Date: 19990107 Docket: CA 149384

NOVA SCOTIA COURT OF APPEAL
Cite as: Connolly v. Connolly, 1999 NSCA 173

Chipman, Freeman and Roscoe, JJ.A.

BETWEEN:	)	
	)	
MARY DOROTHEA BARBARA CONNOLLY	)	Kenzie MacKinnon
	)	for the Appellant
Appellant	)	
	)	
- and -	)	
	)	
PAUL RONALD CONNOLLY	)	Paul Thomas
	)	for the Respondent
Respondent	)	
	)	
	)	
	)	
	)	Appeal Heard:
	)	December 8, 1998
	)	
	)	
	)	Judgment Delivered:
	)	January 7, 1999

THE COURT: The appeal is dismissed without costs as per reasons for judgment of Roscoe, J.A.; Chipman and Freeman, JJ.A., concurring.

ROSCOE, J.A.:

This is an appeal from a decision granting a Corollary Relief Judgment dividing the assets and liabilities between the parties pursuant to the **Matrimonial Property Act**, R.S.N.S. 1989, c. 275.

The parties began living together in 1978 and were married in 1980. It was a second marriage for both. They had no children together but both had children from their previous marriages. They separated in 1988.

The sole issue on appeal concerns the division of the respondent husband's federal government pension benefits, which the trial judge ordered divided by crediting fifty percent of the value of the pension benefits earned during the period of the parties' cohabitation, to the appellant. The period of cohabitation was determined to be almost ten years. The respondent, who had retired and was receiving the monthly pension at the time of the divorce hearing, had contributed to the pension a total of 33 years, 16 years of which were before the parties began to live together and seven years after the separation. The appellant had submitted to the trial judge and continues to argue in this Court that she was entitled to fifty percent of the pension benefits from the commencement of the contributions until the time of separation, a total of 26 years.

As of October, 1997 the respondent's total monthly pension was $2,219.39. An estimate prepared by an employee of the Federal Superannuation Directorate indicated that, based on a division of benefits for a period of eight years, the length of the marriage, the appellant's share would be $312.17 per month.

The respondent's pension was the only asset of significant value upon the parties' separation. Although the parties had owned a home, there were little or no net

proceeds available at the time of its sale. The appellant is employed as a provincial civil servant earning approximately $25,000 annually and has made contributions to a pension since 1988. The cashed-in value of the appellant's pension, earned prior to cohabitation with the respondent, was converted to the joint use of the parties at the time they purchased the matrimonial home. As well, the appellant's pension benefits earned as a result of periods of employment during the marriage, totalling $2,896.05 were used as matrimonial funds, when received upon her resignation from employment in 1987.

The trial judge, Glube C.J.S.C., as she then was, assumed that the full value of the husband's pension at the time of separation was to be included as a matrimonial asset and then considered whether an unequal division pursuant to s.13 of the **Matrimonial Property Act** was appropriate. The scheme of the **Act** is that there be an equal sharing of matrimonial assets on marriage breakdown provided it would not be unfair or unconscionable to make such a division. Section 13 provides circumstances under which a court can make an unequal division of matrimonial assets and the trial judge determined that in this case the relevant subsections thereof were:

> 13 Upon an application pursuant to Section 12, the court may make a division of matrimonial assets that is not equal or may make a division of property that is not a matrimonial asset, where the court is satisfied that the division of matrimonial assets in equal shares would be unfair or unconscionable taking into account the following factors:
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> . . .
>
> (d) the length of time that the spouses have cohabited with each other during their marriage;
>
> (e) the date and manner of acquisition of the assets;

. . .

> (i) the contribution made by each spouse to the marriage and to the welfare of the family, including any contribution made as a homemaker or parent;

. . .

In arriving at the conclusion that there should be an unequal division of matrimonial assets by only splitting ten years of the respondent's pension benefits with the appellant, Chief Justice Glube made the following findings of fact, after reviewing the totality of the evidence:

- The appellant is an alcoholic and by 1983 her drinking was out of control. From then until 1988, she was unsuccessful in maintaining sobriety.
- The parties had a very bad relationship, mainly as a result of problems arising from alcohol use by both parties.
- Neither party is free from blame resulting in the breakup of the marriage.

