

CITATION: Jeffrey v. McNab, 2018 ONSC 2635

COURT FILE NO.: 219/16

DATE: 2018/04/26

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:)	
)	
Lisa Ann Jeffrey)	J. Singer, for the Applicant
)	
)	Applicant
)	
– and –)	
)	
Casey Adam McNab)	D. Wowk and S. Yuen, for the Respondent
)	
)	Respondent
)	
)	
)	
)	HEARD: April 6 & 10, 2018

2018 ONSC 2635 (CanLII)

THE HONOURABLE JUSTICE J. R. HENDERSON

DECISION ON MOTION

INTRODUCTION

- [1] Both the applicant (“Jeffrey”) and the respondent (“McNab”) bring motions for interlocutory relief in this proceeding. The two motions were heard together over the course of two full days.

- [2] The parties cohabited, primarily in Niagara-on-the-Lake, Ontario, in a common law relationship that ended in June 2015, after either 11 or 14 years of cohabitation. The parties disagree about when they started living together. They have no children.

- [3] During their cohabitation, the parties either independently or jointly operated several businesses in Niagara-on-the-Lake, including a lucrative patient transfer business that was operated through several corporations (collectively referred to as “Niagara Patient Transfer”). In a transaction that closed a few days prior to the separation of the parties,

McNab sold the assets of Niagara Patient Transfer for the total sum of \$5,630,450. McNab has retained all the proceeds of that sale for himself. He alleges that Niagara Patient Transfer was exclusively his business, and that Jeffrey has no right to any part of the proceeds of the sale.

- [4] Jeffrey alleges that Niagara Patient Transfer was part of a joint family venture that included all properties and businesses that were owned or operated by the parties. Jeffrey makes a claim based on the doctrine of unjust enrichment, and she requests a remedy in accordance with the principles set out in *Kerr v. Baranow*, [2011] 1 S.C.R. 269.
- [5] In her motion, Jeffrey requests the following relief: 1. Temporary spousal support retroactive to March 15, 2017; 2. A non-dissipation order regarding McNab's assets; and 3. Further disclosure as requested by Jeffrey's expert, Kalex Valuations Inc. ("Kalex").
- [6] McNab contests all aspects of Jeffrey's motion. McNab submits that Jeffrey is not entitled to spousal support; that he has made substantial payments to Jeffrey since the separation; that there are no grounds to make a non-dissipation order; and that he has already made full and proper disclosure.
- [7] In his motion, McNab requests the following relief: 1. Partition and sale of the parties' jointly owned home, known as 1220 Line 3, Niagara-on-the-Lake ("the NOTL property"); 2. An order that the expenses regarding the NOTL property be shared equally until the sale; 3. Partition and sale of the property known as 1230 Lakeshore Drive, Mount Dora, Florida ("the Florida property"); and 4. Further and better disclosure from Jeffrey.
- [8] Jeffrey contests all aspects of McNab's motion. Jeffrey submits that the expenses of the NOTL property should be paid by McNab; that an order for the sale of the NOTL property would be a hardship for her; and that there is no jurisdiction for this court to order the sale of the Florida property.

BACKGROUND FACTS

- [9] McNab and Jeffrey met in Windsor in the early 2000's when both were working as ambulance attendants. There is a dispute as to when they first started cohabiting; Jeffrey alleges the cohabitation started in Windsor in 2001, but McNab says the cohabitation started in Niagara-on-the-Lake in 2004. For the purposes of this decision, I find that the parties were cohabiting by at least late 2003 when they moved to Niagara-on-the-Lake.
- [10] In 2005 they jointly purchased a home on Creek Road in Niagara-on-the-Lake. Subsequently, in 2008, they sold the Creek Road home and purchased the NOTL

property as joint tenants, where they resided together until June 2015. Upon separation McNab vacated the home. Jeffrey continues to live in the NOTL property.

- [11] When McNab and Jeffrey first moved to Niagara-on-the-Lake, Jeffrey started a soap making business called Just Soaps, and McNab started a medical supply business called Safe Group. Jeffrey says that Just Soaps was closed after a few years, although this point is disputed by McNab. The Safe Group business has continued and is still operated by McNab.
- [12] The parties' most successful enterprise was the group of businesses collectively called Niagara Patient Transfer. The business of Niagara Patient Transfer was to provide non-emergency transportation of medical patients under the care of paramedics.
- [13] Niagara Patient Transfer grew out of a small patient transfer business, Sports Medic Inc., that had been operated by McNab's father in Windsor, and which McNab's father transferred to McNab in 1999. McNab started the Niagara-on-the-Lake branch of the business in 2005, and the business grew into a multi-city, multi-corporation, lucrative venture until its assets were sold by McNab in 2015.
- [14] In approximately 2008 Jeffrey started a pet supply store known as Mutts and Frutts. Initially, Mutts and Frutts operated out of the same business premises as Niagara Patient Transfer, but Mutts and Frutts moved to a separate location in approximately 2009. By 2012 Mutts and Frutts had closed and Jeffrey was operating a new business, Wearable Art, out of the same business premises on King Street that had been used by Mutts and Frutts.
- [15] In 2014 McNab started a transportation business known as Community Transport Group ("CTG") that ran specialty tours in the Niagara Region. CTG operated from the same business premises on King Street that had been used by Mutts and Frutts and Wearable Art. McNab continues to operate CTG to date.
- [16] There is a significant dispute as to the ownership of each of these businesses, particularly the Niagara Patient Transfer businesses. Niagara Patient Transfer operated through approximately five different corporations, and McNab submits that he was the sole shareholder of all of those corporations. However, Jeffrey has produced evidence that she received dividends from one of the Niagara Patient Transfer businesses in significant amounts in the years 2012, 2013, and 2014. McNab submits that the dividends from Niagara Patient Transfer were paid to Jeffrey in error, but he also deposed that the dividends were attempts at income splitting. There is also a controversy about the transfer

of one share of a holding company for Mutts and Frutts.

