NOVA SCOTIA COURT OF APPEAL
Citation: *Hurley v. Tobin*, 2020 NSCA 48

Date: 20200624
Docket: CA 488265
Registry: Halifax

Between:

Thomas Gerard Hurley

Appellant

v.

Katherine Anne Tobin

Respondent

Judge: The Honourable Justice Cindy A. Bourgeois

Appeal Heard: January 23, 2020, in Halifax, Nova Scotia

Subject: Spousal support, unjust enrichment, setting aside conveyance

Summary: Mr. Hurley and Ms. Tobin had been common-law spouses. In 2016, Ms. Tobin filed a Notice of Application seeking a "common law division of property", pension division, spousal maintenance, and costs. After a four-day hearing, the trial judge ordered Mr. Hurley pay Ms. Tobin lump sum retroactive spousal support and time-limited periodic support. With respect to property issues, the trial judge ordered Mr. Hurley make payment to Ms. Tobin to reflect the value of the improvements she had made to the home the parties had occupied. Given that Mr. Hurley had conveyed to his parents legal title to the home mere days after the date of the separation and she had found they intended him to remain the beneficial owner of the property, the trial judge ordered the deed be set aside.

Mr. Hurley challenges the trial judge's support orders, her finding that Ms. Tobin was entitled to be compensated for the improvements she made to the property, and her direction that

the deed be set aside.

Issues:

1. Did the trial judge err in determining Ms. Tobin's entitlement to retroactive and periodic spousal support?

2. Did the trial judge err in finding Ms. Tobin was entitled to compensation for her improvement of the King Street property?

3. Did the trial judge err in ordering the deed from Mr. Hurley to his parents be rescinded?

4. Did the trial judge err in the manner in which she determined costs arising from the matter before her?

Result: Appeal allowed in part.

Mr. Hurley failed to demonstrate the trial judge erred in her support determinations. The crux of his argument centered on his view that the trial judge was obligated to reference his financial information contained in the court file, but which had not been introduced as evidence at the hearing. Mr. Hurley was represented by counsel. The trial judge was under no obligation to search the court file for information, or to advise him of his obligation to introduce it as evidence.

Mr. Hurley also failed to demonstrate the trial judge erred in her determination that Ms. Tobin had made improvement to the property and was entitled to compensation. The record demonstrated Ms. Tobin, who the trial judge found to be credible, had contributed both financially and by way of labour to the betterment of the property. Based on the record, and the nature of the arguments on appeal, appellate intervention is not warranted.

The Court is satisfied that the trial judge did err in setting aside the deed from Mr. Hurley to his parents. Ms. Tobin had not requested the deed be set aside, rather sought a monetary remedy. Mr. and Mrs. Hurley were the legal owners of the property and ought to have been given notice that the trial judge was contemplating granting a remedy that would impact

on their legal interests. They were not. The trial judge's order rescinding the deed from Mr. Hurley to his parents is set aside.

Finally, Mr. Hurley's complaint regarding the manner in which costs arising from the hearing was determined by the trial judge is without merit.

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Thomas Gerard Hurley

Appellant

v.

Katherine Anne Tobin

Respondent

Judges:	Bourgeois, Scanlan and Derrick JJ.A.
Appeal Heard:	January 23, 2020, in Halifax, Nova Scotia
Held:	Appeal allowed in part without costs, per reasons for judgment of Bourgeois J.A.; Scanlan and Derrick JJ.A. concurring
Counsel:	William P. Burchell, for the appellant Candee J. McCarthy, for the respondent

Reasons for judgment:

[1] Thomas Hurley and Katherine Tobin had been common-law spouses. In 2016, Ms. Tobin filed a Notice of Application seeking a "common law division of property", pension division, spousal maintenance, and costs. After a four-day hearing, Justice Lee Anne MacLeod-Archer ordered Mr. Hurley pay Ms. Tobin lump sum retroactive spousal support and time-limited periodic support. With respect to property issues, the trial judge ordered Mr. Hurley make payment to Ms. Tobin to reflect the value of the improvements she had made to the home the parties had occupied. Given that Mr. Hurley had conveyed to his parents legal title to the home mere days after the date of the separation and she had found they intended him to remain the beneficial owner of the property, the trial judge ordered the deed be set aside to facilitate Ms. Tobin's collection of the trial judge's award.

