the *Rules of the Supreme Court, 1986*, SNL 1986, c. 42, Schedule D, form F34.02A.

F.P. O'Brien J.A.:

OVERVIEW

[1] The appeal and cross-appeal in this matter both concern a family law dispute between two unmarried, former cohabitating parents, and a decision of the Supreme Court of Newfoundland and Labrador respecting the division of certain property, retroactive child support, and partner support (the "Decision").

[2] The appellant, Mr. M, and the respondent, Ms. F, began a relationship in the Fall of 2010. In August 2011, when Ms. F was pregnant with their child, she moved into a home that was owned by Mr. M, which he had purchased in 2008, and which was mortgage-free at the time.

[3] The parties lived together in the home, along with their child, for over seven years. They separated in November 2018. Ms. F moved out of the home in February 2019 and went, with their child, to live with her parents in a neighbouring community.

[4] Following their separation, the parties resolved various issues by consent. The issues that were not resolved, including the division of property, partner support, and child support, were the subject of a trial in the Supreme Court.

[5] With respect to the division of property the Trial Judge (the "Judge") awarded Ms. F a monetary remedy based on a finding of unjust enrichment. The Judge ordered that Ms. F "is entitled to a monetary sum equivalent to 20 percent of the appraised value of [the home]" in which the parties had lived (Decision, at para. 122). Regarding Ms. F's claim for partner support, the Judge ordered that Mr. M pay a retroactive, non-compensatory lump sum amount of $22,006 (at para. 122). Regarding retroactive child support, the Judge indicated that the parties had advised that this issue had been resolved by consent, and that there would be a Consent Order filed reflecting Mr. M's agreement to pay $15,000 for child support for the period between separation and trial (at para. 5).

[6] Mr. M has appealed the Decision and Ms. F has cross-appealed.

[7] On appeal, Mr. M submits that the Judge erred in awarding Ms. F a monetary remedy for unjust enrichment. He further submits that there was no agreement to pay $15,000 in retroactive child support, and that no Consent Order was filed in this respect. In fact, Mr. M contends that he overpaid $2,856.74 in child support for the period in question, and that the Judge erred in stating that the issue had been resolved by consent and that he had agreed to pay $15,000.

[8] Mr. M requests that this Court set aside the Judge's order of a monetary remedy to Ms. F for unjust enrichment, and the order to pay $15,000 for retroactive child support. Regarding partner support, Mr. M is not appealing the award of $22,006.

[9] Ms. F submits that the appeal should be dismissed. She contends that the Judge made no error in awarding her a monetary remedy based on unjust enrichment, and that the $15,000 award for retroactive child support should not be disturbed on appeal as the parties consented to this amount and an order was filed in Supreme Court.

[10] Ms. F argues on the cross-appeal that, if the Judge did err in awarding her a monetary remedy for unjust enrichment and this is set aside on appeal, then the $22,006 awarded to her for partner support should be reconsidered. This, she submits, is because the Judge awarded the $22,006 in partner support on a non-compensatory basis only. The Judge stated in the Decision that there was "no basis for a compensatory support order" given that Ms. F was awarded a monetary remedy for unjust enrichment (Decision, at para. 90). Therefore, Ms. F submits that if the

monetary remedy for unjust enrichment is disturbed on appeal, she should be able to further argue for partner support on a compensatory basis.

ISSUES

[11] The appeal and cross-appeal raise the following issues:

1. Did the Judge err in ordering a lump sum amount of $15,000 in retroactive child support?

2. Did the Judge err in awarding Ms. F a monetary remedy on the basis of unjust enrichment?

3. If the Judge erred in awarding Ms. F a monetary remedy on the basis of unjust enrichment, and this remedy is set aside on appeal, can Ms. F argue that she should have received partner support on a compensatory basis?

[12] For the reasons that follow, I would allow the appeal and the cross-appeal and remit the matter to the Supreme Court for further consideration and determination of the issues.

ISSUE 1: Did the Judge err in ordering a lump sum amount of $15,000 in retroactive child support?

[13] In a section of the Decision entitled "Common Ground Between the Parties" the Judge noted that: "There would be a lump sum reconciliation payment of $15,000 to reflect retroactive child support owed or payable between the date of separation and the date of trial" (Decision, at para. 5).

[14] Accordingly, an order was made that Mr. M pay $15,000 in retroactive child support.

[15] This order appears to have been based on the Judge's understanding that the parties had resolved the issue of retroactive child support and that the parties "would be seeking a Consent Order" in this respect (Decision, at para. 5). However, the parties' post-trial written submissions indicate they were not in agreement regarding whether retroactive child support was owing.

The parties' post-trial submissions do not reflect an agreement on retroactive child support

[16] There were no oral submissions at the conclusion of the trial and the Judge requested that the parties provide written submissions on the issues. Mr. M provided his written submissions first, and Ms. F subsequently filed written submissions in response.

[17] Mr. M made substantive written submissions on the issue of retroactive child support in which he argued that no retroactive payment was owing and that he had, in fact, overpaid child support in the period between separation and trial in the amount of $2,856.74.