- [17] Further, there is a dispute as to how much work each party contributed to each of these businesses. Generally, it appears that McNab was primarily responsible for the day-to-day operation of Niagara Patient Transfer, CTG, and Safe Group, whereas Jeffrey was primarily responsible for the day-to-day operation of Just Soaps, Mutts and Frutts, and Wearable Art.
- [18] However, there is evidence that both parties were involved to some degree in all of these businesses. Specifically, there is evidence that McNab had some control over the administrative aspects of Just Soaps and Mutts and Frutts, and that Jeffrey worked in the retail store for CTG. There is also evidence of commingling of the businesses of Mutts and Frutts and Niagara Patient Transfer, and evidence that Niagara Patient Transfer provided the start-up costs for Mutts and Frutts.
- [19] Moreover, Jeffrey has deposed that she worked in the Niagara Patient Transfer businesses by personally engaging in medical transfers, by working as a medical standby at events, by training staff, by performing administrative duties, and by attending promotional events for the corporation. McNab disputes the statements by Jeffrey that she was involved in Niagara Patient Transfer. Both parties have provided what is submitted as corroborating evidence of their respective positions.
- [20] There is also evidence that McNab held Jeffrey out as a manager in Niagara Patient Transfer. He says that he did so only in order to make the company look bigger than it was. Further, at one point McNab instructed his lawyer that Jeffrey was to be the sole director of a proposed new patient transfer corporation.
- [21] In addition to the aforementioned businesses, Jeffrey has developed a cattery business, known as Spots On The Lake, that breeds a type of cat known as a Savannah cat. Jeffrey states that initially this business was a hobby, but it has become her full-time business since the separation.
- [22] McNab has continued to operate CTG. The CTG business has expanded to include public bus transportation, as well as specialty tours. CTG's largest client is the Town of Niagara-on-the-Lake, for which CTG provides public bus service. McNab states that he does not earn an income from CTG, and that CTG operates at a net loss. McNab also continues to operate Safe Group, from which he earns a small income.
- [23] Regarding the proceeds of the sale of the assets of Niagara Patient Transfer, the sale price was \$5,630,450, but McNab deposes that he received net proceeds of approximately \$4,113,891 after fees and disbursements. He used that money to purchase a condominium

for his own use, furnish the condominium, and pay down joint debts. He then invested the remainder of approximately \$2.9 million in a GIC.

- [24] McNab deposes that he invested the proceeds from the maturity of that GIC in 1938484 Ontario Inc. (“193”). 193 is solely owned by McNab and is a corporation that is engaged in the mortgage and real estate business. Currently, McNab deposes that it owns seven mortgages and one rental property. 193 has also loaned a large sum of money to CTG.
- [25] Jeffrey has continued to live in the NOTL property since the separation. Jeffrey has continued to run her cattery business out of the NOTL property, and it generates a small income for her. In general, since the separation McNab has paid all of the household expenses for both the NOTL property and the Florida property.

THE DECEMBER 2016 LONG MOTION

- [26] This action was commenced by Jeffrey in 2016. Jeffrey initially brought a motion for, among other things, spousal support, a non-dissipation order, and further disclosure. That motion was placed on a long motions list for the week of December 12, 2016.
- [27] By agreement between counsel for the parties, Jeffrey’s long motion was adjourned on terms that were finalized in an email from McNab’s former counsel to Jeffrey’s former counsel, dated December 15, 2016. Although the terms of the adjournment were never incorporated into a court order, I find that there was a binding agreement between the parties regarding the terms of the adjournment that is evidenced by the December 15, 2016 email.
- [28] The terms of the adjournment as set out in the email are significant. The preamble to the 15 itemized terms includes the following statement, “These terms shall be in place until the mediation.”
- [29] Among the itemized terms of the adjournment are the following: 1. Mediation with Alf Mamo shall take place on February 27, 2017 or March 2, 2016 (sic); 3. The long motion returnable the week of December 12, 2017 (sic) will be adjourned to late March 2017, if necessary; 5. On a temporary and without prejudice basis, Mr. McNab will continue with the financial *status quo*. This is to include paying all household related expenses that he has been paying and providing Ms. Jeffrey with an additional \$2,000 in cash each month; 11. Mr. McNab will respond to the further disclosure request delivered on December 9th within 30 days; and 14. Mr. McNab shall provide Ms. Jeffrey with notice if he intends to dispose of any assets before the mediation except in the context of his business operations.

- [30] Despite the above-mentioned agreement, no mediation took place. I accept that counsel for Jeffrey cancelled the mediation because it was felt that McNab had not provided proper disclosure, and that a mediation would therefore not be useful.
- [31] I find that McNab paid \$2,000 per month to Jeffrey for spousal support for the months of December 2016, and January and February 2017, but thereafter ceased making such payments. I accept that McNab has continued to pay the household expenses with respect to the NOTL property, although there has been a dispute with respect to some of the utility bills.
- [32] Jeffrey takes the position that the agreement regarding the terms of the adjournment continues to be binding on the parties to this day. McNab's position is that the agreement was only binding until the date of the planned mediation in March 2017, and therefore it has expired.

SPOUSAL SUPPORT

- [33] Jeffrey claims to be entitled to temporary spousal support based on two alternative grounds. First, counsel for Jeffrey submits that the parties entered into an agreement in December 2016 for spousal support of \$2,000 per month plus payment by McNab of the household expenses for the NOTL property, and this agreement continues to be binding. In the alternative, Jeffrey claims entitlement to temporary spousal support in accordance with the provisions of Part III of the *Family Law Act*. (“FLA”).
- [34] I find that Jeffrey's claim for temporary spousal support succeeds on both grounds. Regarding the first ground, I find that the agreement regarding the terms of the adjournment, as evidenced by the December 15, 2016 email, is a binding contract. I reject the submission that the agreement expired on a fixed date in March 2017; rather, I find that it was the intention of the parties that this agreement would be in effect “until the mediation”.
- [35] I find that if the mediation did not take place as scheduled, the parties intended that the support payments would remain in place until the mediation was held or until a court order was made. There has not yet been a mediation or a court order.
- [36] I do not accept that Jeffrey breached or rescinded the agreement by cancelling the mediation. I find that the postponement of the mediation was a foreseeable consequence of McNab's failure to provide full disclosure. McNab cannot avoid his obligation to pay spousal support by breaching his agreement to provide disclosure.
- [37] Therefore, I find that the terms of the adjournment that provide for ongoing support payments are still in effect. Thus, McNab continues to be bound to pay spousal support of

\$2,000 per month plus pay the household expenses.

