Date: 19971219 Docket: CA136437

NOVA SCOTIA COURT OF APPEAL

Cite as: Irving v. Irving, 1997 NSCA 182

Freeman, Bateman and Cromwell, JJ.A.

BETWEEN:

DEBORAH LYNN IRVING	)	Edward T. Dunsworth
	)	for the appellant
appellant	)	
	)	
	)	
- and -	)	
	)	
	)	Michael I. King
	)	for the respondent
	)	
PAUL GREGORY IRVING	)	
	)	
respondent	)	
	)	
	)	Appeal Heard:
	)	November 12, 1997
	)	
	)	Judgment Delivered:
	)	December 19, 1997
	)	
	)	
	)	

THE COURT: The appeal is dismissed, per reasons for judgment of Bateman, J.A.; Freeman and Cromwell, JJ.A., concurring.

BATEMAN, J.A.:

This is an appeal by Deborah Lynn Irving, from the granting of, uncontested, divorce and corollary relief judgments.

INTRODUCTION:

The parties were married October 20, 1990. They have two children, Paul Charles Irving, born October 1, 1991, and Alexander Gregory Irving, born May 9, 1993. The children are in the joint custody of the parties but reside on a day-to-day basis in the former matrimonial home with their father.

A separation agreement, which was incorporated into the corollary relief judgment, was executed by the parties on November 6 and 7, 1996. According to the divorce petition the parties separated on August 21, 1996. The divorce and corollary relief judgments were granted on February 11, 1997.

The appellant asks this Court to set aside the judgments on the basis that the underlying separation agreement is "unconscionable and unduly harsh." In this regard she has applied to the court to admit fresh evidence bearing upon the circumstances leading up to the divorce.

The regularity of the divorce proceeding itself is not in question. The appellant submits, however, that at the time of the signing of the agreement, which was clearly made in contemplation of the divorce, she was suffering from a lingering depression which so affected her that she entered into an improvident agreement.

FACTUAL BACKGROUND:

In the appellant's affidavit, which was tendered as "fresh evidence", she says that at the time she signed the agreement she was living in the basement of the matrimonial home, being treated for depression by her psychiatrist, Dr. Gerald Gray, and on daily medication. She says that she was extremely unhappy in her marriage and had been diagnosed by her family doctor as suffering from depression in 1994. That doctor initially prescribed Prozac and later Effexor. She had first consulted Dr. Gray in January 1995, on referral from her family doctor, and has been on an antidepressant since then. She alleges that a significant reason for her unhappiness was the controlling nature of the respondent during the marriage. The appellant says that she feared his violent temper.

The parties separated in August of 1996 at the appellant's instigation. They agreed that they would share custody of the children, who remained in the

matrimonial home with the respondent. She initially lived with a female roommate, but when that arrangement collapsed, the appellant moved into separate quarters in the basement of the matrimonial home. Both parties were employed at this time - the respondent as a firefighter and the appellant at S.S. Keddy's. During this separation the appellant was involved with her current common law partner, but had sexual relations with the respondent, allegedly under pressure from him.

On November 7 the respondent gave the appellant the separation agreement which had been drafted by his lawyer. He made arrangements for her to meet with a lawyer to witness her signature and gave her the required $20.00 referral fee. The appellant met with a lawyer who offered to review the agreement for $50.00. Indeed, the lawyer recommended that the appellant have her review the agreement before signing. The appellant declined the offer to have the agreement reviewed. The appellant says that her family doctor had also advised her not to sign the agreement without legal advice, but that she did not have funds to retain a lawyer. At some point, before or after the signing of the agreement, she contacted Legal Aid but could not get an appointment until February 18, 1997. The divorce and corollary relief judgments were granted on February 12, 1997. The appellant's affidavit contains

additional information relevant to the value of the assets and the appellant's role in the marriage.

The respondent has filed an affidavit in response. He says that the parties first separated on December 8, 1994, which was at the appellant's request. They entered into a separation agreement at that time, the terms of which were dictated by the appellant, and the formal document drafted by a lawyer. The respondent received independent legal advice. The appellant did not, but was advised by the husband's lawyer that she should do so. They reconciled and again separated on August 23, 1996. Together they prepared a second separation agreement dated September 27, 1996. Neither had independent legal advice at that time. The only change of substance from the first to the second agreement was that the custody was to be joint rather than sole custody to the respondent. The November 7, 1996 agreement essentially embodied the terms of the September 27 agreement and was drafted by the respondent's current solicitor who was retained, at that point, only to prepare the agreement and not to advise the respondent.