[18] His post-trial written submissions stated:

> [Mr. M] has paid and continues to pay child support to [Ms. F], without a written agreement, or court order, in the amount of $584.05 since February 1, 2019. This amount was based on his 2017 Notice of Assessment, which showed his line 150 income being $66,318, and his 2018 income tax return not having been filed by February 1, 2019. [Mr. M's] Notices of Assessment are found at Consent Exhibit #1, tab 8.
>
> His 2018 Notice of Assessment discloses his line 150 income as $42,647.
> His 2019 Notice of Assessment discloses his line 150 income as $43,598.
> His 2020 Notice of Assessment discloses his line 150 income as $83,150.

(Appeal Book, Part II, Tab 6, at 380)

[19] Mr. M's written submissions also included a table of amounts (reproduced below) which, in his submission, showed that he had overpaid child support in the amount of $2,856.74, and that as a result no retroactive amount was owing:

> The following table sets forth the amount of child support that [Mr. M] paid and the amount that he was required to pay.

Year	Amount Paid	Amount Required	Excess or shortfall
2019 (11 months)	$584.05	$377.31	+$2,274.14
2020	$584.05	$385.26	+$2,385.48
2021	$584.05	$734.29	-$1,802.88

Overpayment to December 2021	$2,856.74

(Appeal Book, Part II, Tab 6, at 381)

[20] Without determining the accuracy of Mr. M's submitted figures, it is clear from his written submissions to the Court that his position was that no retroactive child support (in the amount of $15,000 or otherwise) was owed.

[21] Ms. F's written submissions, filed with the Court approximately two weeks after Mr. M's submissions, indicated simply that the parties had agreed on the issue of retroactive child support. Her submission on this issue was that: "The parties have agreed that [Mr. M] will pay [Ms. F] $15,000.00 in retroactive support owed or payable between the date of separation to the date of the trial." (Appeal Book, Part II, Tab 7, at 411). She did not respond to Mr. M's submission that there had been no agreement on this issue, or his position that he had overpaid child support and owed nothing in retroactive payments.

[22] Both parties' written submissions were filed with the Supreme Court before the Decision was released. The submissions, when read together, do not demonstrate that the parties had agreed on this issue.

The order filed regarding retroactive child support was not a Consent Order

[23] Under the Supreme Court of Newfoundland and Labrador's *Supreme Court Family Rules*, being Part IV of the *Rules of the Supreme Court, 1986*, SNL 1986, c. 42, Schedule D, a consent order is to be filed with the Court when parties consent to the resolution of an issue. However, in this case, while an order was prepared and filed regarding the payment of $15,000 for retroactive child support, it was not agreed upon by Mr. M and was not a Consent Order. Ms. F, in her appeal factum (at para. 24), acknowledged that no Consent Order was filed on this issue.

[24] Pursuant to the *Supreme Court Family Rules*, a specific form is generally used regarding consent orders for support, being Form F34.02A, entitled "Consent Order – Support (Family Law)". Unlike other forms in the *Supreme Court Family Rules*, the Consent Order – Support (Family Law) form clearly indicates that the matter has been resolved by consent. This form provides that the parties (as well as their lawyers, if lawyers are representing the parties) sign and date the consent order. The signatures indicate that the parties (and their lawyers, if any) understand that the support issue is being resolved by consent and that they agree to the terms.

[25] In this case, the Consent Order – Support (Family Law) form was not used. Rather, a different form was filed with the Court, entitled "Order - Support (Family Law)". This order required the Judge's signature only and it did not require the signatures of the parties or counsel.

[26] There is no magic in the form used, and the use of a particular form might not be determinative. What matters is whether there was an agreement to resolve the issue in question. Accordingly, in circumstances where it is clear that the parties have agreed to resolve an aspect of their dispute, such as support, a judge may formalize the agreement with an order that includes the consent terms.

[27] In the present circumstances, there was no such clarity. Despite the Judge's statement in the Decision that a "Consent Order" for the lump sum amount of $15,000 was expected, the parties' post-trial written submissions revealed that they were not in agreement on this issue. Moreover, the order presented was not signed by the parties or their lawyers, as would be expected for a Consent Order. In these circumstances, the required level of certainty of consent was not present, and therefore the order was not a Consent Order and cannot be enforced as if it were.

[28] I would allow the appeal on this issue and remit the issue to the Supreme Court for consideration and determination after hearing the respective positions of the parties.

[29] Finally, on appeal, counsel for Ms. F argued that notwithstanding Mr. M's post-trial submissions that there was no agreement to pay retroactive child support and that none was owing, earlier discussions between the parties and their counsel, and statements by Mr. M's counsel during the proceedings in Supreme Court, establish Mr. M's agreement to pay $15,000.

[30] Whether or not the parties had, through their counsels' discussions or statements in court, reached a binding agreement to pay $15,000 was not argued at the original trial, and the issue was not decided by the Court below. Although raised by Ms. F, the issue was not fully argued on this appeal.

[31] However, as the issue of retroactive child support is remitted to the Supreme Court, this argument may be advanced in that Court should Ms. F decide to pursue it there. Ms. F may wish to introduce evidence to assert that there had in fact been an enforceable agreement. Should Ms. F decide to pursue this argument, it can be determined accordingly in the Supreme Court.

ISSUE 2: Did the Judge err in awarding Ms. F a monetary remedy based on unjust enrichment?

[32] The Judge found that Ms. F and Mr. M's relationship constituted a joint family venture, and that Mr. M had been unjustly enriched. Flowing from this finding, the Judge awarded Ms. F a "monetary sum equivalent to 20 percent of the appraised value" of the home (Decision, at para. 122).