[38] In the alternative, if the agreement expired because the mediation did not take place in March 2017, I find that McNab should be required to pay temporary spousal support in the same amount as had been agreed in December 2016, pursuant to Part III of the *FLA*.

[39] There are many decisions that have summarized the principles that apply to an order for temporary spousal support. Regarding a motion for temporary spousal support pursuant to

the *FLA*, I adopt the following statement by Zisman J. in *Graves v. Defelice*, 2015 ONCJ 162, [2015] O.J. No. 1471, at para. 32, as follows:

As this is a motion for temporary spousal support, the relevant applicable principles to be applied are as follows:

a) temporary support is to provide income for the dependent spouse from the time the proceedings were instituted until trial. It should only be ordered when a *prima facie* case for entitlement has been made out;

b) on a temporary support motion, needs of the dependent spouse and the ability of the other spouse to pay support take on greater significance than the need to achieve self-sufficiency;

c) the court need not conduct a complete inquiry into all aspects and details to determine what extent either party suffered an economic advantage or disadvantage as a result of the relationship. That is to be left for the trial judge;

d) temporary support is a holding order to maintain the accustomed lifestyle if possible pending final disposition as long as the claimant is able to present a triable case for economic disadvantage;

e) temporary support is to be based on the parties' means and needs, assuming that a triable issue exists. The merits of the case in its entirety must wait a final hearing; and

f) temporary support should be ordered within the Spousal Support Advisory Guidelines ("SSAG") range unless exceptional circumstances dictate otherwise.

[40] Similar principles were adopted in the Superior Court of Justice in *Nicholson v. Nicholson*, 2016 ONSC 5573, [2016] O.J. No. 4631, in the context of an application under the *Divorce Act*. I accept the statement by Sutherland J. at para. 23 of *Nicholson* that in setting an amount of temporary spousal support the court at best "achieves a form of rough justice".

- [41] In the present case, I find that Jeffrey has a *prima facie* case for entitlement to spousal support. I find that McNab and Jeffrey had a long-term interdependent relationship. I accept that the evidentiary foundation for the spousal support claim is in dispute, but I find that a detailed analysis of the claim at this stage is not appropriate. A complete analysis of the spousal support claim is the purview of the trial judge.
- [42] At this stage there is evidence that could provide the basis for a finding that the parties acted through a joint family venture, or that Jeffrey contributed to McNab's businesses to her detriment, or that Jeffrey operated her own businesses so as to permit McNab to develop a lucrative patient transfer business, or that Jeffrey suffered an economic disadvantage arising out of the relationship. Any of these findings would support a claim for spousal support.
- [43] Further, for reasons set out hereinafter, I find that Jeffrey has an immediate need for support, and that McNab has the means to pay spousal support.
- [44] Jeffrey's current income is from the cattery business. In 2017 the sales associated with this business were approximately \$21,400, and the expenses were approximately \$16,900, leaving a net income of less than \$5,000. Given that the business is being run out of the NOTL property, many of these expenses should be added back in order to establish Jeffrey's current income for support purposes. In that respect, I accept the suggestion by counsel for Jeffrey that I should find Jeffrey's income to be approximately \$20,000 per year for support purposes.
- [45] Jeffrey continues to reside in the NOTL property. The basic expenses for the NOTL property are approximately \$4,443 per month, including utilities, taxes, insurance, and mortgage, as set out in Jeffrey's financial statement. To date those expenses have been paid by McNab as a form of temporary spousal support.
- [46] Given the lifestyle that McNab and Jeffrey enjoyed when they were together, Jeffrey's ongoing living expenses, and the evidence that Jeffrey has borrowed large sums of money to pay her expenses since the separation, I find that Jeffrey has a need for temporary spousal support.
- [47] Regarding McNab's means to pay spousal support, McNab estimates that his 2017 income will be approximately \$50,000. He states that he does not earn an income from either CTG or 193, but he has some income from consulting fees. He may also have a small income from Safe Group. Therefore, counsel for McNab submits that McNab does not have the means to pay any spousal support.
- [48] In support of his submissions, McNab relies upon his 2015 and 2016 income tax returns.

The 2015 income tax return shows that McNab's income was approximately \$405,000, but this income was comprised entirely of the taxable portion of the capital gain created by the sale of Niagara Patient Transfer. McNab showed no other income for 2015.

- [49] The 2016 income tax return shows a small amount of income, approximately \$6,700, from Safe Group, plus approximately \$55,000 that was paid to McNab as a taxable dividend by one of the Niagara Patient Transfer businesses. McNab has deposed that he did not actually receive any dividend income in 2016, and that the amount shown in his tax return was a reference to a paper transaction that accounted for the repayment of a previous shareholder loan.
- [50] Regarding McNab's interests in CTG and 193, the corporate financial statements show a net loss for both corporations, although that fact is not entirely clear with respect to 193. McNab's counsel in submissions relies on the principle that McNab should not be required to encroach on capital for the purpose of paying spousal support.
- [51] In the circumstances of this case I do not accept McNab's submission that he should not be required to pay spousal support. McNab's most significant assets are his interests in CTG and 193. Based on the financial statements, both corporations are financially healthy. CTG had revenue of approximately \$856,655 in 2017, and its revenue is increasing from year to year. It had a paper loss of approximately \$1,300,000 in 2016, but this loss was reduced to approximately \$280,000 in 2017. I have limited information about 193, but it appears as if 193 owned assets valued at approximately \$4,600,000 as of 2016, including real estate of \$1,200,000.
- [52] It is important to recognize that prior to the separation McNab owned an asset, Niagara Patient Transfer, that had a value of approximately \$5,600,000. That asset had been used to generate a substantial income for the parties. At approximately the time of separation McNab sold this income-generating asset, retained all the proceeds of sale, invested the proceeds into his own corporations, and then organized his affairs so that the corporations did not generate an income.
- [53] This "capitalization" of the parties' primary income generating asset cannot be used as a way for McNab to avoid paying spousal support to Jeffrey. That is, McNab cannot claim that he has no income for support by reason of the fact that he has converted an income generating asset into a non-income generating asset.
- [54] The difficult issue is determining the amount of income that should be imputed to McNab for support purposes. I find that he has a small income from Safe Group and some income from consulting fees, but he is not using the bulk of his assets to generate a personal income. Considering McNab's support obligations, McNab's business assets

should be directed toward generating an income.