The respondent says that the appellant was pushing for a speedy divorce because she was anxious to commence living with her current common law partner.

The respondent details his perspective on the marriage - that the appellant was immature and had difficulty adjusting to married life. The appellant had admitted extramarital affairs to the respondent. He denies treating her in a controlling and dominant manner, or exhibiting a violent temper. He says she displayed emotional ambivalence about whether she wanted to be married or single. He acknowledges that the appellant started taking the drug Effexor in the summer of 1995. The respondent's affidavit contains information about their respective roles in the marriage and the contribution of each to the assets.

ISSUES:

(i) Should the "new" evidence be admitted?

(ii) Should the judgments be set aside?

ANALYSIS:

(i) The "Fresh Evidence":

The appellant asks this court to receive as "fresh evidence" her affidavit detailing the circumstances of the marriage. The respondent opposes the introduction of the evidence but submits, in the alternative, that if it is received, his affidavit should be admitted as well.

It is the respondent's position that the appellant has not met the test for the admission of the fresh evidence and that without that evidence her appeal must fail. He submits, as well, that even should the affidavit evidence be admitted, it is not sufficient to warrant success on the appeal.

Civil Procedure Rule 62.22 provides:

> 62.22 (1) The Court on application of a party may on special grounds authorize evidence to be given to the Court on the hearing of an appeal on any question of fact as it directs.
>
> (2) The evidence shall be taken by oral examination before the Court or by affidavit or deposition, as the Court directs.
>
> (3) The Court on an appeal may on special grounds inspect or view any place, property or thing.

The test for the admission of fresh evidence in civil matters is set out in **Thies v. Thies** (1992), 110 N.S.R. (2d) 177, where Freeman, J.A. said at p.179:

> The test for admission of fresh evidence on appeals was set out by McIntyre, J., writing for the Supreme Court of Canada in **R. v. Palmer** (1979), 30 N.R. 181; 50 C.C.C. (2d) 193 (S.C.C.):
>
> > "(1) the evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases . . .
> >
> > "(2) the evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial;

> "(3) the evidence must be credible in the sense that it is reasonably capable of belief, and
>
> "(4) it must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result."
>
> . . .

The procedure which should be followed when an application is made to a court of appeal for the admission of fresh evidence is set out by McIntyre, J., again writing for the Supreme Court of Canada, in **R. v. Neilson and Stolar** (1988), 82 N.R. 280; 52 Man. R. (2d) 46; 40 C.C.C. (3d) 1 at p. 8:

> ". . . the motion should be heard and, if not dismissed, judgment should be reserved and the appeal heard. *In this way, the Court of Appeal has the opportunity to consider the question of fresh evidence against the whole background of the case and all the other evidence in the case.* It is then in a position where it can decide realistically whether the proffered evidence could reasonably have been expected to affect the result of the case. If, then, having heard the appeal, the court should be of the opinion that the evidence could not reasonably have affected the result, it would dismiss the application for the introduction of fresh evidence and proceed to the disposition of the appeal. On the other hand, if it should be of the view that the fresh evidence is of such nature and effect that, taken with the other evidence, it would be conclusive of the issues in the case, the Court of Appeal could dispose of the matter then and there. Where, however, the fresh evidence does not possess that decisive character which would allow an immediate disposition of the appeal but, nevertheless, has sufficient weight or probative force that if accepted by the trier of fact, when considered with the other evidence in the case, it might have altered the result at trial, the Court of Appeal should admit the proffered evidence and direct a new trial where the evidence could be heard and the issues determined by the trier of fact."
>
> [Emphasis added]

The appellant says that due to her mental condition, specifically depression leading up to the granting of the uncontested divorce, she could not have produced the relevant evidence at trial, thus meeting the first requirement of the **Palmer** test. She further submits that the "fresh" evidence that she tenders, because it bears upon the division of assets, is relevant, credible and might have affected the result, had there been a trial.

Counsel for the appellant originally asked that this Court (i) find that the separation agreement is unfair and unconscionable, (ii) set aside the Corollary relief judgment and (iii) refer the matter to the Supreme Court for a trial on the merits. At the time of the appeal hearing, however, he conceded that, should the appellant's argument prevail, we should remit the matter to the trial court for a hearing on the legality of the agreement.

