

NOVA SCOTIA COURT OF APPEAL

[Cite as: Miller v. Miller, 2000 NSCA 64]

Glube, C.J.N.S.; Chipman and Bateman, J.J.A.

BETWEEN:

KEITH NOEL MILLER

Appellant

- and -

LYNN NORENE MILLER

Respondent

REASONS FOR JUDGMENT

Counsel: Ronald D. Richter for the appellant
David G. Cottenden, Q.C. for the respondent

Appeal Heard: May 16, 2000

Judgment Delivered: May 16, 2000

THE COURT: Appeal dismissed per oral reasons for judgment of Bateman, J.A.; Glube, C.J.N.S. and Chipman, J.A. concurring.

Bateman, J.A.: (Orally)

[1] This is an appeal by Keith Noel Miller from a judgment of Justice Charles Haliburton of the Supreme Court granting a divorce and corollary relief.

[2] The appellant says that the judge erred in refusing to adjourn the divorce proceeding and in fixing the date that the parties commenced living “separate and apart” pursuant to the ***Divorce Act***, R.S., 1985, c. 3 (2nd Supp).

[3] On September 24, 1999, pursuant to a date assignment conference with Justice Allan P. Boudreau, counsel for the parties agreed that the matter would proceed to trial on November 12, 1999. On November 8, 1999, at a pretrial conference with Justice Haliburton, counsel for the appellant advised that Mr. Miller was en route to British Columbia, having been transferred by his employer the Canadian Armed Forces, and would be unavailable for trial. Justice Haliburton offered two further dates for trial, December 7 or December 22 and instructed counsel for Mr. Miller to indicate his preference by November 15. The trial was set for December 22, 1999. On that day counsel for Mr. Miller appeared before Justice Haliburton and requested a further adjournment. He had not previously alerted the court or counsel for Ms. Miller that he would be seeking a further adjournment. The only explanation offered for Mr. Miller’s failure to attend the trial was that by virtue of his posting to British Columbia his client was “unavailable”. He offered no elaboration on why Mr. Miller could not attend, no confirmation from his employer that he was not free to attend, and no explanation to the court as to why he had not advised of this further intended request for an adjournment

until the morning of trial. Justice Haliburton directed that the trial proceed. We are not persuaded that in doing so he erred.

[4] The trial judge aptly described the circumstances of the parties' separation as unique. The respondent testified that on October 24, 1995 she moved into a friend's home, she and Mr. Miller having agreed to live in different residences while they worked on their marital problems. From that time forward they spent the majority of weekends together, had regular sexual relations, shopped, dined and attended social functions together as they had always done. She testified that although the parties were living in separate accommodation, it was with a view to working out their differences, not ending their marriage. During the months preceding Christmas of 1997 they began to spend less time together and were arguing frequently. In March of 1998 the respondent initiated divorce proceedings. The respondent's evidence in this regard was uncontradicted. Justice Haliburton found that January 1, 1998 was the date of separation. Counsel for Mr. Miller submits that the trial judge should have chosen October 24, 1995 or, alternatively, some date between then and January 1, 1998. We are not persuaded that Justice Haliburton erred in law in fixing the separation date as he did on these unusual facts. Nor, on the evidence before him, did he err in equally dividing the pensions as of the date of separation and the balance of the assets as of the date of trial.

[5] Accordingly, the appeal is dismissed with costs to the respondent which are fixed at \$500 plus disbursements.

Bateman. J.A.

Concurred in:

Glube, C.J.N.S.

Chipman, J.A.