- [55] One approach is to consider that McNab received a net sum of approximately \$4,100,000 from the sale of the assets, and that he could have invested that money into a relatively conservative investment vehicle that would have provided a steady income. Given that McNab is now in the mortgage business, a return of five per cent per year on these funds is not unreasonable. This approach would result in annual income of over \$200,000.
- [56] Another approach is to consider the internal appreciation in the value of CTG and 193. The financial statements of 193 show a healthy corporation that has significant real estate/mortgage investments. In addition, the 193 financial statements show an account receivable from CTG that in 2016 was approximately \$2,851,000. However, the 2017 CTG financial statements show that in 2017 CTG paid down its debt to 193 by approximately \$215,000. This indicates that in 2017 CTG was able to improve its profitability, and, at the same time, pay out \$215,000 to a corporation that is controlled by McNab.
- [57] Both these approaches suggest that McNab could use his business assets to earn over \$200,000 per year. In addition, McNab also has his income from Safe Group and from consulting fees. Further, some of the expenses of Safe Group and some of McNab's personal expenses that were paid by his corporations should be added to McNab's income for support purposes. For these reasons, I find that McNab's income for temporary support purposes is \$250,000 per year.
- [58] Based on the above-mentioned figures, temporary spousal support should be in the range of approximately \$4,500 per month. If McNab paid all of the household expenses for the NOTL property, using Jeffrey's estimated figures, Jeffrey would receive a benefit of approximately \$882 per month for her utilities expenses, and each of the parties would receive a benefit of approximately \$1,810, being one half of the mortgage, taxes and insurance expenses. Thus, if McNab paid spousal support of \$2,000 per month plus the household expenses, Jeffrey would receive a benefit of approximately \$4,692 per month. This figure would be reduced if the parties renegotiated the mortgage to include a more conventional amortization period, as requested by McNab.
- [59] For these reasons, I find that an order that McNab pay temporary spousal support of \$2,000 per month plus pay all of the household expenses regarding the NOTL property is reasonable. Further, I accept that it is reasonable for the parties to arrange a more conventional amortization period for the mortgage. In my view, a temporary spousal support order on these terms would achieve a form of rough justice.

[60] Accordingly, on both alternative grounds, I find that Jeffrey is entitled to temporary spousal support as requested. Considering that I have found that the December 2016 agreement has not expired, I find that the portion of the spousal support order that requires the payment of \$2,000 per month should be retroactive to March 15, 2017.

[61] Therefore, it is ordered:

1. The respondent shall pay to the applicant a lump sum of \$26,000 representing temporary without prejudice spousal support arrears of \$2,000 per month for support payable on the 15th day of each month from March 15, 2017 to March 15, 2018, inclusive.

2. Commencing on April 15, 2018 and on the 15th day of each month thereafter the respondent shall pay to the applicant temporary without prejudice spousal support of

\$2,000 per month, plus the respondent shall pay the household expenses of the NOTL property consisting of the mortgage, property taxes, property insurance, water bill, heat/gas bill, electric bill, cable satellite bill, and internet satellite bill.

3. The applicant shall co-operate with the respondent and facilitate the immediate renegotiation of the terms of the mortgage on the NOTL property so as to increase the amortization period with a view to minimizing the monthly payments.

THE NON-DISSIPATION ORDER

[62] As with the submission for spousal support, counsel for Jeffrey submits that the parties agreed to a non-dissipation order as a term of the adjournment of the long motion. I find that in December 2016 the parties agreed that McNab would provide notice if he intended to dispose of any assets. That is, I find that the parties did not agree to a true non-dissipation order; at best they agreed to a precursor to a non-dissipation order. Therefore, I am prepared to consider this request afresh.

[63] Based on the present circumstances in this case, counsel for Jeffrey submits that there should be a non-dissipation order pursuant to s. 40 of the *FLA* in order to protect Jeffrey's claim for lump-sum support. In the alternative, counsel submits that a non-dissipation order may be made to protect Jeffrey's claim for a remedy in the context of her unjust enrichment claim arising out of a joint family venture.

[64] I find that the test for a non-dissipation order pursuant to s. 40 of the *FLA* for the purpose of protecting a claim for support under Part III of the *FLA* is the test that would normally be applied with respect to a motion for an interim injunction.

[65] In *Price v. Price*, 2016 ONSC 728, [2016] O.J. No. 466, at para. 6, Timms J. summarized the principles regarding a motion for a non-dissipation order as follows:

The onus lies on the party asserting that a preservation order is necessary to protect his or her interests under Part I of the *FLA*, or that his or her claim for support under Part III of the Act would be impaired or defeated unless a preservation order was made,

... The correct standard is the same one to be applied when determining whether to grant an interim injunction:

1. Is there a serious issue to be tried?
2. Will the moving party suffer irreparable harm if relief is not granted?
and
3. Which party will suffer the greater harm from granting or refusing the remedy pending a decision of the merits?

[66] Regarding the proposed alternate ground for the granting of a non-dissipation order, I accept that Jeffrey does not have a claim under Part I of the *FLA*, and therefore s. 12 of the *FLA* does not apply. However, I find that for the purposes of a non-dissipation order, a claim for a remedy in the context of an unjust enrichment claim is analogous to a claim for an equalization payment pursuant to Part I of the *FLA*. The same principles apply. Accordingly, although Part I of the *FLA* does not apply, the same test as discussed in the *Price* case applies to this alternate ground.

[67] On the facts of the present case I find that all three aspects of the test favour Jeffrey's request for a non-dissipation order. Specifically, I find that there is a serious issue to be tried. Jeffrey has provided evidence that could support findings that there was a joint family venture, and/or that there is a valid unjust enrichment claim. If those findings are made at trial, the trial judge may award monetary damages to Jeffrey or may make a declaration that Jeffrey is entitled to an interest in McNab's assets. Moreover, Jeffrey has a strong case for spousal support given her evidence that she worked in McNab's businesses and/or made non-monetary contributions to the business ventures.