A preliminary issue is whether the test outlined in **Thies, supra**, is the appropriate one where there has been no adjudication on the merits by a trial court. The **Thies/Palmer** test is clearly predicated upon the premise that there has been an evidentiary record established in the court below. In the usual "fresh evidence" application the appellant seeks leave of the Appeal Court to add to that record. In the words of McIntyre, J. from **Stolar, supra**, *"the Court of Appeal has the opportunity*

to consider the question of fresh evidence against the whole background of the case and all the other evidence in the case." There is no evidentiary context here within which to consider the additional evidence. This is not an application to admit fresh evidence, but rather an application to this Court to receive additional evidence for the purpose of determining whether the judgments in the Court below should be vacated.

In essence, we have before us an appeal from a settlement agreement. I could find no case law directly on point; however, there is some guidance to be drawn from the cases.

In **Makowka v. Anderson**, [1988] B.C.J. No. 2568 (B.C.C.A.) a mother and child were injured in a motor vehicle accident. The individual claims by the mother and child against the Insurance Corporation of British Columbia were settled. The child's settlement required court approval under the provisions of the **Infants Act**. The settlement, although consented to by the insurer and the mother of the child, acting in her capacity of guardian *ad litem* for the infant, was opposed by the Public Trustee. The Chambers judge heard representations from the parties and the Public Trustee. The Public Trustee appealed the Chamber judge's approval of the infant's

settlement. On that appeal the parties applied for the admission of fresh evidence. Lambert J. A. said, commencing at page 8:

> I turn now to the application to lead fresh evidence. *The circumstances raised by this application are dissimilar from those in the authorities to which we were referred where there has been a trial of issues of fact based on oral evidence, or on expert evidence, or on affidavit evidence, that was intended to result in conclusive findings of fact.* There, it is essential to the administration of justice that there should be regarded as finality at that stage, subject to the well-understood exceptions set out in the cases. That is so even if the interests of an infant are at stake in the trial. But where the issue before the chambers judge is not a determination of the true facts, but an assessment of whether a settlement that has been agreed upon by well instructed lawyers in the interests of their clients should be approved, and a consideration of things like the possibility of delay and the benefits that immediate money will bring, the matter that was decided by the chambers judge is quite different. It is not a decision on the evidence and the weighing of the evidence; it is a decision on the best interests of the infant. So the purpose of the introduction of fresh evidence in this appeal is not to show that a factual assessment of the previously existing evidence was incorrect, but it is to show that the best interests of the infant may not in fact have been carried through in the way that the chambers judge thought he was carrying them through.[Emphasis added]

The circumstances here are not entirely analogous to those in **Makowka**, **supra**. There, the Chambers judge did adjudicate a contest on the propriety of the settlement agreement, the approval of which was appealed. Lambert, J.A., however, recognized that it may be appropriate to apply a different test when there have not been factual determinations by a trial judge.

In the situation before us, the judge granting the divorce and corollary relief judgments quite properly assumed that he had all relevant evidence before him, and that the parties agreed that the divorce be granted embodying the recent separation agreement. Accordingly, it was not necessary for him to receive *vive voce* evidence, nor weigh, as a judge would in a contested proceeding, the merits of the proposed arrangements.

Lambert, J.A. continued in **Makowka**:

> Having regard to . . . the best interests of the child and the good administration of justice, it would, in my opinion, in the words of the cases, be an affront to justice to insist on imposing this settlement on this infant if it was, when it was agreed upon, an unjust settlement. *In my opinion, the introduction of the new evidence that we were asked to permit would allow the court which hears the appeal to assess as it wishes the interests of justice*. For that reason, I would allow the admission of the evidence that we were specifically asked to allow . . . [Emphasis added]

In **Cosper v. Cosper**, (1995) 141 N.S.R. (2d) 344 (C.A.), the wife sought to set aside a corollary relief judgment based upon the agreement of the parties reached after one half day of evidence at the contested divorce hearing. She maintained that her lawyer improperly pressured her into making the agreement. There, this Court, applying the **Palmer** test, as approved in **Thies**, **supra**, dismissed the application to admit fresh evidence.

