**NOVA SCOTIA COURT OF APPEAL**
**Citation:** ***Goyetche v. Goyetche***, 2007 NSCA 25

**Date:** 20070220
**Docket:** CA 268158
**Registry:** Halifax

**Between:**

Eileen Elizabeth Goyetche

Appellant

v.

David Thomas Goyetche

Respondent

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| **Judges:** | MacDonald, C.J.N.S.; Bateman and Hamilton, JJ.A. |
| **Appeal Heard:** | February 14, 2007, in Halifax, Nova Scotia |
| **Held:** | Appeal dismissed per reasons for judgment of Bateman, J.A.; MacDonald, C.J.N.S. and Hamilton, J.A. concurring. |
| **Counsel:** | Geoffrey C. Newton, for the appellant<br>Alain Bègin, for the respondent |

**Reasons for judgment**:

[1] Eileen Elizabeth Goyetche appealed from the Corollary Relief Judgment dated June 7, 2006, issued ancillary to divorce. At the conclusion of the hearing we dismissed the appeal with reasons to follow. These are the reasons:

**Background:**

[2] This dissolution of this short term marriage has a tortured legal history. This is the second time this matter has been before our Court. The decision resulting from the first appeal is reported as **Goyetche v. Goyetche** 2006 NSCA 24; [2006] N.S.J. No. 65 (Q.L.). On that appeal both parties were dissatisfied with the results of an earlier Corollary Relief Judgment (issued July 19, 2005). This Court found the procedure in arriving at that judgment was wanting and resulted in an injustice.

[3] The central issue at the first trial was the division of the matrimonial home. Mrs. Goyetche wanted to retain the home, which she had owned before marriage. It was unlikely she could do so without continued financial contribution from Mr. Goyetche. Scanlan, J. had ordered the sale of the home with equal division of the proceeds. He dealt, as well, with other items including ongoing spousal support and the division of personal effects. In view of the short duration of the marriage, Mr. Goyetche's spousal support obligation was to terminate on June 1, 2006. He was to continue to make the monthly mortgage payment but, upon sale, to receive reimbursement for those payments made after June 28, 2005. The single issue appealed was the disposition of the matrimonial home. We allowed the appeal on the following terms:

. . .

> (ii) temporarily vacate para. 1 Justice Scanlan's order dated July 19, 2005 so as to permit the parties a reasonable opportunity to make timely alternative arrangements to resolve the matters in issue, consensually, short of selling the matrimonial home. This might include, for example, Mrs. Goyetche arranging for a refinancing of her equity in the home in order to settle payment of Mr. Goyetche's interest. Should those efforts prove unsuccessful, para. 1 of Justice Scanlan's order will be restored and reactivated effective May 30, 2006, thereby authorizing the immediate sale of the matrimonial home without delay or impediment by either party (for clarity, that provision is reproduced herewith);

> 1. THAT the matrimonial home at 70 Guest Drive shall be put up for immediate sale. THAT Eileen Goyetche shall cooperate fully with the real estate agent for the purpose of permitting the real estate agent to prepare the home for listing, and Eileen Goyetche will further cooperate fully with the real estate agent for all showings.

(iii) direct that Mr. Goyetche's obligation to continue paying the mortgage on the matrimonial home shall continue, under this Order, only until the earlier of either the sale of the matrimonial home, or June 2, 2006 (being the day after the June mortgage payment is due). This provision does not, however, alter the legal responsibilities either party may have to the bank under their mortgage, for payment of the monthly mortgage amounts or the principal secured;

(iv) strike para. 8 of the said order (for clarity, that provision is reproduced herewith);

> 8. THAT subject to the previous paragraphs, the equity in the matrimonial home shall be divided equally between both parties after the payment of legal fees and real estate commission.

(v) direct that the case be remitted to the Supreme Court on an expedited basis for a rehearing and proper determination (should such a rehearing be necessary) based on these directions, which hearing should include a final determination on the apportionment of all assets of the parties;

(vi) direct that on any final division of assets the judge shall be at liberty but not obliged to include the value of the personal items already determined to belong to Mr. Goyetche, no appeal having been taken with respect to that allocation.

[4] If the parties were unable to settle and therefore a rehearing was necessary, the only issue remitted to the trial court was the disposition of the matrimonial home. It is from the rehearing that Mrs. Goyetche appeals.