[68] Regarding the second factor, I find that there would be irreparable harm to Jeffrey if McNab were permitted to liquidate and dispose of all of his assets. One potential remedy at trial is for the trial judge to award Jeffrey an interest in McNab's assets by way of a constructive trust. Another potential remedy is an order that McNab's assets would act as security for lump sum or retroactive spousal support. These orders could not be made if the assets had been dissipated.

[69] Finally, the balance of convenience favours Jeffrey's request. There is no compelling reason for McNab to sell his business assets. McNab has funnelled most of his funds into two corporations, both of which continue to operate and grow. McNab has no immediate plans to sell the assets of these corporations except in the ordinary course of business. Of course, McNab will be permitted to carry on the ordinary business of these corporations. In my view, the protection of Jeffrey's claim far outweighs the remote possibility that McNab may wish to sell his corporations.

[70] In addition, there are many other corporations that still exist in which McNab has an ownership interest. Full disclosure has yet to be made of some of these corporations. Therefore, my order today will apply to restrain McNab and all of his corporations from disposing of assets outside of the usual course of business.

[71] **For these reasons, it is ordered:**

4. The respondent and the following corporations shall be restrained from disposing of any assets outside of the usual and ordinary course of business: 2314815 Ontario Inc., 2269284 Ontario Inc., 2273671 Ontario Inc., 760614 Ontario Inc., 1938484 Ontario Inc., 1635446 Ontario LTD, Community Transport Group Inc., Niagara Patient Transfer Inc., 2462876 Ontario Inc., Community Patient Transfer Group Inc., Sports Medic Windsor Inc., 2509094 Ontario Inc., and Safe Group.

FURTHER DISCLOSURE FROM MCNAB

[72] Jeffrey retained Kalex to provide a valuation of McNab's businesses and to determine his ability to pay support. In order to conduct its investigation, Kalex has written several letters requesting specific disclosure from McNab. In the December 2016 agreement between the parties McNab agreed to provide the requested disclosure within 30 days.

[73] Although McNab has provided some of the requested disclosure, a significant amount remains outstanding. Further, based on Kalex's review of the materials provided, Kalex has made subsequent requests, all of which are summarized in the Kalex letter of April 8, 2018.

[74] In my view the spousal support claim and the unjust enrichment claim are both very complex. McNab and Jeffrey operated several businesses through a web of interconnected corporations. The opinion of an expert will be essential to the prosecution of the claim. Nothing short of full and complete disclosure is warranted.

[75] Therefore, it is ordered that:

5. Within 45 days of the date of this decision the respondent shall answer the request for

disclosure from Kalex Valuations Inc. as set out in the Kalex letter dated April 8, 2018, attached as Schedule A to this decision.

6. For the purposes of this disclosure, the parties and Kalex shall execute a confidentiality agreement in a form that is acceptable to the parties.

THE NIAGARA-ON-THE-LAKE PROPERTY

[76] The NOTL property is owned in joint tenancy by McNab and Jeffrey. There is a dispute about the value of the property, but the evidence suggests it is worth \$700,000 to \$950,000. It is subject to one mortgage in the approximate amount of \$180,000.

[77] As a co-owner of the NOTL property McNab correctly claims that he has a right, pursuant to the *Partition Act*, R.S.O. 1990, c. P.4, to compel the sale of the property so that he may realize his interest in the property. In response, Jeffrey claims that the sale of the property

would cause a hardship for her because she has modified the NOTL property to accommodate her cattery business.

[78] Section 2 of the *Partition Act*, reads in part:

All joint tenants, tenants in common, and ... all parties interested in, to or out of, any land in Ontario, may be compelled to make or suffer partition or sale of the land, ... whether the estate is legal and equitable or equitable only.

[79] This section of the *Partition Act* gives a joint tenant a *prima facie* right to compel partition or sale. This is a fundamental right that flows from the joint tenancy, and the other joint tenant has a corresponding obligation to permit that partition or sale. See *Davis v. Davis*, [1954] O.R. 23 (OCA).

[80] Therefore, the court is required to compel a partition or sale if no sufficient reason can be shown why such an order should not be made. The onus to show that the court should exercise its discretion to refuse an application for a partition or sale order rests with the party opposing the application.

[81] In *Latcham v. Latcham* (2002), 27 R.F.L. (5th) 358, the Ontario Court of Appeal (“OCA”) confirmed that the discretion of the court to refuse an order for the partition or sale of jointly held property was confined to a narrow standard. In order to engage the court’s discretion to refuse partition or sale under the *Partition Act* the opposing party was required to show evidence of malicious, vexatious or oppressive conduct.

[82] In *Greenbanktree Power Corp. v. Coinamatic Canada Inc.* (2004), 75 O.R. (3d) 478, the

OCA confirmed the narrow standard for the exercise of the court's discretion, but stated at para. 2:

“In our view, "oppression" properly includes hardship, and a judge can refuse partition and sale because hardship to the co-tenant resisting the application would be of such a nature as to amount to oppression.”

[83] Jeffrey's allegation of hardship is that she operates her cattery business out of the NOTL property, and that she has renovated the freestanding garage and the basement on the NOTL property in order to accommodate the business. Both of these areas of the property now contain multiple cages and enclosed areas that are used to house, breed, and treat the cats.

[84] In addition, Jeffrey has an extra furnace in the basement to provide warmth for the kittens, and she has installed synthetic flooring in the garage and the basement to protect the floors and the lower parts of the walls from cat urine. Further, Jeffrey deposes that any move from the NOTL property would be upsetting for the cats and could interfere with her ability to

breed the cats.

[85] Although I have some sympathy for Jeffrey's position, I find that a partition and sale of the NOTL property would not constitute a hardship to Jeffrey that amounts to oppression. I accept that any change of residence or business location can be difficult. I also accept that moving the location of a breeding business may have unique difficulties. However, difficulties do not amount to oppression.

[86] In the present case I find that the cages, breeding areas, and play areas can all be easily moved, or reconstructed at a new location. The synthetic flooring may be problematic to move, but a similar floor can be installed at a new place of business. I do not accept that the temperament of the cats is a compelling reason to refuse McNab's request for a sale of the property.