[2] Mr. Hurley challenges the trial judge's support orders, her finding that Ms. Tobin was entitled to be compensated for the improvements she made to the property, and her direction that the deed be set aside. For the reasons to follow, I would dismiss all of Mr. Hurley's complaints with the exception of that relating to the trial judge's decision to set aside the deed to his parents. As I will explain later, the trial judge went a step too far in declaring the conveyance to be void.

Background

[3] The matter was heard over four days. There were three primary issues for determination: the length of the parties' common-law relationship; whether Ms. Tobin had unjustly enriched Mr. Hurley and, as such, should be compensated by him; and whether Ms. Tobin was entitled to spousal support.

[4] With respect to the nature of their relationship, both parties agreed they had started a common-law relationship in 1999. Ms. Tobin asserted they were partners for nearly 18 years, having separated in June 2016. Mr. Hurley's position was that the relationship ended in 2005. After considering the evidence advanced by both parties, the trial judge found the testimony of Ms. Tobin and her witnesses more credible than Mr. Hurley's. She found Ms. Tobin and Mr. Hurley lived together as common-law spouses until June 2, 2016.

[5] Regarding Ms. Tobin's unjust enrichment claim, the trial judge heard extensive evidence in relation to the property in which the parties had resided. In

her written reasons (2018 NSSC 313) the history of 680 King Street, New Waterford, was noted as follows:

- When purchased in December 2007, Mr. Hurley's parents had taken title to the property and obtained financing in their names;
- The property was purchased for $35,000. Despite it being almost inhabitable, Mr. Hurley and Ms. Tobin moved into the property and continued to reside there until their separation;
- Some time later, Mr. Hurley's parents moved to the property, living in their own newly built self-contained apartment;
- In 2014, Mr. Hurley was transferred title after the loan was paid in full;
- Eight days after separating from Ms. Tobin, Mr. Hurley conveyed title back to his parents. At the same time, they executed Codicils in which they bequeathed the property to Mr. Hurley; and
- Significant improvements had been made to the property by Mr. Hurley and Ms. Tobin since 2007. The parties agreed it had an appraised value of $95,000.

[6] In the court below, Mr. Hurley argued Ms. Tobin could not establish a claim for unjust enrichment because if she had improved the property (which he denied), it was not his, but his parents'. Ms. Tobin argued the property was always intended to be Mr. Hurley's and hers. She explained that when it was originally purchased, Mr. Hurley was receiving income assistance due to an injury and could not obtain financing. His parents obtained a loan, it being understood Mr. Hurley would make the payments and ultimately be conveyed the property when paid off. When the loan was retired in 2014, the property was conveyed to Mr. Hurley. Ms. Tobin argued the transfer back to his parents in 2016 was Mr. Hurley's attempt to shield this asset from any claims she may have arising from the separation.

[7] The trial judge found, notwithstanding his parents having held legal title to the property both when acquired and after separation, it was an asset beneficially owned by Mr. Hurley. After considering the principled approach to unjust enrichment set out by the Supreme Court of Canada in *Kerr v. Baranow*, 2011 SCC 10, the trial judge concluded Ms. Tobin's claim of unjust enrichment in relation to the King Street property had been proven on a balance of probabilities. (The trial judge also found Ms. Tobin did not establish a claim to Mr. Hurley's other assets based either on unjust enrichment or on the basis of a family venture—findings not challenged on appeal.)

[8] After considering the property appraisal, the nature of the improvements contributed to by Ms. Tobin, and disposition costs, the trial judge found she was entitled to a payment of $28,025.00. The trial judge ordered Mr. Hurley to make payment in 60 days.

[9] After considering the evidence of Mr. Hurley and his parents, the trial judge then found:

> [68] If title remains with Mr. Hurley's parents, there's little chance Ms. Tobin will collect on her judgment. Mr. Hurley has few assets against which Ms. Tobin can execute.
>
> [69] I have already found that Mr. Hurley conveyed title in 2016 with the intent of depriving Ms. Tobin of a claim to the home. There was no consideration for the transaction. Mr. Hurley's parents always intended for him to retain an interest in the home, according to their evidence and the Codicils they signed. So the deed was a sham.

[10] The trial judge rescinded the deed from Mr. Hurley to his parents. She further ordered should Mr. Hurley not make the payment to Ms. Tobin, she could enter judgment and "record her interest against the home" as of the date of the decision.

[11] With respect to support, Ms. Tobin claimed both retroactive support from the date of separation to the hearing and ongoing periodic support thereafter. Mr. Hurley opposed any order for spousal support, arguing Ms. Tobin was fully capable of supporting herself.