[5] As noted above, this was a marriage of very short duration occurring relatively late in life. The parties married on August 18, 2001 but lived apart during the first eighteen months of marriage due to Mr. Goyetche's work commitments outside the province. They separated on July 15, 2004. They are each 65 years old. Mr. Goyetche retired in December 2002. His post retirement

income consisted of a monthly pension of about $2400 and US Social Security of $590.

[6] On the rehearing before Scanlan, J., the focus was, again, the division as between the parties of the equity in the home. As had been the case at the first hearing, the evidence about the value of the home was sketchy. Mrs. Goyetche owned the home well before the parties' marriage. At that time she was able to make ends meet from her sole source of income which was a monthly social assistance disability benefit. She lost that benefit on account of remarrying and had no other income. During the marriage the parties had undertaken renovations to the home - constructing a new garage and an addition; installing new kitchen cabinets, flooring and appliances. These initiatives were funded through a remortgaging, increasing the principle by $15,000, and cash injected from Mr. Goyetche's savings and pension income. There was no clear evidence of how much had been expended on the improvements.

[7] Upon separation Mr. Goyetche was ordered to pay spousal support of $800 monthly along with the monthly mortgage on the home which was about $500. As confirmed by this Court's order (at para. 3, above), Mr. Goyetche was to continue to pay the mortgage until June 2, 2006, unless the home was earlier sold. According to the first Corollary Relief Judgment, spousal support payments were to end with the payment on June 1, 2006. These aspects of that Corollary Relief Judgment were not appealed.

[8] On the re-hearing, as in the first hearing, there was no reliable evidence before the trial court on the value of the home prior to the renovations. This was clearly of concern to the judge. The mortgage balance before refinancing for the renovations was about $33,000. While the value of the house at that time was recited on the bank documents as $75,000, it was conceded by all that this was not an appraised value and probably significantly overstated the true value of the home.

[9] It was agreed by the parties on the re-hearing that, for division purposes, Mr. Goyetche would be taken to have contributed cash of $15,000 to the improvements to the home (in addition to the amount borrowed by the parties). From Mr. Goyetche's perspective, this was a concession on his part since he was the sole

breadwinner and the evidence indicated that he had contributed substantially more than that from income and savings.

[10] The appraised market value of the home at the time of the re-hearing was $68,000 with a balance on the mortgage of about $35,000. The judge thus found the equity to be $33,000.

[11] Mrs. Goyetche sought an unequal division of the house equity in her favour, with no share going to Mr. Goyetche.

[12] Prior to the first hearing the parties had each filed a Statement of Property setting out their respective assets. According to his Statement and the evidence at the re-hearing, Mr. Goyetche had financial assets located in the United States where he had worked from 1971 until his retirement in December 2002. At the time of marriage he had a $5000 annuity in Toledo, Ohio, to which he did not contribute during the marriage. He also had a $16,000 annuity in a bank in South Carolina related to his work with the plumbers and pipefitter's union. It appears to be subject to taxation if withdrawn. He last contributed to that annuity at the time of his retirement. In addition, he owns a piece of land in South Carolina which is currently listed for sale at $12,000. That land was owned before marriage and never used for any purpose by the parties while married.

[13] Mr. Goyetche owned a property in Brantford, Ontario which was sold in May 2001, prior to the parties' marriage that August. At the first hearing Mrs. Goyetche claimed a share of that property on the basis that she had attended with Mr. Goyetche at the home in the months leading up to the sale and prepared the property to be sold. The judge found that her contribution had been minimal and did not entitle her to a share of the sale proceeds. It was Mr. Goyetche's evidence that he cleared about five or six thousand dollars on that sale, which money was contributed to the parties' living expenses. Mrs. Goyetche believed he had made considerably more money and that she was entitled to a share for her efforts in readying the property for sale. It suffices to say that, at the first hearing, the judge did not accept her evidence on this issue. This finding was not altered on the first appeal.

[14] A GIC to which Mr. Goyetche had contributed $500 monthly during the marriage and which had accumulated to about $12,000 was completely depleted for living expenses and renovations to the matrimonial home.

[15] Prior to the marriage Mr. Goyetche had purchased a 2000 Ford Escort in the United States for $15,000. That was the car used by the parties during the marriage. While recognizing it as a matrimonial asset, in exempting that asset from distribution the judge considered the fact that it was a depreciable asset that had been owned by Mr. Goyetche before marriage. He was not satisfied that the use of it over the limited length of the marriage entitled Mrs. Goyetche to a share.