[87] Moreover, I find that any hardship that may be caused by the sale of this property has arisen in part because Jeffrey changed her focus after the commencement of these proceedings. In the initial exchange of material McNab served a notice of motion, returnable in December 2016, in which he requested that the NOTL property be sold. In her initial material Jeffrey deposed that she was not operating her cattery business full-time and that the future prospects of that business were very uncertain. Further, Jeffrey deposed that she planned to become involved in the real estate business or the operation of a franchise. Thus, I accept that it has only been since sometime after December 2016 that Jeffrey decided to invest more time and money into the cattery business. This

investment was done during a period in which she knew that McNab, a joint tenant, was requesting a sale of the NOTL property.

[88] Under the circumstances I will grant McNab's request for partition and sale of the NOTL property. I am also prepared to delay the sale somewhat in order to permit Jeffrey to find an alternative location for her cattery and to renovate that location if necessary.

[89] For these reasons it is ordered:

7. The property known as 1220 Line 3, Niagara-on-the-Lake, Ontario, shall be listed for sale on or before August 1, 2018, with a real estate agent agreed upon by the parties at a price recommended by the listing agent. If the parties are unable to agree on the listing agent, the issue may be determined by the court.

8. To effect the sale, the applicant shall follow the recommendations of the listing agent in order to optimize the positive presentation of the property, keep the property in a clean and tidy condition, and make the property available for showings as requested by the listing agent.

THE FLORIDA PROPERTY

[90] The *Partition Act* only applies to property that is situated Ontario. Specifically, both s. 2 and s. 3 of the Act refer to "land in Ontario." Therefore, this court has no jurisdiction to order partition and sale of the Florida property. This request by McNab is dismissed.

FURTHER DISCLOSURE FROM JEFFREY

[91] McNab requests further and better disclosure from Jeffrey as set out in a schedule to his amended notice of motion. As discussed earlier, full and complete disclosure is essential in this case. However, some of the requests in McNab's schedule amount to requests for particulars, or should be the subject of questioning. Accordingly, I have revised McNab's schedule and created a list of the disclosure that should be made by Jeffrey, which I have titled Schedule B.

[92] Therefore, it is ordered that:

9. Within 45 days of the date of this decision the applicant shall provide disclosure to the respondent as set out in the Disclosure from Applicant, attached as Schedule B to this decision.

CONCLUSION

[93] There will be an order in accordance with the reasons set out herein.

[94] If there are any issues arising out of this decision, including costs, I direct that the party seeking relief shall deliver written submissions to the trial coordinator at St. Catharines within 14 days of the release of this decision with responding submissions to be delivered within 10 days thereafter. If no submissions are received within this timeframe, the parties will be deemed to have settled all of the remaining issues as between themselves.

J.R. Henderson J.

Released: April 26, 2018

SCHEDULE A



Kalex Valuations Inc.
133 Lowther Avenue
Toronto, ON M5R 1E4
T 416-488-9590
F 416-488-2591
www.kalexvaluations.com

April 8, 2018

Private and Confidential

Lisa Jeffrey
c/o James D. Singer, Barrister & Solicitor
8901 Woodbine Avenue, Suite 219
Markham, ON
L3R 9Y4

Dear Mr. Singer:

Re: Jeffrey and McNab Matrimonial

Kalex Valuations Inc. has been engaged, as independent valuers and accountants, by your client, Lisa Jeffrey, to undertake the following engagements:

- a) Estimate the fair market value of the Business Interests of Casey McNab as at June 29, 2015 (the "Valuation Date");
- b) Calculate the income for support purposes of Mr. McNab for 2013 to date.

I have been advised that our analysis will be used to assist with family law proceedings involving Ms. Jeffrey and Mr. McNab who were separated on June 29, 2015 after co-habiting since approximately January 2001. (I note that according to Mr. McNab, the separation date of the parties is June 11, 2015.)

Prior to August 9, 2016, I was provided certain documentation as outlined in my August 9, 2016 letter. On November 29, 2016, I was provided with three volumes of documents from the offices of Niman Gelgoot ("NG"). Based on my review of those documents, I prepared an updated request letter dated December 9, 2016. Since December 9, 2016, I received certain documentation and,



based upon my review of that material, I prepared an updated request letter dated January 23, 2018. Since the date of that letter, I received a letter dated March 1, 2018 from NG which contained attachments responding to certain of my outstanding requests (the "March 2018 NG Letter").

Based on my review of the March 2018 NG Letter, I have revised my January 23, 2018 letter below to reflect which of the requests have been satisfied. I have retained the numerical sequencing of requests in those letters and inserted follow up comments after the original requests in **[bold]**. Upon receipt and review of the items listed below, I anticipate having further requests and queries, which I will forward to you at that time.

Given that we are currently in April 2018, certain additional documentation that is not specified below (e.g., current financial statements of the Business Interests, Mr. McNab's 2017 income tax return, Mr. McNab's tax slips, etc.) is, or will be, available shortly. (You have asked that I not update the requests in my January 23, 2018 letter, but simply remove those items that are now satisfied.) However, as stated in my January 23, 2018 letter, I require ongoing and current financial and other information.

2. Financial statements for the last five fiscal years (or since inception if established within five years) to date for the following entities:
 - d) 1635446 Ontario Ltd. ("1635446"); **[outstanding for November 30, 2013 to 2015 – According to the July 2017 NG Letter, "[t]he financial statements for 2013, 2014, and 2015 are in the process of being completed and will be provided upon receipt..." This was also stated in the letter dated November 28, 2016 from NG (the "November 2016 NG Letter"). I still have not received the fiscal 2013 to 2015 financial statements or any subsequent financial statements. It is unclear as to why these financial statements, which are outdated by more than two and four years, have not yet been completed, particularly in light of the fact that this company received proceeds from the June 2015 sale of assets to Spectrum Patient Services LP and presumably had resulting income tax obligations.]**
 - l) 2509094 Ontario Inc. o/a Niagara Fitness and Rehabilitation ("2509094"); **[outstanding – According to the April 2017 NG Letter, "Mr. McNab advises that 2509094 Ontario Inc. o/a Niagara Fitness Rehabilitation was started in March 2016 and does not have a year end". By March 2017, this company would have completed a year end. I have not received financial statements for the year ended February 2017 or any subsequent period.]**

