C.A. No.141482

NOVA SCOTIA COURT OF APPEAL

Cite as: Monette v. Jordan, 1997 NSCA 163

BETWEEN:

JOSEPH JEAN MARC MONETTE Applicant/Appellant - and - **SHERRY CHARLENE (MONETTE) JORDAN** Respondent	)	Applicant/Appellant in Person Jean DeWolfe for the Respondent Application Heard: October 8, 1997 Decision Delivered: October 15 , 1997

BEFORE THE HONOURABLE JUSTICE NANCY J. BATEMAN
IN CHAMBERS

<u>Bateman, J.A.</u> (In Chambers):

The appellant, Joseph Jean Marc Monette, has appealed a decision of Justice Suzanne Hood of the Supreme Court. The respondent, Sherry Charlene Monette, has applied for security for costs on the appeal.

The respondent makes application for security for costs pursuant to ***Civil Procedure Rule 62.13*** which provides:

> (1) A Judge on an application of a party to an appeal may at any time order security for the costs of appeal to be given as he deems just.
>
> (2) If a party fails to give security for costs when ordered, a Judge on application may dismiss or allow the appeal, as the case may require.

This rule was considered by Macdonald, J.A., in **Frost v. Herman**, (1976), 18 N.S.R. (2d) 167 (N.S.C.A.). He said at p.168:

> In my view, however, the discretion given a judge under the present Rule 62.13 to order security "as he deems just" should not be exercised in favour of an applicant unless special circumstances exist for so doing.

I have reviewed the extensive file material which provides background to the current proceeding. The parties were husband and wife. Divorce and Corollary Relief Judgments were granted on May 21, 1996. Since that time,

the record reveals, Mr. Monette has failed to comply with his various financial obligations pursuant to the Corollary Relief Judgement. In June of 1997, Mr. Monette successfully applied to vary his maintenance obligation which was reduced from $1500 per month to $285 per month. Chief Justice Glube, who presided at the variation hearing, notwithstanding that she granted the application, found that Mr. Monette had voluntarily terminated his employment at Michelin Tire, where he was earning in excess of $50,000, and had subsequently voluntarily terminated another job, where he was earning approximately $19,000 per annum. She said in her decision of July 28, 1997:

> Mr. Monette has disregarded his children's best interests and they are now in financial jeopardy due to his quitting two jobs, failing to remove Ms. Jordan's name from the apartment mortgages and failing to profitably manage the apartments.

There are a number of outstanding Execution Orders in the file in relation to unpaid maintenance. Mr. Monette now lives in New Brunswick. Mrs. Monette made further application to vary, which proceeding was scheduled for September, 2, 1997. In compliance with an Order of Justice Boudreau of the Supreme Court, notice of the application was personally served upon Mr. Monette on August 29, 1997. The Affidavit of Service is in the file. Mr. Monette did not appear at the proceeding on September 2,

1997 before Justice Suzanne Hood. Justice Hood granted the relief sought by the respondent. It is from that Order that Mr. Monette now appeals. Mr. Monette submits that he should not be required to post security for costs because he is impecunious.

Macdonald, J.A., said in **Frost, *supra***, at pp.171-172:

> Accepting the declaration of the solicitor for the appellant that he believes that the latter is not insolvent and is in a position to pay his just debts, the fact remains that he has not paid the costs taxed against him even though an execution order therefor has been issued. In my view, the following words of Bowen, L.J., in **Cowell v. Taylor** (1885), 31 C.D. 34 (C.A.), at p. 38, in referring to the position of an insolvent appellant are particularly apt:
>
> > . . . there the appellant has had the benefit of a decision of one of Her Majesty's courts, and so an insolvent party is not excluded from the courts, but only prevented, if he cannot find security, from dragging his opponent from one court to another.
> >
> > The appellant has acted in an insolvent manner toward the respondent and whether or not the former is in fact insolvent is not for me to decide. The respondent has reason to be apprehensive about the recovery of his costs.

In my view, the respondent, has demonstrated "special circumstances" sufficient to warrant security for costs. The appellant has

ignored prior court orders requiring the payment of funds, notwithstanding that he has received substantial relief from the Court in the form of his successful Application to Vary. As in **Frost, *supra***, he has acted in an "insolvent manner" toward the respondent. Nor has the appellant provided any information that would lead me to conclude that the appeal cannot be advanced if security is ordered.

Accordingly, I order security for costs in the amount of $500 to be posted with the Court on or before the 24th day of October, 1997.

Bateman, J.A.

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