In **Benoit v. Reid** (1995), 18 R.F.L. (4th) 136 (C.A.), the New Brunswick Court of Appeal received new evidence on an appeal from a trial judge's refusal to vary a prior consent order, restricting the removal of the child of the marriage from the province. Bastarache, J.A., as he then was, said:

> [para10] This Court obtained updated information from counsel, by way of documents filed in other courts and by way of affidavits. Although it is unusual to receive such additional information on appeal, I believe that it is important to recognize that accurate information is essential in custody cases and that some flexibility is required in order to assess the best interests of the child. This approach was taken by L'Heureux-Dubé, J. in *C.C.A.S., Metro Toronto v. M.(C.)*, [1994] 2 S.C.R. 165, at 188 where she says:
>
> > ... Although it might be more in line with usual procedures for a court of appeal to base its conclusions on the evidence before the trial judge, the particular nature of appeals in child welfare legislation requires a sufficiently flexible rule, where an accurate assessment of the present situation of the parties and the children, in particular, is of crucial importance. If *Genereux, supra,* has enlarged the scope of the admission of fresh evidence on appeal, it has done so, in the present case at least, with regard to the final arm of the *Stolar* test, that is, whether the fresh evidence may affect the result of the appeal when considered with the other evidence. If that is so, and the fact that the admission of up-to-date evidence is essential in cases such as the one at hand, *Genereux, supra,* should be applied in cases determining the welfare of children.

In **Benoit**, **supra** some time had elapsed between the original proceeding and the hearing of the appeal. The information before the trial judge had been sketchy. In addition, since the trial, there had been a change in the child's residence and Community Services had become involved with the family. The information received

on appeal was, therefore, to update the court on circumstances as they existed at the time of the appeal hearing. Again, the situation is not strictly analogous to that before us, but the Court of Appeal does recognize that in certain circumstances, the traditional test may not be appropriate, particularly where the welfare of children is involved.

This Court, in **Children's Aid Society of Halifax v. C.M. et al.** (1995), 145 N.S.R. (2d) 161 and **Children's Aid Society of Cape Breton v. S.G.** (1995), 142 N.S.R. (2d) 57 has recognized that the **Palmer** test for the admission of fresh evidence applies "in modified form" to child welfare proceedings. This is particularly so when the evidence relates primarily to events occurring after the order of the trial judge.

This, however, is not a child welfare proceeding. We are advised by counsel that the matter of the custody of the children, and, in particular, their day to day care arrangements is presently before the Supreme Court on a variation application. The separation agreement, which was incorporated into the corollary relief judgment, provides for joint custody, with no particulars as to care and control. The respondent's affidavit in support of the granting of the judgments states that the children have resided with him on a day to day basis since the separation. Even should the appellant

successfully challenge the separation agreement, the arrangements regarding the children must be reviewed taking into account the *status quo* as it has developed since the separation. That review process is currently underway. This appeal, while it indirectly concerns the custody of the children of the marriage, is primarily focused upon the division of assets between the parties.

Drawing upon the comments in cases such as **Makowka** and **Benoit**, I am satisfied that in these circumstances, application of the **Palmer** test is neither appropriate nor workable. The purpose of the proffered evidence here is to enable this Court to determine whether the appellant should have an opportunity, in a new proceeding in the trial court, to attack the validity of the separation agreement. It is, in my view, impossible for us to do justice to that task without receiving and considering the affidavit evidence, providing that we find the evidence to be relevant and reasonably capable of belief. I am satisfied that the affidavit evidence tendered by both parties is relevant to the issue before us and is reasonably capable of belief and, accordingly, that it should be received and considered.

(ii) The Merits:

When seeking to set aside a default judgment, the applicant must satisfy the

Court that he/she has a good defence on the merits (a substantial issue to be tried) and that he/she has a reasonable excuse for not filing the defence on time. (See, for example, **Marissink v. Kold-Pack Inc., et al.** (1993), 125 N.S.R. (2d) 204 Chipman J.A.)

The appellant having entered into a settlement of the issues in contemplation of the divorce proceeding, the test applied here should, in my view, be somewhat more onerous than that required to set aside a default judgment. Where a legal action has been settled, and, in particular, where the settlement has formed the basis of a court order, a party should not be permitted to resile from that bargain save in exceptional circumstances. I would require that the appellant demonstrate: (i) that she has a reasonable excuse for failing to challenge the separation agreement, upon being served with the divorce documents, *and* (ii) that she has a strong, *prima facie* case that the agreement is unconscionable or unduly harsh.