3. Documentation showing the share ownership of the Business Interests including Minute Books. [outstanding for 1635446 and 2509094]
4. Corporate income tax returns of each of the Business Interests for fiscal 2015. [outstanding for 1635446, Community Patient Transfer Group Inc./2314815 Ontario Inc. ("CPTGI") and Sports Medic Windsor Inc./2273671 Ontario Inc. ("SMWI"). According to the July 2017 NG Letter, "[t]he 2015 income tax returns for 2509094 Ontario Inc. and 1635446 Ontario Inc. are not yet completed and will be provided upon receipt." There was a similar statement in the April 2017 NG Letter. The March 2018 NG Letter states that the "2015 corporate income tax returns for CPTGI and SMWI were provided in Mr. McNab's disclosure brief on November 28, 2016". However, Mr. McNab's November 28, 2016 disclosure brief contained the fiscal 2016 corporate income tax returns of CPTGI and SMWI not the fiscal 2015 returns. The November 2016 NG Letter contains a chart entitled "Response to Information Request from Melanie Russell, dated August 9, 2016", which specifically states that the fiscal 2016 tax returns were provided. Accordingly, the fiscal 2015 returns of these two companies remain outstanding.]
5. T4 slips and summary document of each of the Business Interests for 2013 to 2015. [T4 slips of 1635446 and Mutts and Frutts for 2014 and 2015, as well as any other entity other than Niagara Patient Transfer, CPTGI and SMWI.]
6. Schedule 6.4 to the Agreement. [outstanding]
7. Closing documents relating to the sale in July 2015. [outstanding]
8. EY's report provided on May 19, 2015. [outstanding]
9. EY's EBITDA calculations pursuant to the Agreement. [outstanding]
10. Working capital calculations pursuant to the Agreement. [outstanding]
12. Financial statements provided to Spectrum pursuant to the Agreement (e.g., for the quarter ended January 31, 2015). [outstanding]
14. Detailed General Ledger/Detailed Trial Balance of each of the Business Interests for the last five fiscal years (or since inception if established within five years) and for the interim fiscal year to date. This document (whatever the name in the system) should detail each transaction in the relevant company's accounting records. (Note that upon receipt and review of these documents, I may require access to supporting documentation for individual transactions.) [outstanding –



NG provided Trial Balances for certain entities only, and not Detailed General Ledgers/Detailed Trial Balances. The documents provided by NG are summary documents only; as per my original request, I require the Detailed General Ledgers/Detailed Trial Balances (or whatever the document is called in the accounting system used by the Business Interests) which shows the details of every transaction in every account for each period. According to the July 2017 NG Letter, "Mr. McNab advises that the 2015 general ledger and trial balance data for 2314815 Ontario Inc, 2269284 Ontario Inc, and 227361 Ontario Inc can be found on the 2016 trial balance sheets." This is not the case; as mentioned previously, the "sheets" provided are summary schedules only and do not provide any detail which I requested commencing in my August 9, 2016 request letter.]

15. Detailed composition, by entity/individual, of all related/associated/affiliated party/entity accounts and balances of each of the Business Interests for the last five fiscal years (or since inception if established within five years) and for the interim fiscal year to date. **[outstanding – This request will likely be addressed once the correct Detailed General Ledgers/Detailed Trial Balances for the Business Interests are provided as requested in #14 above.]**
16. Any customer contracts for each of the Business Interests for fiscal 2015 and fiscal 2016 to date (beyond those listed in Schedule 2.1(d) of the Agreement). **[outstanding]**
18. Detailed composition, by recipient, of the following accounts of Casey McNab (per Form T776E in his personal income tax returns) for calendar 2013 to 2015. Include supporting documentation (e.g., invoices, receipts, cancelled cheques, credit card statements). **[outstanding – wording of item clarified as requested by NG]**
 - a) interest;
 - b) property taxes;
 - c) maintenance and repairs.
19. Detailed composition, by recipient, of the following accounts of Casey McNab (per Form T2125E in his personal income tax returns) for calendar 2013 to 2015. Include supporting documentation (e.g., invoices, receipts, cancelled cheques, credit card statements). **[outstanding – wording of item clarified as requested by NG]**
 - a) purchases;
 - b) other costs.



21. All applications for credit made by the Business Interests from 2012 to date. **[outstanding. The March 2018 NG Letter stated that “Mr. McNab advises that he has not made any personal loan applications since 2012, but did not respond to the portion of the request relating to his Business Interests.]**
22. Statements for all of the following accounts (regardless of currency) in Mr. McNab’s name, used by him, used by or on behalf of him, his family or any other related/associated/affiliated parties, or for which he has signing authority for 2013 to date (including personal and business accounts). (Note that upon receipt and review of these statements, I may require access to supporting documentation for individual transactions.)
 - f) casino player cards and related records. **[outstanding]**
23. Credit card statements in the name of any of the Business Interests from 2011 to date. (Note that upon receipt and review of these statements, I may require access to supporting documentation for individual transactions.) **[outstanding – The March 2018 NG Letter states that since the “sale of his patient transfer business in June 2015, he no longer has any business or corporate credit cards. Instead, he uses his personal credit cards for business expenses.” Therefore, the personal credit cards of Mr. McNab (and supporting documentation) remain outstanding, which are also covered in #31 below.]**
25. Reconciliation of Mr. McNab’s income per his Form 13.1 of \$68,154 to his expenses of \$91,012. In particular, how was the deficiency covered? Please provide supporting documentation for the deficiency, which I assume relates to calendar 2015. **[outstanding – according to NG, “Mr. McNab advises that he used his capital to fund his expenses”. Our request included supporting documentation to evidence the deficiency, which has not been provided to us.]**

Additional Requests Based on Review to Date and Due to the Passage of Time

26. What is the nature of 1635446’s investment asset (\$2,625 at November 30, 2011 and 2012)? Provide supporting documentation for the nature and value of this asset. **[outstanding]**
27. Financial statements of each of the Business Interests for the 2016 and 2017 fiscal years. **[partially outstanding – financial statements of 1938484 Ontario Inc. (“1938484”) and Sports Medic Inc./760614 Ontario Inc. (“SMI”) for the year ended December 31, 2017 remain outstanding, as do financial statements of SMWI, CPTGI and Niagara Patient Transfer Inc./269284 Ontario Inc. (“269284”) for the year ended January 31, 2018. According to the March 2018 NG Letter, “Mr. McNab advises that the financial statements for the 2017 fiscal year”, which I believe includes the January 31, 2018 fiscal**



year for the three companies, “will not be completed until mid-2018. These will be provided upon receipt.” I would have anticipated that internal financial statements for the December 31, 2017/January 31, 2018 fiscal years would be available given that it is now April 2018.]