[33] Mr. M appeals the Judge's order awarding Ms. F a monetary award based on unjust enrichment, arguing that such an award is not supported by the evidence and should be set aside.

[34] For the reasons that follow, I would conclude that the Judge erred by not undertaking the requisite analysis, as set out in *Kerr v. Baranow*, 2011 SCC 10, [2011] 1 S.C.R. 269, before determining whether Ms. F should be awarded a monetary sum on the basis of unjust enrichment. Accordingly, I would allow the appeal on this issue and remit the matter to the Supreme Court for further analysis and determination.

The *Kerr* analysis: Identifying unjust enrichment in the family law context

[35] In *Kerr*, the Supreme Court of Canada identified the analytical framework to be used when considering a claim for unjust enrichment in the family law context.

[36] The decision in *Kerr* concerned two appeals argued consecutively, namely *Kerr v. Baranow*, 2009 BCCA 111 and *Vanasse v. Seguin* 2009 ONCA 595. These appeals provided the Supreme Court of Canada with an opportunity to consider and clarify issues involving the application of unjust enrichment principles as a "vehicle for addressing the financial consequences of the breakdown of domestic relationships" (at para. 3). The Court confirmed that to "successfully prove a claim for unjust enrichment, the claimant must show that the defendant has been enriched, the claimant suffered a corresponding detriment, and there is no "juristic reason" for the enrichment" (at para. 3).

[37] The Supreme Court in *Kerr* described the circumstances where an unjust enrichment may result from a joint family venture:

> [60] At least one other basis for an unjust enrichment claim is easy to identify. It consists of cases in which the contributions of both parties over time have resulted in

> an accumulation of wealth. The unjust enrichment occurs following the breakdown of their relationship when one party retains a disproportionate share of the assets which are the product of their joint efforts. The required link between the contributions and a specific property may not exist, making it inappropriate to confer a proprietary remedy. However, there may clearly be a link between the joint efforts of the parties and the accumulation of wealth; in other words, a link between the "value received" and the "value surviving", as McLachlin J. put it in *Peter*, at pp. 1000-1001. …

[38] The Court, at paragraph 60 in *Kerr*, summarized the circumstances that may create an unjust enrichment in this context, as follows: "Thus, where there is a relationship that can be described as a "joint family venture", and the joint efforts of the parties are linked to the accumulation of wealth, the unjust enrichment should be thought of as leaving one party with a disproportionate share of the jointly earned assets".

[39] Accordingly, when considering whether there has been an unjust enrichment, a court must determine: whether the parties have been engaged in a joint family venture; whether the parties' respective contributions to the joint family venture have "resulted in an accumulation of wealth"; the degree to which the respective contributions of the parties are linked to the accumulation of wealth; and whether, on the breakdown of the relationship "one party retains a disproportionate share" of the wealth or assets, "which are the product of their joint efforts" (at para. 60). If these conditions are met, *Kerr* directs that the appropriate remedy is to award to the claimant a share of the accumulated wealth that is proportionate to the contributions that the claimant made to the accumulated wealth of the joint family venture (at paras. 85-87).

[40] This analytical framework provides a guide for reviewing the Decision on appeal by considering the following questions:

1. Was there a joint family venture between Ms. F and Mr. M?

2. Did the parties' respective contributions to the joint venture result in the accumulation of wealth?

3. Did either party retain a disproportionate share of the wealth accumulated through the joint venture, resulting in an unjust enrichment?

4. Was the remedy awarded to Ms. F consistent with the remedial direction outlined in *Kerr*, namely that the appropriate remedy is to award to the claimant a share of the accumulated wealth that is proportionate to the contributions that the claimant made to the accumulated wealth of the joint family venture?

1. Was there a joint family venture between Ms. F and Mr. M?

[41] In *Kerr*, the Supreme Court of Canada indicated it is first necessary to identify whether the parties have been engaged in a joint family venture (at para. 87). This was recognized by the Judge, noting that "*Kerr* identifies, as part of the initial inquiry, whether there is evidence the parties have been engaged in a joint family venture or unit" (Decision, at para. 29).

[42] The Supreme Court described several relevant factors to consider in identifying a joint family venture, noting that this is not a closed list. Among the factors identified are whether the parties "worked collaboratively towards common goals", the degree of economic integration of the parties, the actual intent of the parties, and "whether and to what extent [the parties] have given priority to the family in their decision making" (*Kerr*, at paras. 87-99).

[43] In the present case, the Judge considered these factors and found that the relationship constituted a joint family venture (Decision, at paras. 29-36). This finding was supported by the evidence, which showed that both Ms. F and Mr. M made contributions to the joint family venture.

[44] For example, Mr. M made financial contributions to the joint family venture throughout the seven years of the relationship. The evidence of Ms. F and Mr. M indicated that Mr. M paid virtually all financial expenses of the joint family venture, including expenses related to the home, cars, and all day-to-day living expenses such as utility bills, groceries, and clothing. The evidence was that Mr. M's financial contributions came primarily from resources he had obtained before the relationship, and that he was required to return to the workforce on a part-time basis and collapse Registered Retirement Saving Plan (RRSP) investments. The Decision notes that Mr. M "cashed in a significant amount of his RRSP portfolio" (see paras. 1, 22, 77, 111).