(iii) Failure to Contest the Divorce Proceeding:

Many of the background facts are not in dispute. The parties dated for about a year before entering into a common law relationship in October of 1990. At that time they resided in the respondent's house in Dartmouth. They lived together for six months before marrying. During the marriage the appellant had income through employment or unemployment insurance. They moved to a new home, built by the

respondent. The equity from the house that the respondent had owned before marriage went into the second house. The appellant was unhappy in the marriage. The parties separated for about three months in the late fall of 1994, reconciling in January of 1995. They separated again in August of 1996 with the appellant maintaining separate accommodation until October. The separation continued; however, the appellant moved into the basement of the matrimonial home. During the separation they shared time with the children equally. The appellant was served with the notice of petition and petition for divorce at the offices of the respondent's solicitor on December 13, 1996. The appellant moved from the basement of the matrimonial home on January 6, 1997. The appellant did not receive legal advice before signing the final separation agreement.

That the appellant was encountering emotional distress during the marriage is not in dispute. In an affidavit filed in the Supreme Court variation proceeding the respondent says that the appellant ". . . has ongoing mental and emotional problems for which she must use antidepressants and is subject to large mood swings". He acknowledges that the appellant took the drug Effexor. He says that on one occasion after the separation, although the appellant was involved with another man, when the respondent invited a woman to a movie, the appellant threatened suicide. He arranged

for an emergency session with her physician.

We have before us, then, the appellant's evidence that she was clinically depressed and on medication and the respondent's evidence that she was exhibiting mood swings and unhappy in the marriage. Conspicuously absent from the file material is any evidence from the appellant's psychiatrist confirming her state of mind at the relevant time and the probable effect of the medication upon her ability to make rational decisions. The appellant attached to her affidavit three pages from a medical text outlining the potential side effects of her medication. This information is of little assistance to the Court failing evidence from her psychiatrist about how the drug was affecting the appellant. The drug was prescribed to alleviate the effects of the depression. The appellant has remained on the drug, according to her evidence, since January of 1995. One would assume it to have had the desired result, without debilitating side effects.

There is, as well, uncontradicted evidence that the parties had entered into two previous separation agreements, containing similar terms. According to the affidavit of the respondent, the terms of the first of these agreements were those dictated by the appellant. The lawyer who drew that agreement advised the appellant that she should

receive independent legal advice in relation thereto. At the time of signing the final agreement she met with a lawyer who was prepared, for a nominal fee ($50), to provide independent legal advice. The appellant declined that offer.

Nowhere in the material before us does the appellant say that she did not understand her legal entitlement at the time of signing the various agreements, that she did not understand the agreements, that the agreements did not express her wishes, that she was not capable of making a reasoned or rational decision in this regard, or that she did not appreciate that a divorce proceeding had been commenced. The import of her evidence is that she was on medication for depression when she signed the agreement, that she declined to exercise her opportunity to receive independent legal advice, that she allowed the divorce to proceed on an uncontested basis and that she now believes that she made a bad bargain.

I am not satisfied that the appellant has demonstrated that she had a reasonable excuse for failing to challenge the separation agreement at the time of the divorce proceeding. I am persuaded to this view for the following reasons: the fact that over a period of two years the appellant entered into a series of agreements, each consistent with the other; that twice she rejected recommendations from lawyers to obtain

independent legal advice; that she had access to funds to retain counsel; that the separations were at the instigation of the appellant; and that there is an absence of persuasive evidence that the appellant was unable to make an informed decision either at the time of entering the final agreement, or at the time of the commencement of the divorce proceeding.

The appellant having failed to meet the first requirement of the two part test, it is unnecessary to consider whether or not she has a strong *prima facie* case that the agreement is unconscionable.

Although I have, here, resolved this appeal on the merits, I would express reservation as to whether an appeal is the proper avenue in a matter such as this. This was not an issue raised by counsel. My concerns are based upon the premise that the judgments granted in this matter, which incorporate the separation agreement, equate to consent orders.

In **Levy v. Messom** (1997) 159 N.S.R. (2d) 252 1997 Hallett, J.A. said, for the Court, at p.259:

> In **Bank of Nova Scotia v. Golden Forest Holdings Ltd.** (1990), 98 N.S.R. (2d) 429; 263 A.P.R. 429 (C.A.), this Court had occasion to consider the power of a superior court to vary a consent order that gives effect to a settlement. We concluded that such an order could not be varied unless the settlement agreement itself could be varied. By implication we approved the following statement from **Chitel v. Rothbart et al.** (1987), 19 C.P.C. (2d) 48 (Ont. S.C.):
>
> > A consent order may only be set aside or varied by subsequent consent, or upon the grounds of common mistake, misrepresentation or fraud, or on any other ground which would invalidate a contract. None of these grounds are present in the within case.
> >
> > Although the limits of a superior court's power in the exercise of its inherent jurisdiction are not fully defined, there are nevertheless limits that have been established in certain areas and the power of a court to vary a consent order is one of them.
>
> There are clear limitations on the inherent jurisdiction of the Supreme Court of Nova Scotia to set aside a consent order. But, more importantly, *the Appeal Court is not the forum in which to set aside a consent order. As stated by the New Brunswick Court of Appeal in* ***Morency and Pelletier v. Charest et al.*** *(1991), 123 N.B.R. (2d) 392; 310 A.P.R. 392; 84 D.L.R. (4th) 567, a consent order must be set aside, if it is to be set aside, in a new proceeding instituted for that purpose. Such a proceeding would be in the Supreme Court of Nova Scotia.* [Emphasis added]