[16] The judge limited Mrs. Goyetche's share of his pensions to one half of the contributions made by Mr. Goyetche during the marriage. The judge found that any money held by Mr. Goyetche in bank accounts in the United States was acquired before marriage and not used for the benefit of the parties during marriage and was thus not to be divided between the parties.

[17] As to the division of the equity in the matrimonial home the judge said:

> I am satisfied that it is appropriate to make an order which entitles Mr. Goyetche to a division of the property related to the matrimonial home. I am satisfied that his share should be less than 50 percent not because I have any detailed information as to exactly what her equity might have been at the time of the marriage above and beyond the $33,000, approximately, outstanding on the mortgage but it is as much for lack of evidence as it is for evidence that I am convinced there should be some small adjustment made for that.
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> . . .
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> I am prepared to make an order which says that Mr. Goyetche is entitled to a division of property and his entitlement is $12,500 . . .

[18] The judge further ordered that from the capital sum owing to Mr. Goyetche would be deducted any accumulation of spousal support arrears, as calculated by Maintenance Enforcement.

[19] As previously ordered Mr. Goyetche's obligation to pay the mortgage was to end with the with the June 1, 2006 payment. At that time Mrs. Goyetche would be

receiving her Old Age and Canada Pensions which, she testified, would enable her to make the mortgage payments.

[20] Appellate intervention on a division of matrimonial assets requires error of law or a manifest error of fact (**Edwards v. Edwards** (1995), 133 N.S.R. (2d) 8 (C.A.) and **Roberts v. Shotten** (1997), 156 N.S.R. (2d) 47 (C.A.)). The appellant submits that the judge failed to recognize that, with certain exceptions, all assets acquired before or during the marriage are matrimonial assets which are *prima facie*, subject to equal division. This error, he says, is particularly apparent in the judge's treatment of the motor vehicle, pension and U.S. investments.

[21] It would have been preferable had the judge, in his decision, expressly addressed the relevant sections of the **Matrimonial Property Act**, R.S.N.S. 1989, c. 275, and made clearer reference to the classification of the assets. That said, his decision on the division of assets was obviously driven by the fact that this was a short term marriage, late in life. It was not a situation where Ms. Goyetche functioned in a traditional role to her financial disadvantage. While the **Matrimonial Property Act** contemplates an equal division (s. 12) of matrimonial assets (s. 4), exceptions to that approach are permitted under s. 13. Particularly relevant here and clearly central to the judge's decision are s.13(d) (the length the spouses co-habited during the marriage) and s.13(e) (the date and manner of acquisition of the assets). There is, as well, some flexibility in classification under s. 4, depending upon the circumstances of the marriage (see **Roberts v. Shotten**, **supra**).

[22] We are not persuaded that the judge here erred, within the standard of review, in excluding Mr. Goyetche's pre-marital assets from division (see **Roberts v. Shotten**, **supra**). Whether they are classified as matrimonial assets or otherwise, we are satisfied that the judge did not err at law or in the exercise of his discretion in concluding that Mrs. Goyetche was not entitled to a share. This was not a situation where Mr. Goyetche had withheld contribution of his income or otherwise impoverished the matrimonial assets in order to build separate wealth. There was no evidence that he had contributed in any material way to the growth of these assets after marriage.

[23] Mrs. Goyetche has new counsel on appeal. She is effectively seeking a re-trial of the issues which were before the judge on both the first and second

hearings. She further fails to recognize that the matter remitted to Scanlan, J. by this Court was limited.

[24] To briefly address a few of her assertions: (i) Mrs. Goyetche's complaints about lack of disclosure by Mr. Goyetche are untimely and unfounded. At trial there was no attack on the adequacy of disclosure. (ii) The status of the Brantford property had been determined at the first hearing and was not the subject of appeal, thus not in issue on the re-hearing. (iii) The evidence that the GIC had been expended on home improvements during the marriage was uncontradicted. (iv) There is no merit to the submission that awarding Mr. Goyetche a $12,500 share of the $33,000 equity in the matrimonial home was an erroneous exercise of discretion in view of the uncontradicted evidence of his substantial financial contribution to the maintenance and renovation of the property.

[25] In brief, we were satisfied that this unfortunate appeal could not succeed. It stands dismissed with costs to Mr. Goyetche of $1500.00 plus disbursements as taxed or agreed.

Bateman, J.A.

Concurred in:

MacDonald, C.J.N.S.

Hamilton, J.A.