[45] The record indicates, and the Decision confirms, that Ms. F made no financial contribution to the joint family venture. The Judge noted that Ms. F "described this

period in her life as "financially stress free". She had no income of her own and derived benefits from [Mr. M's] income and assets", and "she had a Visa card attached to [Mr. M's] bank account which was used regularly to purchase daily common items for the entire family such as groceries, gas and clothing" (Decision, at paras. 82, 32).

[46] Further the Judge noted that "[f]rom a financial perspective, [Mr. M] was able to support the joint family venture from his investments and debt-free ownership" of the home (at para. 59), and that "[w]hen [Ms. F] began living with [Mr. M] he had already purchased and paid for [the home]. There was no outstanding mortgage or debt owing on the property at that time" (at para. 16).

[47] The Judge also noted that improvements to the home were financed solely by Mr. M, stating:

> [18] … On top of this, [Mr. M] used his own labour and money to make improvements to the house and surrounding property. This included building a detached garage (and an extension six years later), staining the back deck several times, completing all the landscaping and gardening including building a 50' fence so [their child] and their dog could play safely.

[48] The record indicated that both Mr. M and Ms. F equally contributed to childcare during the early years of their child's life. Neither worked outside the home for approximately three years after their child was born (at para. 9). During that period, the Judge noted that "the parties shared domestic household duties equally" and "collaborated fully on domestic and childcare responsibilities" (Decision, at paras. 18, 34).

[49] The Judge stated that the "evidence discloses that early in the relationship both [Mr. M] and [Ms. F] agreed it was not necessary for either of them to be employed and, instead, they should care equally for [the child] and maintain the home" (Decision, at para. 87).

[50] The Judge noted that when Mr. M would undertake various household projects, Ms. F would care for their child (at para. 19). The Judge referenced Mr. M's testimony that Ms. F's contribution to improvements in the home was "miniscule" and was limited to "some painting in the basement and in [the child's] nursery" when she first moved into the home (at para. 20). The Judge further noted that, while Ms. F did not dispute Mr. M's assessment of Ms. F's direct contributions

to the home, Ms. F undertook an enhanced role in childcare, especially in later years when Mr. M returned to the workforce:

> [20] … [Ms. F's] evidence was not at odds with this picture except that she testified that she would be looking after [the child] when [Mr. M] undertook these home improvements and even more so when he returned to the workforce … on a part-time basis and also became involved in looking after two rental properties he purchased independent of their relationship.

[51] As their child got older, Mr. M returned to work on a part-time basis, at a retail store. From that time, the Judge found that Ms. F had more responsibility and "an enhanced role" related to childcare and domestic services (see, for example, paras. 9, 36, 60).

[52] The Judge stated that Ms. F contributed to the joint family venture, for example, "by taking on a greater role in domestic responsibilities and childcare when [Mr. M] undertook household improvement projects" and "by staying at home with [their child]" when Mr. M returned to the workforce on a part-time basis (at para. 37).

[53] The Judge described Ms. F's role as follows:

> [25] [Mr. M] returned to the workforce on a part-time basis in 2014. At this point in the relationship [their child] would have been three years old. Prior to 2014, any time [Mr. M] undertook a household project someone was required to care for [their child]. This responsibility was carried out by [Ms. F]. I accept her evidence that she cared for [their child] while [Mr. M] shouldered the responsibility of making improvements and repairs to [the home] and attended to his rental properties. …

[54] Contributions to domestic and childcare services, as undertaken by Ms. F, may give rise to a joint family venture and ground a claim in unjust enrichment. As confirmed by the Supreme Court in *Kerr*, and other authorities, the provision of domestic and childcare services by a party to a joint family venture can be a basis to support a claim for unjust enrichment. The Supreme Court noted in *Kerr* that "such services are of great value to the family and to the other spouse", and that "any other conclusion devalues contributions, mostly by women, to the family economy" (at paras. 42, 44; see also *Peter v. Beblow*, [1993] 1 S.C.R. 980, at 989-995). This was noted by the Judge (Decision, at para. 28).

[55] The Judge found that the relationship constituted a joint family venture and that both parties made contributions to this joint family venture. This finding is amply supported by the evidence and there is no basis for appellate intervention in this regard.

2. Did the parties' respective contributions to the joint family venture result in the accumulation of wealth?

[56] Wealth accumulation resulting from a joint family venture features as an important consideration throughout the reasons in *Kerr* (see, for example, generally, at paras. 60, 61, 63, 65-68, 78, 81, 85, 87, 100, 102; in the specific context of the facts in the *Vanasse* appeal, at paras. 126, 128, 142, 144-145, 154-155, 157; and in the specific context of the facts in the *Kerr* appeal, at paras. 189, 194, 197-198).

[57] The Supreme Court in *Kerr* makes numerous references to the accumulation of wealth in the context of assessing a claim in unjust enrichment. For example, it is stated:

> [87] My view is that when the parties have been engaged in a joint family venture, and the claimant's contributions to it are linked to the generation of wealth, a monetary award for unjust enrichment should be calculated according to the share of the accumulated wealth proportionate to the claimant's contributions. …
>
> (Underlining added.)

[58] At paragraph 60 the Supreme Court stated that unjust enrichment can arise, in the family context, where "the contributions of both parties over time have resulted in an accumulation of wealth".

(Underlining added.)