In **Morency v. Charest**, (1991) 84 D.L.R. (4th) 567, (N.B.C.A.) Ayles, J.A., writing for the Court, refers to certain relevant passages from *Halsbury's Laws of England*, vol. 26, 4th ed. (London: Butterworths, 1979). (See also **Family and Children's Services of Lunenburg County v. G.D.** (1997), 160 N.S.R. (2d) 270 (N.S.C.A.))

At p. 286 *Hals*., para. 562, "Setting aside consent judgment or order":

> Unless all the parties agree, a consent order, when entered, can only be set aside by a fresh action, and an application cannot be made to the court of first instance in the original action to set aside the judgment or order, except, apparently, in the case of an interlocutory order. Nor can it be set aside by way of appeal.

And at 37 *Hals*., 4th ed., at p. 286, para. 390:

> On the other hand, once a consent judgment or order has been entered or passed, it cannot be set aside by the court of first instance in the original action, even if it was entered or passed by mistake, but it may be set aside or extended or altered with the consent of all the parties, provided that to do so will not prejudice a third person. It may also be set aside, in a fresh action brought for the purpose, on any ground which may invalidate the agreement on which it is founded. Moreover, where the consent order or judgment is still executory, the court may refuse to enforce it if it would be inequitable to do so.

The Encyclopedia of Court Forms and Precedents, vol. X (London: Butterworth & Co. (Publishers) Ltd., 1948) (Judgments and Orders), states, at p. 147:

> A consent judgment or order, even though it has been passed and entered, may be set aside on any ground which may invalidate the agreement on which it is founded, such as that the consent was induced by fraud, or was the result of a mistake, or was ultra vires on the part of one of the contracting parties. *A consent judgment or order which has been passed and entered can only be set aside in a fresh action brought for the purpose*; except with the consent of the parties it cannot be set aside by motion in the original action, unless there has been a clerical mistake or error arising from an accidental slip or omission, or the judgment or order drawn up does not correctly state what the Court actually approved and intended, or the order is an interlocutory order. If the judgment or order has not been passed and entered, it may be set aside on motion, unless from the nature of the ground on which the application is made conflicting

> evidence will have to be considered or viva voce evidence and cross-examination is essential. . . .
> [Emphasis added]

Notwithstanding the clear thrust of the above authorities, the issue is somewhat complicated by **s. 39** of the **Judicature Act**, R.S.N.S. 1989, c. 240:

> No order of the Supreme Court made with the consent of the parties is subject to appeal, and no order of the Supreme Court as to costs only that by law are left to the discretion of the Supreme Court is subject to appeal on the ground that the discretion was wrongly exercised or that it was exercised under a misapprehension as to the facts or the law or on any other ground except by leave of the Court of Appeal.

In the event that the **Judicature Act** is applicable in this matter, in which regard I make no finding, it is unclear from the wording of **s. 39**, whether leave of the Court is available only with respect to appeals as to costs, or whether leave may be granted where a consent order is appealed. In **Cosper**, **supra**, another panel of this Court remarked that an appeal from a consent order requires leave of the Court, implying, therefore, that a consent order may be the subject of an appeal.

In view of my above analysis on the merits this procedural issue will not be determined in this appeal.

DISPOSITION:

I would dismiss the appeal with costs to the respondent of $1,000 plus disbursements.

Bateman, J.A.

Concurred in:

Freeman, J.A

Cromwell, J.A.

CA: 136437

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

DEBORAH LYNN IRVING	)	
	)	
Appellant	)	
	)	
	)	
- and -	)	
	)	
PAUL GREGORY IRVING	)	REASONS FOR
	)	JUDGMENT
	)	BY:
Respondent	)	
	)	BATEMAN,J.A.
	)	
	)	
	)	