[12] In her reasons, the trial judge considered the governing legislative framework, applying it to the facts before her:

> [78] The relevant factors from the **Parenting and Support Act** R.S.N.S. 1989, c. 160 (as amended) include:
>
> 1. There is little evidence on the division of roles, though Ms. Tobin was a stay-at-home mother when the parties met.
>
> 2. There is no express or tacit agreement dealing with support
>
> 3. There is no written agreement.
>
> 4. There are no children of the relationship.
>
> 5. There are no dependent children.
>
> 6. Mr. Hurley suffered a workplace injury years ago but successfully returned to work in 2010. Ms. Tobin is healthy.
>
> 7. Both are able to work.
>
> 8. Mr. Hurley assisted Ms. Tobin in obtaining work through the union.
>
> 9. Ms. Tobin's budget shows a deficit. Mr. Hurley did not tender a statement of expenses or his 2017 income tax return, so his ability to pay support is unclear.
>
> 10. Mr. Hurley lives in a home with no mortgage. His other reasonable needs are not clear.
>
> 11. Ms. Tobin has a tax free savings account, two RRSPs, savings and a small pension. Mr. Hurley has two union pensions, a home with no debt, tax free savings, an RRSP and several vehicles. He also retained all of the household furnishings after Ms. Tobin left.
>
> 12. There is no child support payable.
>
> 13. Ms. Tobin is able to earn income, but she travels for work as a labourer to earn her current income.

[13] The trial judge concluded Ms. Tobin was entitled to support on a non-compensatory basis. She then considered whether retroactive support would be warranted based upon the principles set out by the Supreme Court of Canada in *D.B.S. v. S.R.G.*, 2006 SCC 37.

[14] With respect to Ms. Tobin's support claims, the trial judge concluded:

> [82] I have no evidence that a retroactive award would cause hardship to Mr. Hurley. There's evidence that he has assets available to pay.
>
> [83] Mr. Hurley should have paid support to Ms. Tobin after separation to allow her to re-establish herself after a lengthy common law relationship. It's appropriate that he pay a retroactive award now. I direct that he pay a total of

> $10,000.00 as lump sum retroactive spousal support within 60 days. This figure represents a net sum, because Mr. Hurley will not get the tax deduction associated with periodic payments.
>
> [84] Ms. Tobin shows a monthly shortfall of $471.60 but some of her expenses are discretionary and don't appear to reflect her shared living arrangements. Again, I don't have Mr. Hurley's budget or current income. However, I do know that he earned over $100,000.00 annually while working with the union, and that he lives in a home with no mortgage. He chooses to work in Cape Breton for less, but he also testified that he keeps cash around the home, so I will assume that his income meets his needs and more.
>
> [85] I direct that Mr. Hurley pay periodic and ongoing spousal support of $300.00 monthly to Ms. Tobin, commencing December 1, 2018 and continuing until December 1, 2022 when it will terminate. Ms. Tobin will be 60 years of age and eligible for Canada Pension benefits at that time.

[15] In concluding her reasons, the trial judge wrote:

> [86] … I will hear counsel on the issue of costs if they cannot agree, in which case time for submissions may be booked through the Scheduling office.

[16] It would appear from the record the trial judge received written submissions from Ms. Tobin's counsel on the issue of costs. She did not receive submissions on behalf of Mr. Hurley. The trial judge subsequently ordered Mr. Hurley to pay Ms. Tobin costs in the amount of $12,250.00.

Issues

[17] In his Notice of Appeal, Mr. Hurley sets out the grounds of appeal as follows:

> THAT:
>
> The learned trial Justice erred in law by awarding the Respondent an interest in 680 King Street, New Waterford, Nova Scotia, based on the unjust enrichment of the Appellant at the expense of the Respondent.
>
> The learned trial Justice erred in law by divesting Gerald Hurley and Helen Hurley of title to 680 King Street, New Waterford, Nova Scotia and vesting the same in the Appellant.
>
> The learned trial Justice erred in law by imputing income to the Appellant if he worked out West, disregarding his evidence as to why and when he began to work locally.