[59] The Supreme Court of Canada continued at paragraph 60:

> Thus, where there is a relationship that can be described as a "joint family venture", and the joint efforts of the parties are linked to the accumulation of wealth, the unjust enrichment should be thought of as leaving one party with a disproportionate share of the jointly earned assets.
>
> (Underlining added.)

[60] The requirement that an unjust enrichment claim be assessed in the context of the accumulation of wealth during the joint family venture is again referenced in the Court's conclusion, at paragraph 100:

> I conclude:
>
> …
>
> 3. To be entitled to a monetary remedy of this nature, the claimant must show both (a) that there was, in fact, a joint family venture, and (b) that there is a link between his or her contributions to it and the accumulation of assets and/or wealth.
>
> (Underlining added.)

[61] And further at paragraph 102:

> [102] The answer is fairly straightforward when the essence of the unjust enrichment claim is that one party has emerged from the relationship with a disproportionate share of assets accumulated through their joint efforts. These are the cases of a joint family venture in which the mutual efforts of the parties have resulted in an accumulation of wealth. The remedy is a share of that wealth proportionate to the claimant's contributions. …
>
> (Underlining added.)

[62] The Supreme Court also noted in *Kerr* that this notion of assessing the parties' joint contributions to the accumulation of wealth during the relationship, which is at the core of unjust enrichment, is not a novel idea, but has roots in many of the Court's earlier decisions in this area, including in *Pettkus v. Becker*, [1980] 2 S.C.R. 834, *Rathwell v. Rathwell*, [1978] 2 S.C.R. 436, and *Peter* (see *Kerr*, at paras. 60-69).

[63] It is the failure to properly share the wealth that the parties have accumulated, according to the parties' proportionate contributions to the joint family venture, which gives rise to the unjust enrichment (*Kerr*, at paras. 78, 81). But this of course presumes and requires that wealth has been accumulated during the joint family venture.

[64] As such, some degree of financial assessment or analysis is generally required to determine whether wealth was accumulated through the joint family venture. Depending on the factual circumstances, this financial analysis may be extensive,

and would consider not only whether wealth was accumulated, but also the link between the wealth accumulated and the parties' respective contributions to the wealth (see, for example, *Thew v. Nichol*, 2015 ABQB 556).

[65] Such an analysis is referenced in the Supreme Court of Canada's consideration of the decisions in both the *Kerr* and *Vanasse* appeals.

[66] In the *Vanasse* appeal, the Supreme Court noted the trial judge's findings that there was a joint family venture, that there was a substantial accumulation of wealth, and that there had been an unjust enrichment because Ms. Vanasse's proportionate contribution to the accumulation of wealth had not been properly compensated. As such, there was a "monetary award appropriate to reverse this unjust enrichment" (at para. 128). The Supreme Court reviewed the trial findings, which were firmly based in the evidence, of substantial wealth accumulation during the parties' relationship, and concluded that "there was a clear link between Ms. Vanasse's contribution … and the accumulation of wealth" (at para. 157).

[67] In considering the claim in *Vanasse* for unjust enrichment, the Supreme Court again reiterated the need for an accumulation of wealth during the joint family venture:

> [142] … As I have set out earlier, an unjust enrichment is best characterized as one party leaving the relationship with a disproportionate share of wealth that accumulated as a result of the parties' joint efforts. This will be so when the parties were engaged in a joint family venture and where there is a link between the contributions of the claimant and the accumulation of wealth. When this is the case, the amount of the enrichment should be assessed by determining the claimant's proportionate contribution to that accumulated wealth. …
>
> (Underlining added.)

[68] In the *Kerr* appeal the Supreme Court also considered the evidence relating to the accumulation of wealth and the parties' proportionate contributions to this wealth:

> [194] … As set out earlier in my reasons, for Ms. Kerr to show an entitlement to a proportionate share of the wealth accumulated during the relationship, she must establish that Mr. Baranow has been unjustly enriched at her expense, that their relationship constituted a joint family venture, and that her contributions are linked to

> the generation of wealth during the relationship. She would then have to show what proportion of the jointly accumulated wealth reflects her contributions. …
>
> (Underlining added.)

[69] In the specific circumstances of the *Kerr* appeal the Supreme Court concluded that, based on the record, it was not possible to evaluate the "proportionate contributions to a joint family venture" or to determine whether Ms. Kerr's contributions to the joint family venture "were linked to the accumulation of wealth". Accordingly, the matter was remitted for a new trial on the unjust enrichment claim (at paras. 193-194, 197-199).

[70] By contrast, in the present appeal the Decision does not demonstrate that the Judge considered or determined, based on the record, whether there was in fact an accumulation of wealth resulting from the parties' joint efforts during the relationship. Rather, without first confirming through the record that wealth had been accumulated in the joint family venture, the Judge awarded Ms. F a monetary sum to redress an assumed unjust enrichment.

[71] Again, as unjust enrichment entails an unjust sharing of accumulated wealth, this requires some evidentiary basis to conclude that wealth has been accumulated. It was not obvious that there was an accumulation of wealth in this instance.

[72] If the record does not establish that there has been an accumulation of wealth during the joint family venture, it does not follow that the parties to the joint family venture would have been enriched. In such circumstances, there would be no accumulated wealth, no enrichment of either party at all (unjust or otherwise), and no need to redistribute property between the parties.

[73] In some cases, for example in the *Vanasse* appeal, it is clear from the evidence that wealth has been accumulated, and the focus shifts to determining the proportionate sharing of this wealth. In other cases, whether wealth has been accumulated is not obvious, and should be determined from the record.