The trial judge concluded the pension division question as follows:

> As stated, Mr. Connolly earned his pension over a thirty year period but he only cohabited with Mrs. Connolly for ten of those years. Accepting as I do that he has not been able to prove the period of cohabitation was shorter than ten years, yet it is clear to me that with Mrs. Connolly's sporadic employment and Mr. Connolly's continuous employment, he made the greater contribution to the marriage financially. As to the contributions to the marriage and the welfare of the family, I suggest that neither of them were stellar participants, but certainly as an alcoholic at the time, I am entitled to infer and I find that Mrs. Connolly's contribution was less than would normally be anticipated.
>
> Based on all these factors, (s. 13(d), (e) and (i)), I find there is strong evidence to negate an equal division of the pension. I find that to award fifty-percent of the total pension to Mrs. Connolly would be unfair and unconscionable. The only

> appropriate amount to award to Mrs. Connolly is fifty-percent of the period of cohabitation, namely from August 1978 to the date of separation, June 18th, 1988.
>
> Later in the decision she added:
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> . . . It would not be logical in the present case on these facts to make an award of fifty percent of the whole period of the pension. The only appropriate period upon which to base a division is the period of cohabitation in 1978 until the parties separated in 1988.

The appellant argues on the appeal that the trial judge erred in assessing the evidence and in the application of s. 13 to the circumstances of the marriage in arriving at this conclusion.

The applicable standard of review in this case is as stated by Bateman, J.A. in **Roberts v. Shotton** (1997), 156 N.S.R. (2d) 47 beginning at paragraph 10:

> In **Moge v. Moge** (1992), 145 N.R. 1; 81 Man.R. (2d) 161; 30 W.A.C. 161; 43 R.F.L. (3d) 345 (S.C.C.) L'Heureux-Dubé, J., at p. 359, accepted the following statement of Morden J.A., in **Harrington v. Harrington** (1981), 33 O.R. (2d) 150 (C.A.), at p. 154:
>
> > As far as the applicable standard of appellate review is concerned I am of the view that we should not interfere with the trial judge's decision unless we are persuaded that his reasons disclose material error and this would include a significant misapprehension of the evidence, of course, and, to use familiar language, the trial judge's having 'gone wrong in principle or (his) final award (being) otherwise clearly wrong': **Attwood v. Attwood**, [1968] P. 591 at p. 596. In other words, in the absence of material error, I do not think that this court has an 'independent discretion' to decide afresh the question of maintenance and I say this with due respect for decisions to the contrary. . .
>
> Chipman, J. A. wrote, for the court, in **Edwards v. Edwards** (1994), 133 N.S.R. (2d) 8; 380 A.P.R. 8 (C.A.), at p. 20:

> Having regard to all the evidence and particularly the respective incomes of the parties, I cannot say that the trial judge erred in his assessment. This court is not a fact finding tribunal. That is the role of the trial judge. Ours, as has been said many times, is a more limited role. We are charged with the duty of reviewing the reasons of the trier of fact with a view of correcting errors of law and manifest errors of fact. The degree of deference accorded to the trial judge with respect to factual findings is probably no higher anywhere than it is in matters relating to family law. Hart, J.A., put it well when he said on behalf of this court in **Corkum v. Corkum** (1989), 20 R.F.L. (3d) 197 at 198:
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> > In domestic matters the trial judge always has a great advantage over an appellate court. He sees and hears the witnesses and can assess the emotional aspects of their testimony in a way that is denied to us. Unless there has been a glaring misconception of the facts before him or some manifest error in the application of the law, we would be unwise to interfere.
>
> A similar standard is applicable to appeals from a division of assets made pursuant to the **Matrimonial Property Act**, R.S.N.S. 1989, c. 275.

The appellant submits that the trial judge erred by not taking into account the assets that she brought into the marriage, most notably her pre-cohabitation pension benefits. It is not now known what the value of that collapsed pension was. It is contended that it is unfair that the respondent is entitled to keep his pre-cohabitation pension benefits when the appellant has in effect shared hers with the respondent. Furthermore, it is argued that the evidence does not support a finding that the appellant's contribution to the marriage and welfare of the family was less than the respondent's. The appellant asserts that three recent cases in the Nova Scotia Supreme Court where pre-marriage pension contributions were not divided equally, should be distinguished on the facts; namely: **Dort**

v. Dort (1994), 130 N.S.R. (2d) 108; **Adie v. Adie** (1994), 134 N.S.R. (2d) 60; and **Frost v. Frost** (1996), 154 N.S.R. (2d) 341.

