Date: 20011221
Docket: CA173985

NOVA SCOTIA COURT OF APPEAL

[Cite as: *Schaffner v. Schaffner*, 2001 NSCA 185]

Bateman, Flinn and Hamilton, JJ.A.

BETWEEN:

BRIAN ROSS SCHAFFNER

Appellant

- and -

WANDA LEIGH JO-ANNE SCHAFFNER

Respondent

REASONS FOR JUDGMENT

Counsel: Allen C. Fownes, for the appellant
The respondent in person

Appeal Heard: December 13, 2001

Judgment Delivered: December 21, 2001

THE COURT: The appeal is allowed, per reasons for judgment of Hamilton, J.A.; Bateman and Flinn, JJ.A., concurring.

Hamilton, J.A.:

[1] This is an appeal from a decision of Justice Hiram J. Carver dated June 20, 2001 and a corollary relief judgment dated August 17, 2001.

[2] The parties first appeared before the trial judge on August 23, 2000, unrepresented. They had previously been divorced and apparently the resolution of the corollary relief was reserved pending further discussions and possible settlement between the parties. The parties' appearance on August 23, 2000 was in response to Mr. Schafffner's application to vary an interim consent order to have his daughter live with him and to vary child support.

[3] Unbeknownst to Mr. Schaffner, Mrs. Schaffner had written a letter to the court prior to August 23, asking that all corollary relief matters be dealt with at the hearing of Mr. Schaffner's application. The trial judge may not have been aware that Mr. Schaffner had no knowledge of Mrs. Schaffner's letter and hence no knowledge that the final division of matrimonial assets may be dealt with on August 23.

[4] Affidavits were filed with respect to Mr. Schaffner's application, but rather than a hearing where evidence is presented, there was discussion among Mr. Schaffner, Mrs. Schaffner and the trial judge about corollary relief issues and where their daughter would live, with the judge trying to determine what corollary relief issues were in dispute. There was no discussion with the appellant about whether he was prepared to deal with a final division of matrimonial assets at that time or about the consequences of his doing so.

[5] At the end of the discussion the trial judge suggested to the parties they retain a lawyer to draft a corollary relief judgment, as he apparently concluded that all corollary relief issues were agreed. This despite his earlier indication to Mr. Schaffner that the question of whom their daughter would live with, the only issue Mr. Schaffner knew would be dealt with on August 23, could be dealt with on an interim basis, when he stated:

> Well, can we leave it that it is agreed to just on an interim basis but don't tie anybody's hands, so when you come to the corollary relief which would be a little later then you can determine whether that's to be for good or for a term or for whatever you want to make it but I think if you leave it that you agree to it on an interim basis that she go with him and see how it works out.

[6] The transcript of the August 23rd appearance also indicates Mr. Schaffner expected a subsequent hearing to deal with the division of matrimonial assets, when he stated "...can the day to day care and control be transferred on the interim order until a hearing can be set down to deal with marital assets..." No order was agreed to by the parties following that appearance in court.

[7] On April 18, 2001, Mrs. Schaffner applied to have all corollary relief issues determined and to have Mr. Schaffner file financial information. On June 7, 2001 Mr. Schaffner applied seeking custody of his daughter and his son, child support and forgiveness of arrears of child support. Both applications were set to be heard together on June 20, 2001, but again there was no hearing and no evidence presented. Instead counsel for both parties met with the trial judge in chambers and settlement negotiations took place unsuccessfully. Following the discussions in chambers the matter moved into the courtroom where Mrs. Schaffner's counsel read into the record the terms of the corollary relief judgment his client wanted. Mr. Schaffner's counsel clearly indicated his client was not consenting to the proposed corollary relief judgment and objected to an order being made dealing with the corollary relief issues without a hearing since there was no agreement between the parties. He indicated he wished to present evidence and to conduct cross-examination.

[8] The trial judge indicated he would grant the corollary relief as read into the record by Mrs. Schaffner's counsel because it reflected the agreement he felt the parties came to when they appeared before him on August 23, 2000, with the addition of some "boiler plate". The trial judge declined to hear Mr. Schaffner's application with respect to custody and child support, suggesting it should be dealt with by another judge because he had so much knowledge about the case.

[9] It is this decision and consequent corollary relief judgment that is appealed.

[10] The powers of this court on appeal are set out in subsection 21(5) of the **Divorce Act**. This subsection provides that the court can dismiss the appeal, or allow the appeal and make the order that ought to have been made, including such order as it deems just, or order a new hearing where it deems it necessary to do so to correct a substantial wrong or miscarriage of justice.

[11] As set out in **Marshall v. Marshall**, [1998] N.S.J. No.172 (NSCA) at page 10:

In **Keddy v. Keddy** (1974), 8 N.S.R.(2d) 158 at page 167, Macdonald, J.A. listed the principles of appellate review in family matters as follows:

> The principles upon which an appellate court is justified in interfering with the exercise of the discretion of a primary tribunal are well known and have been stated in many cases. Shortly, they are - (1) if the primary Judge has acted upon a wrong principle of law; (2) if irrelevant considerations have been taken into account and have affected the decision; (3) if relevant considerations are ignored or not adequately weighed and have affected the decision; (4) if the appellate court is clearly satisfied that the order of the primary Judge has caused an injustice, i.e. that the order is one which is unreasonable or plainly unjust; (5) the appellate Court has no right to substitute its own discretion for that entrusted to the primary judge.

[12] As set out in the **Marshall** case, *supra*, an appeal ought to be allowed if the order of the primary judge caused an injustice. Here the order of the trial judge did cause an injustice. The injustice arises from the trial judge granting a corollary relief judgment based on comments made by Mr. Schaffner when he was unrepresented in court on August 23, 2000. He went to court expecting to deal with changes of his daughter's residence and child support and finds now all corollary relief issues have been determined based on that brief discussion in court. Mr. Schaffner had no notice the final division of matrimonial assets would be dealt with at that time. It is not clear from the record he understood that he was agreeing to a final division of matrimonial assets, consented to deal with this issue or understood the consequences of such consent. He was never given the opportunity of presenting his evidence to the court and having the court make a decision based on the evidence.

[13] For these reasons the appeal is allowed , the order of the trial judge set aside and a new hearing ordered before a different judge.

[14] Until disposition of these issues at the future hearing, the parties have agreed and we order, without prejudice to any future determination, that the daughter, Ashley Lynn Marie Schaffner, born September 21, 1987, continue to live with Mr. Schaffner and that the son, Logan Joseph Brian Schaffner, born April 27, 1992, continue to live with Mrs. Schaffner, and that the support in the amount of $328.00 per month continue to be paid by Mr. Schaffner to Mrs. Schaffner on the first day of each month until further order of the court.

Hamilton, J. A.

Concurred in:

Bateman, J.A

Flinn, J.A.