[74] Having found that both parties made contributions to the joint family venture, the Judge awarded Ms. F a monetary remedy. However it does not follow that, because the parties both contributed to a joint family venture, this will automatically yield an award for unjust enrichment. As noted in *Kerr*: "Cohabitation does not, in itself, under the common law of unjust enrichment, entitle one party to a share of the

other's property or any other relief. However, where wealth is accumulated as a result of joint effort, as evidenced by the nature of the parties' relationship and their dealings with each other, the law of unjust enrichment should reflect that reality" (at para. 85).

[75] In the present case, it is not evident that the Judge undertook the required analysis of the evidence to determine whether there was wealth accumulated during the joint family venture. This is required before concluding that one party was unjustly enriched and before making an award to redress an assumed enrichment. The Judge made no determination that wealth had been accumulated during the joint family venture.

[76] With respect, I would conclude that the Judge erred in awarding Ms. F a monetary remedy without identifying the requisite evidentiary basis in the record necessary to conclude that there had been an accumulation of wealth during the relationship, and to conclude that this accumulated wealth had not been properly distributed between Ms. F and Mr. M, resulting in Mr. M's unjust enrichment.

[77] Accordingly, I would set aside the Judge's award of a monetary remedy to Ms. F and remit this issue of unjust enrichment to the Supreme Court for further consideration and determination pursuant to the guidance in *Kerr*.

3. Did either party retain a disproportionate share of the wealth accumulated through the joint venture, resulting in an unjust enrichment?

[78] Even if an accumulation of wealth has been established through a joint family venture, which as discussed above was not determined, a further assessment would then be required to consider the link between the parties' respective contributions to the wealth accumulated.

[79] This requirement that there be a link between a claimant's contributions and wealth accumulated in a joint family venture is clearly referenced and described in *Kerr* (see, for example, paras. 60, 78, 81, 87, 100, 102, 128, 138-139, 142, 154, 157, 194, 197-198). Many of these referenced paragraphs are reproduced above in the discussion of wealth accumulation. What is required is an analysis or assessment of how the claimant's contributions are linked to, and result in, wealth accumulation.

[80] This assessment does not require a parsing of the parties' day-to-day activities or contributions but involves an overall determination of the claimant's proportionate contributions, grounded in the evidence, as noted in *Kerr*:

> [102] …While determining the proportionate contributions of the parties is not an exact science, it generally does not call for a minute examination of the give and take of daily life. It calls, rather, for the reasoned exercise of judgment in light of all of the evidence.

[81] In my respectful view, the necessary evidence-based assessment to determine the parties' proportionate contributions or links to an accumulation of wealth was not undertaken in this case. There was no assessment of Mr. M's or Ms. F's financial situation either before the joint venture began or at separation. Indeed, Mr. M's evidence suggested that there was potentially much less wealth at the end of the joint family venture, and that he was potentially worse off financially, with circumstances requiring an early collapse of his RRSP investments and his return to the workforce on a part-time basis.

[82] A review of the Decision does not reveal that there was an analysis of the record to confirm that the relationship yielded an increase in wealth by Mr. M, which was unjustly retained and which should be redistributed to Ms. F. It is not evident that such an analysis was done, to provide the evidentiary basis for such a conclusion. Without such an analysis, an award premised in unjust enrichment on the basis that wealth was accumulated, and that Mr. M retained a disproportionate share of this accumulated wealth, cannot be maintained.

[83] In *Kerr*, the Supreme Court concluded that "to attempt to resolve Ms. Kerr's unjust enrichment claim on its merits, using the record before this Court, involves too much uncertainty and risks injustice" (at para. 197). Similarly, in this case, the relative dearth of information regarding the parties' financial positions, whether wealth was accumulated during the relationship (and, if so, how it was retained and by whom), and the respective links between the parties' contributions and the wealth, precludes this Court from undertaking the assessment based on the present record.

[84] Accordingly, I would remit the matter to the Supreme Court.

4. Was the remedy awarded to Ms. F consistent with the remedial direction outlined in *Kerr*?

[85] As noted in *Kerr*, "remedies for unjust enrichment may either be proprietary (normally a remedial constructive trust) or personal (normally a monetary remedy)" (at paras. 46, 55).

[86] In the present case, the Judge awarded a monetary remedy and ordered the payment of a "monetary sum" to redress the assumed unjust enrichment (Decision, at para. 122). *Kerr* indicated that "[o]nce the choice has been made to award a monetary… remedy, the question of how to quantify the monetary remedy arises" (at para. 55). In quantifying an award for unjust enrichment in the context of a joint family venture, *Kerr* directs that an appropriate remedy is one that awards a share of the accumulated wealth that is proportionate to the contributions made by the claimant to this wealth (at paras. 85-87).

[87] It is not evident from the record how the Judge undertook the requisite analysis, as set out in *Kerr*, to award Ms. F a share of the accumulated wealth that was meant to be proportionate to her contributions to this wealth.