The respondent submits generally that there is no error of law or fact which entitles this Court to interfere with the trial judgment and specifically, that the respondent also brought significant assets into the marriage and that in the circumstances of this marriage, to divide the pension benefits earned prior to cohabitation would be unfair and unconscionable.

As noted in **Roberts v. Shotton, supra**, it is not open to this Court to substitute its view of the evidence nor do we have an independent discretion to decide the case based on our view of the merits of the competing claims, unless we are first satisfied that there has been a manifest error of fact or a material error of law.

After reviewing the three cases referred to above, (**Dort**, **Adie** and **Frost, supra**) there does appear to be a trend emerging in the treatment of pre-marriage pension contributions in certain types of cases, perhaps reflected in the significance given to certain factors, noted by Justice Stewart in **Dort**:

> . . . It is not a “short” marriage but it is important to note at what point in their lives they chose to marry. It was a second marriage for the wife and also for the husband, who has adult children from his first marriage of seventeen years. They were mature when they married. No children were born of the parties . . .

These three cases share several features with the case under appeal. In all these instances, the marriages were second marriages for both spouses. The marriages and/or periods of cohabitation were of short to medium length, five years in **Frost**, ten years in **Dort** and this case, and 15 years in **Adie**. In none of these cases were there any children born to the parties during the relationship. In **Dort** and **Adie** the entire pension contributions were made prior to cohabitation, and in **Frost** all but six months were pre-marriage contributions. In **Dort**, **Adie** and **Frost** the trial judges relied, either partially or entirely, on the date and manner of acquisition of the asset, (s.13(e)), as the rationale for an unequal division and awarding 100 percent of the pension to the contributor. That is perfectly consistent with the decision under appeal where 100 percent of the pre-cohabitation contributions were not shared with the other spouse.

As noted in **Adie, supra**, at page 64, another consideration for this disposition of the pension asset, in some of the cases, is that the portion of the pension not divided with the present spouse was not accumulated by the diversion of family income:

> . . . The result is that it was acquired exclusively by him before he had even met his present wife, and it was acquired by him without any contribution by the present Mrs. Adie whatsoever. She did not have a relationship with Mr. Adie during the contributing phase of several years so as to be able to point to a reduction in availability of income resulting in a standard of living during the contributing years which reduction was in essence being set aside for a future security enjoyment.

After considering these cases, it does not appear that the result in this case is inconsistent with other recent cases of similar circumstances, or that it was an error in law or in fact for the trial judge here to rely on s. 13 (d) and (e) in dealing with the pension division issue on the facts of this marriage.

The appellant also maintains that the trial judge was in error in her finding that the appellant's contribution to the marriage was "less than would normally be anticipated", which finding was related to the fact that the appellant suffered from alcoholism. The appellant argues that the evidence does not support this finding, and even if this were true, there was no evidence that the respondent contributed any more to the marriage which would entitle him to an unequal division of assets. Although Chief Justice Glube did not elaborate on this point, there was an abundance of evidence in the affidavits and in the **viva voce** evidence which if accepted, would support a finding that the appellant's continuing difficulties with alcohol negatively affected the family, the running of the household and her own employment. The conclusion reached is therefore one supported by the evidence.

In conclusion, I have carefully reviewed the evidence, the grounds of appeal, and the written and oral submissions of counsel. In my opinion, the trial judge did not misconstrue the facts or err in law. The appellant has not persuaded me that the trial judge acted upon any wrong principle or disregarded any material evidence. I am satisfied that

in the course of her assessment of the evidence she made findings of fact which are amply supported by the evidence.

Had this Court found that there was an error by the trial judge, the respondent submitted that as a result of the operation of the **Pension Benefits Division Act**,1992 S.C., c. 46, that the pension benefits to be transferred could not exceed 50 percent of those earned during the period of cohabitation, in any event. In view of the finding that there was no error by the trial judge, it is not necessary to deal with this issue.

I would dismiss the appeal without costs.

Roscoe, J.A.

Concurred in:

Chipman, J.A.

Freeman, J.A.