> The learned trial Justice erred by failing to notice supplementary financial information forwarded to the Court on June 8, 2018, which information provided details of the Appellant's income for 2016, 2017 and 2018 (to date), the Appellant's annual income being less than that of the Respondent.
>
> The learned trial Justice erred in law by awarding periodic and ongoing spousal support to the Respondent on a non-compensatory basis when the Respondent's trial evidence established that her needs were met when she worked, and she was able to contribute to her Registered Retirement Savings Plan.
>
> The learned trial Justice erred in law when she awarded the Respondent $10,000.00 as lump sum retroactive spousal support when the Respondent had not shown a specific or immediate need.
>
> The learned trial Justice erred in awarding costs to the Respondent in a manner contrary to the Order.
>
> Such further and other grounds which may be disclosed upon completion of the transcript.

[18] Mr. Hurley's written and oral submissions repeat the above allegations of error.

[19] Having considered the submissions of the parties, I would reframe and re-order the issues to be determined on appeal:

1. Did the trial judge err in determining Ms. Tobin's entitlement to retroactive and periodic spousal support?
2. Did the trial judge err in finding Ms. Tobin was entitled to compensation for her improvement of the King Street property?
3. Did the trial judge err in ordering the deed from Mr. Hurley to his parents be rescinded?
4. Did the trial judge err in the manner in which she determined costs arising from the matter before her?

Standard of Review

[20] The standards of review this Court applies in matters such as this is well-established. The lens through which we are to consider the findings of the trial judge was stated by Justice Saunders in *Laframboise v. Millington*, 2019 NSCA 43 as follows:

> [14] The standards of appellate review in cases such as this are so well-known as to hardly require elaboration. Questions of law are reviewed on a standard of

> correctness. When interpreting and applying the law the judge must be right. On questions of fact, or inferences based on accepted facts, or questions of mixed law and fact where the legal point is not readily extricable, a trial judge's factual findings will only be disturbed if they evince palpable and overriding error. "Palpable" means obvious. "Overriding" means dispositive; a mistake so serious as to have likely influenced the outcome. In appeals from a trial judge's exercise of discretion, deference is owed. We will only intervene if we are satisfied that in the exercise of that discretion the judge erred in law or the outcome is patently unjust. Unless an appellant can persuade us that the trial judge either erred in law, or erred in fact, or erred in the exercise of discretion in the ways I have just described, the appeal will fail. See generally, *Housen v. Nikolaisen*, 2002 SCC 33 at ¶8 *ff.*; *Gwynne-Timothy v. McPhee*, 2005 NSCA 80 at ¶31-34; *Laushway v. Messervey*, 2014 NSCA 7 at ¶27-29; *Homburg v. Stichting Autoriteit Financiële Markten*, 2016 NSCA 38 at ¶18-19; and *McPherson v. Campbell*, 2019 NSCA 23 at ¶17-20.

[21] I will apply the above standards in my analysis to follow.

Analysis

Did the trial judge err in determining Ms. Tobin's entitlement to retroactive and periodic spousal support?

[22] Mr. Hurley challenges the trial judge's conclusion that Ms. Tobin was entitled to spousal support on a non-compensatory basis. He argues given their respective incomes, both the awards of periodic and retroactive support were unwarranted.

[23] At the heart of Mr. Hurley's complaint is his view the trial judge did not consider that his income was less than Ms. Tobin's from 2016 to the date of the hearing. He says the trial judge's failure to note this disparity led her to improperly impute a higher income to him, resulting in her inappropriately awarding support to Ms. Tobin. Mr. Hurley says the statements in her decision indicating he did not provide his income information or Statement of Expenses constitute misapprehensions of evidence.

[24] Mr. Hurley says the trial judge was clearly wrong. He explains he had filed a Statement of Expenses in 2016. Further, he asserts in June 2018, several weeks before the commencement of the hearing, he sent a letter to the Court Administration office that included his 2016 and 2017 income documentation, as well as proof to date of his 2018 income.

[25] In response, Ms. Tobin submits during the course of the hearing, Mr. Hurley did not enter into evidence a Statement of Expenses, nor any income information for 2016, 2017, or what he had earned to date in 2018. She does not challenge these documents may have been filed, but says until tendered at the hearing, none of it could be considered evidence. Ms. Tobin argues the trial judge applied the correct law to the facts she found based on the evidence before her.

[26] In submissions before this Court, Mr. Burchell, counsel for Mr. Hurley said:

- He could not recall whether Mr. Hurley had testified as to his recent income at the hearing (a review of the record satisfies me he did not);
- His pre-trial and post-trial written submissions set out Mr. Hurley's 2016, 2017, and 2018 income, which the trial judge ought to have considered as evidence before her;
- The trial judge had an obligation to search the court file to ascertain whether Mr. Hurley had filed the materials; and
- If his written submissions and the information in the court file were not going to be considered by the trial judge as evidence before her, she had an obligation to advise him accordingly so he would have been aware of the necessity to introduce it at the hearing.