28. Corporate income tax returns of each of the Business Interests for the 2016 and 2017 fiscal years. [partially outstanding – for the same periods as outlined in #27 above.]
29. Detailed General Ledger/Detailed Trial Balance of each of the Business Interests for the 2016 and 2017 fiscal years. [outstanding – note that certain companies have a December 31 year-end and others have a January 31 year-end. The requested GLs/TBs relate to the matching period to the financial statements in #27 above.]
30. Detailed composition, by entity/individual, of all related/associated/affiliated party/entity accounts and balances of each of the Business Interests for the 2016 and 2017 fiscal years. [outstanding]
31. Statements for all of the following accounts (regardless of currency) in Mr. McNab’s name, used by him, used by or on behalf of him, his family or any other related/associated/affiliated parties, or for which he has signing authority to date (including personal and business accounts) since those provided up until the July 2017 NG Letter. (Note that upon receipt and review of these statements, I may require access to supporting documentation for individual transactions.) [outstanding]
 - a) credit card;
 - b) bank;
 - c) investment (including transaction detail);
 - d) RRSP;
 - e) loan/line of credit;
 - f) casino player cards and related records.
32. T4 slips and summary document of each of the Business Interests for 2016 and 2017. [outstanding]
34. Notices of Assessment and Reassessment for Mr. McNab’s 2013 personal income tax return. [outstanding]
35. Information and supporting documentation regarding Mr. McNab’s income for 2017. [outstanding]



36. Any customer contracts for each of the Business Interests for fiscal 2017. **[I have been advised that through the litigation process, the signed agreement with the Town of Niagara-on-the-Lake was served as part of Mr. McNab's Affidavit dated April 2018.]**
37. Detailed composition, by recipient, of the expenses of Casey McNab (per Forms T776E and T2125E in his personal income tax returns) for calendar 2016 and 2017 (when his expenses are known for 2017). **[outstanding]**
38. Tax and other planning memoranda and documentation relating to the June 2015 sale to Spectrum Patient Services LP, which would have been prepared by MNP LLP and DLA Piper. For example, 2452876 Ontario Inc. received \$2,918,191 of the proceeds on the sale but did not record any gain on the sale and, according to the April 2017 NG Letter, "was amalgamated into 1938484 Ontario Inc. on June 29, 2015". Although the April 2017 NG Letter further states that "[w]e are advised that there are no other financial statements", it is not clear to me how this company could have been a vendor pursuant to the May 19, 2015 Asset Purchase Agreement without having financial statements other than a balance sheet at June 28, 2015. I require clarification on this issue. **[outstanding]**
39. Tracing of 2462876 Ontario Inc.'s \$2,918,202 cash (at June 28, 2015) and \$480,980 holdback that was received in cash on 12/29/2015 in relation to the Spectrum transaction. Include copies of all tax and other planning memoranda and documentation. **[outstanding]**
40. Tracing of 1938484 Ontario Inc.'s cash and \$382,100 that was received in cash on 1/14/2016 in relation to the Spectrum transaction. Include copies of all tax and other planning memoranda and documentation. **[outstanding]**
41. Bank statements of (a) 2462876 Ontario Inc. and (b) 1938484 Ontario Inc. for the 2015 to date. **[outstanding]**
43. Details of any aircraft owned by Mr. McNab's business interests, and documents evidencing the values thereof. **[outstanding]**
44. Explanation as to why Mr. McNab reported a capital gain in 2015 in relation to the sale of his shares of 2462876 of \$813,600 whereas the balance sheet of 2462876 at June 28, 2015 shows a share redemption of \$813,600. Include copies of all tax and other planning memoranda and documentation. **[outstanding]**



Please feel free to contact me with any questions.

Yours very truly,

KALEX VALUATIONS INC.

A handwritten signature in cursive script that reads "Melanie E. Russell".

Melanie E. Russell, CPA, CA, CBV, CIM, CFE, CFF, ABV

SCHEDULE B

1. A copy of monthly statements for all bank accounts in the applicant's name, alone or joint, held on her behalf, or which she has access, from July 2016 to present.
2. A copy of monthly statements for all mortgages, credit cards or line or credit accounts, in the applicant's name, alone or joint from July 2016 to present.
3. A copy of all credit and lending applications the applicant has submitted to all financial institutions for credit and/or entity for borrowing of any kind since June 2013.
4. Documentary evidence of the \$103,121.60 loan that the applicant claims to have received from family and friends since separation, particularly the \$92,597.60 she claims to have received from her boyfriend, Rainer Hummel.
5. Documentation of all financial contributions the applicant claims to have made to the purchase, carrying costs, improvements or repairs in relation to the home located at 1220 Line 3, Niagara-on-the-Lake, Ontario.
6. Documentation of all financial contributions the applicant claims to have made to the purchase, carrying costs, improvements or repairs in relation to the home located at 1230 Lakeshore Drive, Mount Dora, Florida.
7. A copy of the applicant's complete 2016 Income Tax Return, including all schedules.
8. A copy of the applicant's 2016 and 2017 Notice of Assessment, when available.
9. A copy of the applicant's complete 2017 Income Tax Return, including all schedules, when available.
10. A copy of the 2017 Statement of business/professional activities for Cattery & Kennel.
11. Documentation of all expenses related to the Cattery & Kennel operated by the applicant in 2016 and 2017.
12. Documentary evidence of the \$35,847.60 loan she claims to have received from a personal friend in 2017 to purchase two new breeding cats.
13. Documentation of the applicant's kitten and cat sales since June 2015.

CITATION: Jeffrey v. McNab, 2018 ONSC 2635

COURT FILE NO.: 219/16

DATE: 2018/04/26

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Lisa Ann Jeffrey

Applicant

-and-

Casey Adam McNab

Respondent

DECISION ON MOTION

J.R. Henderson J.

Released: April 26, 2018