[88] As part of this analysis, consideration would need to be given to determining the link between the wealth accumulated and Ms. F's proportionate contribution to the joint family venture. Again, this link was referenced in *Kerr* as follows:

> [102] … Once the claimant has established his or her contribution to a joint family venture, and a link between that contribution and the accumulation of wealth, the respective contributions of the parties are taken into account in determining the claimant's proportionate share. …

[89] The unjust enrichment award in the present matter was made on the basis that Ms. F "had an enhanced role in providing domestic services to the joint family venture after [Mr. M] began part-time work in 2014" (Decision, at para. 15). However, the Decision does not evince an analysis regarding the parties' respective contributions to accumulated wealth.

[90] Presuming there is wealth accumulation and a link between the wealth accumulated and the claimant's contributions, the case authorities frequently express a remedy in terms of a percentage of the accumulated wealth that is attributable to

the claimant's contributions. In this case, the Judge awarded Ms. F a monetary sum equivalent to 20 percent of the home's appraised value.

[91] However, I would respectfully conclude that the Judge erred in awarding this remedy. First, and as noted above, the Decision did not indicate that the Judge had considered or determined the issues of wealth accumulation or the proportionate link between this wealth and the claimant's contributions. Second, the 20 percent amount awarded by the Judge (i.e. that Ms. F be awarded a monetary sum equivalent to 20 percent of the appraised value of the home) appears to have been based, at least to some extent, on matrimonial property cases which entail a different analytical framework than the common law framework of unjust enrichment.

[92] As authority for awarding Ms. F a monetary sum equivalent to 20 percent of the home's appraised value, the Judge referenced the decisions in *Hillier Estate v. McLean*, 2011 NLTD(G) 86; *Churchill v. Churchill*, 1981 CarswellNfld 132 (NF Dist Ct); and *Franey v. Franey*, 1997 CanLII 14632 (NLCA).

[93] In *Hillier Estate*, the claimant sought an interest in a home, a cabin, and a garage, respectively, based on unjust enrichment arising from a common law relationship. Based on the factual circumstances in that case, the Supreme Court of Newfoundland and Labrador dismissed the claims relating to the cabin and garage and ordered payment of a monetary award equal to 10 percent of the value of the home, minus the outstanding balance remaining on the mortgage.

[94] The Judge in the present case distinguished *Hillier Estate*, noting that (unlike Ms. F in the present case) the claimant in *Hillier Estate* had made a direct contribution to the planning and construction of a new home, which entitled her to a 10 percent interest in the home. The Judge referenced this difference in the Decision:

> [23] In my view, the factual context in *Hillier Estate* differs from the present case, in so far as Ms. McLean [the claimant in the *Hillier Estate* case] was involved in the planning and the construction of a new home for her, her daughter and Mr. Hillier to live together. In [the judge's] opinion this constituted a joint family venture deserving of compensation (see paras. 23 and 37). Despite this distinction, it does not mean that [Ms. F's] contribution to the domestic relationship should go unrecognized. …

[95] The Judge, at paragraph 24 of the Decision, preferred the decision in *Churchill* as being more on point. In *Churchill*, the claimant received a 20 percent interest in a matrimonial home:

> [24] Rather, I find the facts of this case are more analogous to those in *Churchill* … where the Court [the Newfoundland District Court] found a 20 percent interest in the matrimonial home. The evidence disclosed Mr. Churchill owned the matrimonial home for three decades prior to the termination of a three-year relationship [with Mrs. Churchill]. The [Newfoundland District] Court held that Mrs. Churchill made "very little contribution to the matrimonial home", except "the usual housekeeping" (see paras. 38-43).

[96] With respect, the decision in *Churchill* to award a 20 percent interest in the matrimonial home to Mrs. Churchill does not support awarding Ms. F a monetary remedy equivalent to 20 percent of the appraised value of the home in the present case. *Churchill* was a case from the early 1980s, dealing with the provisions of the *Matrimonial Property Act* (now the *Family Law Act*, RSNL 1990, c. F-2) in this province in the context of the breakdown of a marriage. It did not deal with unjust enrichment in the common law context. Rather, the decision concerned whether, pursuant to the statute, the matrimonial property of two married persons should be divided equally or whether an unequal division was warranted. For the reasons provided, the Judge in *Churchill* determined that, notwithstanding the statutory presumption of equal sharing between spouses, an equal division would be "grossly unjust or unconscionable" and ordered instead that the claimant receive 20 percent of the matrimonial assets (which included the matrimonial home).

[97] The *Churchill* decision was made in the context of the statutory division of matrimonial assets, where an equal division is the default position and the statute provided, exceptionally, for an unequal division in appropriate circumstances. It does not engage the principles of unjust enrichment in a joint family venture context as described in *Kerr* and elsewhere. Therefore, it does not follow that the 20 percent interest awarded in the matrimonial assets and matrimonial home in *Churchill*, would support Ms. F receiving a monetary sum equivalent to 20 percent of the value of the home in the present circumstances. The basis for the claimed entitlement is different in both cases.

[98] The Judge also referenced this Court's decision in *Franey* to support the monetary remedy to Ms. F, stating:

> [38] In making this finding, I am reminded that every case must be considered on its own merits and in its specific context. As held by our Court of Appeal in *Franey v. Franey* (1997), 148 Nfld. & P.E.I.R. 181, 28 R.F.L. (4th) 1 (Nfld. C.A.) at paras. 22 - 26, the *Family Law Act,* R.S.N.L. 1990, c. F-2 (the "Act"*)* discourages me from examining each spouse's individual contribution with respect to particular assets because each spouse is

> recognized to contribute to the marriage in different ways. This is explicitly stated in s. 19 of the legislation.
>
> [39] When the issue of unequal division is considered, courts have found the legislation encourages a global analysis of the parties' union. Only then can it be determined whether in this particular circumstance equal division will be grossly unjust or unconscionable.