[27] The above views as to what constitutes evidence and the obligations of the trial judge are misguided.

[28] Court files contain many different types of documents. Some are sworn, some are not. Some are letters from parties setting out their positions, often with alleged facts. Filed documents are not evidence in a proceeding unless they are admissible and introduced either through a witness, by agreement, or through the operation of legislation (e.g. *Evidence Act*, R.S.N.S. 1989 c. 154, as amended). Although Mr. Hurley could have introduced the documents he says existed in the court file through his trial testimony, he did not. It was not evidence, and the trial judge cannot be faulted for not referencing it.

[29] Mr. Hurley was represented at the hearing. Although it is recognized a trial judge may have an obligation to assist a self-represented litigant with the mechanics of presenting their case, she was under no such obligation in the present instance. She did not have an obligation to scour the court file to ascertain whether there was material in it that would assist Mr. Hurley. She was under no obligation

to notify Mr. Hurley or his counsel she would not be considering material that had not been made part of the evidence.

[30] Returning to the support ordered, I am satisfied the trial judge identified and applied the correct legal principles. Her findings with respect to Ms. Tobin's entitlement to support and its quantum were ones available to her on the evidentiary record. Mr. Hurley has failed to demonstrate an error of law or a palpable and overriding error of fact. Appellate intervention is not warranted.

> *Did the trial judge err in finding Ms. Tobin was entitled to compensation for her improvement of the King Street property?*

[31] As noted earlier, the trial judge's determination that Ms. Tobin was entitled to be compensated was grounded in the principle of unjust enrichment. On appeal, Mr. Hurley does not challenge the legal principles applied by the trial judge, rather her factual findings that the King Street property was beneficially held by Mr. Hurley and that Ms. Tobin made improvements to it.

[32] I highlight several key passages in the trial judge's reasons:

> [50] I accept that Ms. Tobin helped clean the property after the deal closed in December, 2007. I also accept that Mr. Hurley hired drywallers and other workers to help renovate. However, that does not mean Ms. Tobin did not assist as she describes. I accept that she helped with the renovations (painting, crack-filling, etc.) and that she chose finishes and directed some of the work. Her contributions helped to improve the property's value and utility.
>
> [51] However, Ms. Tobin did not contribute directly to the acquisition of the home and there's nothing in writing to confirm her interest.
>
> [52] That doesn't end the inquiry. Ms. Tobin directly contributed to the improvement of the home. The property purchased in 2007 bears little resemblance to the home appraised in 2018. Mr. Hurley was enriched by Ms. Tobin's contributions, and she has been deprived by reason of that enrichment.

And further:

> [56] The claim of unjust enrichment has been proven on a balance of probabilities. Ms. Tobin's contributions were not a gift to Mr. Hurley. She had a reasonable expectation that she would benefit from her contributions to the home's improvement.

[33] After having reviewed the record, I am satisfied there was ample evidence to support the trial judge's conclusion that Mr. and Mrs. Hurley were holding title to the King Street property for their son's benefit, and Ms. Tobin had made significant contribution to its increase in value. In addition to the contributions referenced by the trial judge in her reasons, the record shows Ms. Tobin made significant contributions to increasing the value of the property. Her contributions of $5,000 to the building of an apartment for Mr. Hurley's parents, purchasing a furnace, and purchasing appliances and fixtures are just a few examples. The trial judge explained why she did not accept the evidence offered by Mr. Hurley and his parents on these critical issues in contention, rather preferring that of Ms. Tobin. It is not this Court's function to second guess the trial judge's credibility assessment, particularly in the face of an evidentiary record clearly supporting her findings.

[34] I see no justification to interfere with either the trial judge's factual findings or her conclusion that Mr. Hurley, having been unjustly enriched by Ms. Tobin, was required to pay her compensation.

Did the trial judge err in ordering the deed from Mr. Hurley to his parents be rescinded?

[35] After having found Ms. Tobin was entitled to compensation of $28,025.00 from Mr. Hurley, the trial judge noted:

> [68] If title remains with Mr. Hurley's parents, there's little chance Ms. Tobin will collect on her judgment. Mr. Hurley has few assets against which Ms. Tobin can execute.
>
> [69] I have already found that Mr. Hurley conveyed title in 2016 with the intent of depriving Ms. Tobin of a claim to the home. There was no consideration for the transaction. Mr. Hurley's parents always intended for him to retain an interest in the home, according to their evidence and the Codicils they signed. So the deed was a sham.

