

NOVA SCOTIA COURT OF APPEAL

Citation: Gill v. Hurst, 2011 NSCA 100

Date: 20111101

Docket: CA 338209

Registry: Halifax

Between:

Christopher Valentino Gill

Appellant

v.

Christine Mary Hurst

Respondent

- and -

Wickwire Holm

Appellant

v.

Christine Mary Hurst and Christopher Valentino Gill

Respondents

Judge: The Honourable Justice Peter M. S. Bryson

Appeal Heard: June 3, 2011

Subject: Family Law – Matrimonial Property – Division of Assets – Equalization Payments – Spousal Support – Imputing Income – Claim to Business – Property Law – Priority of Judgments

Summary: Consolidated appeal by appellant Gill and his former law firm, Wickwire Holm. Appellant Gill claimed the trial judge made a fundamental error in assessing credibility. As a result, the trial judge allegedly erred by:

- (a) awarding too little spousal support to Gill;
- (b) wrongly imputing income to appellant Gill and imputing too little to respondent Hurst;
- (c) rejecting Gill’s claim to an interest in respondent Hurst’s physiotherapy business.

Appellant Gill also alleged error by the trial judge in awarding

costs.

Appellant law firm claimed trial judge erred in giving priority to equalization payment from Mr. Gill to Ms. Hurst in preference to law firm's registered judgment.

Issues:

1. Did the trial judge make unreasonable findings of credibility/fact?
2. Did the trial judge impute too much income to Mr. Gill and too little to Ms. Hurst?
3. Did the trial judge err in failing to award Mr. Gill an interest in Ms. Hurst's physiotherapy clinic business?
4. Did the trial judge err in awarding costs against Mr. Gill?
5. Did the trial judge err in subordinating the law firm's judgment to an equalization payment from Mr. Gill to Ms. Hurst?

Result:

Mr. Gill's appeal dismissed per Bryson, J.A., Fichaud and Farrar, J.A. concurring.. The trial judge's findings of credibility and fact were entitled to a high degree of deference. There was evidence to sustain those findings. The judge did not err in imputing income to Ms. Hurst or Mr. Gill. In awarding spousal support, the trial judge properly considered Mr. Gill's capacity to earn an income as well as his need to become financially self sufficient. The trial judge properly applied s. 18 of the *Matrimonial Property Act*, R.S.N.S. 1989, c. 275 ("MPA"), in determining that Mr. Gill had no interest in the physiotherapy clinic. There was evidence to support her finding.

Trial judge's discretionary ruling on costs applied appropriate principles.

Wickwire Holm appeal allowed per reasons of Bryson, J.A., Farrar, J.A. concurring. The matrimonial home was owned jointly by Mr. Gill and Ms. Hurst. Neither challenged the other's legal interest in the home. The law firm discontinued acting for Mr. Gill and later obtained a judgment against him which was recorded under the *Land Registration Act*, S.N.S. 2001, c. 6 ("LRA"). That judgment became a mortgage against Mr. Gill's joint tenancy interest when it was recorded under the *Land Registration Act* (s. 66). The matrimonial home was sold with the consent of the law firm on condition that its position would not be prejudiced thereby. The trial judge made an

unequal division of the proceeds of the matrimonial home in favour of Ms. Hurst and gave priority to that equalization payment over the law firm's registered judgment citing ss. 8(1) and 10(1)(d) of the *MPA*. Absent collusion with a creditor, a debtor spouse does not "encumber" or "dispose of" her interest in the matrimonial home when a creditor registers a judgment under the *LRA*. The law firm's judgment did not constitute a breach of s. 8(1) of the *MPA* by Mr. Gill. While s. 10(1)(d) of the *Act* allows a judge to set aside an encumbrance, there was no principled basis to do so in this case.

Knowledge that the Court might make an unequal division of assets did not impair the priority of the law firm's judgment. The law firm did not misuse confidential information or otherwise behave inequitably.

Fichaud, J.A., dissenting in part, respecting Wickwire Holm's appeal: (1) would have dismissed Wickwire Holm's appeal on the basis that ss. 8(1) and 10(1)(d) of the *Matrimonial Property Act* empowered the judge to partially set aside Wickwire Holm's encumbrance; and alternatively, (2) would have ordered that, if the judge had no such power to partially set aside, then the extent of Mr. Gill's executable interest in the matrimonial home has not been pleaded, litigated or determined, and should be remitted to a judge for proper pleading, trial and determination.

This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 46 pages.