[99] However, *Franey* also involved a division of assets between married persons, pursuant to the *Family Law Act*. This again entails a consideration of the statutory provisions regarding the entitlement to a presumptive equal sharing of the matrimonial home and matrimonial assets under the *Family Law Act*, where the legislative starting point is a 50-50 division. A wholly different analysis is required in the present case where the parties were unmarried and the claim is made based on unjust enrichment, at common law. This requires a consideration of the proportionate contributions to the accumulated wealth without a statutory starting presumption of equal sharing.

[100] Accordingly, I am respectfully unable to agree that these authorities support a monetary award to Ms. F of a sum equivalent to 20 percent of the appraised value of the home.

[101] As this matter is being remitted to the Supreme Court, the issue of the appropriate remedy can also be considered in this context in accordance with the direction in *Kerr*. That is, if it is established that wealth was accumulated during the joint venture, and there was a link between the claimant's contributions and the wealth, an appropriate remedy is to award to the claimant a share of the accumulated wealth that is proportionate to the claimant's contributions, having assessed the link between those contributions and the wealth (*Kerr*, at paras. 85-87).

ISSUE 3: If the Judge erred in awarding Ms. F a monetary remedy based on unjust enrichment, and this remedy is set aside on appeal, can Ms. F argue that she should have received partner support on a compensatory basis?

[102] The Judge awarded Ms. F a retroactive lump sum award of $22,006 for partner support on a non-compensatory basis only, as follows:

> [91] In light of [Ms. F's] circumstances, both before and after cohabitation, I have decided dependent support is payable on a non-compensatory basis … I also find that any award will be retroactive and not prospective in nature. I make this conclusion

> based on the evidence that in 2021 [Ms. F] was able to find employment similar in nature to that she had obtained before meeting [Mr. M].
>
> [92] Accordingly, I order [Mr. M] to pay [Ms. F] retroactive dependent support on a non-compensatory basis for the years 2019 and 2020.

[103] In making this award, the Judge determined the issues of entitlement, duration and quantum of support. The Decision explained why Ms. F was entitled to a non-compensatory award for partner support, why the award was retroactive and not prospective, and how the amount of $22,006 was determined:

> [101] The purpose of a non-compensatory award is to address the economic needs and means of the lower income spouse following the breakdown of the relationship. There is no entitlement to enjoy the same standard of living experienced prior to the breakdown. Rather, as set out in s. 41 of the *Act*, the Court should encourage [Ms. F's] financial independence. Based on my analysis above, this effectively occurred in 2021 when she obtained employment … .
>
> [102] Nevertheless, [Ms. F] is deserving of a lump sum award in recognition of the period when her economic needs were not supported by [Mr. M]. Given that a lump sum award is not taxable for [Ms. F] or deductible for [Mr. M], I will use the mid-range DivorceMate figures for 2019 and 2020. Accordingly, I order [Mr. M] to pay [Ms. F] the amount of $22,006 ($10,030 + $11,976).

[104] The Judge's findings on entitlement, duration and quantum are supported by the evidentiary record and no basis for appellate intervention was identified respecting these findings.

[105] The Judge further held that there was "no basis for a compensatory support order" because Ms. F had been awarded a monetary remedy for unjust enrichment. The Judge stated:

> [90] I find there is no basis for a compensatory support order given that I decided [Ms. F] should receive a 20 percent interest of the assessed value of [the home] as compensation for her claim of unjust enrichment.

[106] Ms. F has cross-appealed on this point. She submits that the Judge's determination that there was no basis for support on a compensatory basis was directly linked to her receiving a monetary remedy for unjust enrichment. Therefore, Ms. F submits that if the Judge erred in awarding a monetary remedy and this remedy is set aside on appeal, the $22,006 support award should be reconsidered, specifically

with respect to whether partner support should have also been ordered on a compensatory basis.

[107] As noted above, the monetary award for unjust enrichment has been set aside and the issue remitted to the Supreme Court.

[108] Therefore, as the Judge specifically noted that the monetary award for unjust enrichment was the reason why there was no basis for a compensatory support order, and as that monetary award has been set aside, it is appropriate to have the issue of compensatory support also considered by the Supreme Court. As the award for unjust enrichment will be reconsidered, so too should the issue of whether there was a compensatory basis for support and, if so, whether this would have any impact on the support award that was made.

[109] Accordingly, I would allow Ms. F's cross-appeal on this issue.

SUMMARY AND DISPOSITION

[110] In summary, Mr. M's appeal is allowed. Both the order for retroactive child support and the order for a monetary award for unjust enrichment are set aside. These issues are remitted to the Supreme Court of Newfoundland and Labrador for further consideration and determination.

[111] Ms. F's cross-appeal is allowed. The issue of whether she is entitled to support on a compensatory basis, and whether this might impact the amount of support awarded at first instance, may also be considered by the Supreme Court.

[112] In the present circumstances, and considering the mixed success on the appeal and cross-appeal, there shall be no order as to costs.

_____
F.P. O'Brien J.A.

I concur:_____
K.J. O'Brien J.A.

I concur:_____
G.L.C. Noel J.A.