[36] She concluded:

> [70] For these reasons I direct that the deed to Gerald and Helen Hurley is rescinded, and that all right, title and interest in the King Street property vests with Mr. Hurley effective June 10, 2016. Failing payment by Mr. Hurley of the amount ordered herein, Ms. Tobin may enter judgment and record her interest against the home, effective the date this decision is released.

[37] Although I see no error in the trial judge's factual conclusions regarding the Hurleys' true intentions surrounding the conveyance of the King Street property, I am of the view she fell into error when she ordered the deed be rescinded. I will explain why.

[38] Mr. Hurley argues that because his parents were not parties to the proceeding, the trial judge should not have divested them of their legal title to the property. In agreeing with this submission, I note:

- In her trial pleadings, Ms. Tobin did not request the deed between Mr. Hurley and his parents be set aside;
- In her submissions to the trial judge, Ms. Tobin never asked that she be awarded an interest in the King Street property. In both her pre-trial and post-trial written submissions to the trial judge, she asked for a monetary payment from Mr. Hurley based on her contributions;
- In Mr. Hurley's pre-trial submissions he wrote:

> Title to 680 King Street, New Waterford, Nova Scotia, vests in Gerard T. Hurley and Helen Hurley. Gerard T. Hurley and Helen Hurley are not parties to this action. Their title is beyond the jurisdiction of this Court.

- The trial judge noted the above position regarding the non-party status of Mr. and Mrs. Hurley, writing in her reasons at [67]:

> … Mr. Hurley clearly anticipated a claim from [Ms. Tobin] asking that the deed be overturned, as his brief argues that the court has no jurisdiction to do so.

- The trial judge did not find Ms. Tobin had a beneficial interest in the property, rather her entitlement, a monetary one, was based on the increased value of Mr. Hurley's beneficial interest due to her efforts.

[39] As a general proposition, unless otherwise authorized by statute, a court should be highly reluctant to grant a remedy that binds a person, or materially alters the right of a person, unless they are made aware of the peril they face and have had an opportunity to meaningfully participate in the proceedings. This is a proposition grounded in the principle of natural justice.

[40] In my view, the peril to Mr. and Mrs. Hurley, namely having their legal interest in the King Street property divested, was never made known to them. The brief reference to the court's lack of jurisdiction contained in their son's written submissions did not constitute notice to them. This is especially so in light of the

fact that divesting them of their legal interest in the property was something Ms. Tobin had never requested.

[41] The trial judge's concern regarding Ms. Tobin's ability to collect her award from Mr. Hurley may have been understandable given her findings regarding the intent behind the conveyance. However, her supportable conclusion that the transfer was never intended to change Mr. Hurley's status as the beneficial owner of the property did not justify depriving the legal title holders of their interest without notice, and without them having an opportunity to respond to that possibility.

[42] I would allow this ground of appeal.

> *Did the trial judge err in the manner in which she determined costs arising from the matter before her?*

[43] In his factum, Mr. Hurley sets out his complaint regarding the trial judge's award of costs in a single paragraph:

> 20. The learned trial Justice directed that she would hear Counsel on the issue of costs.
>
> > [86] … I will hear counsel on the issue of costs of (*sic*) they cannot agree, in which case time for submissions may be booked through the Scheduling Office.
>
> Contrary to the direction of the learned trial Justice, Counsel for the Respondent forwarded written submissions to the Court. The learned trial Justice then awarded costs saying in part:
>
> > [9] I am prepared to use the basic scale as proposed by Ms. Tobin where the hearing took longer than necessary, because of the unreasonable position taken by Mr. Hurley with respect to the online dating ad sites, and his lack of income disclosure.

[44] Initially, counsel for Mr. Hurley did not elaborate on his written submissions. Upon questioning from the Court, it became clear the crux of his complaint was that an oral hearing on the issues of costs had not been held. Rather, the trial judge had proceeded to assess costs solely on the basis of the written submissions of Ms. Tobin. Counsel for Mr. Hurley acknowledges:

- He had received correspondence from Ms. Tobin's counsel in January of 2019 indicating she intended to seek costs;

- He had received Ms. Tobin's written submissions to the court on costs on March 21, 2019;
- He did not make an objection to either Ms. Tobin's counsel or the court with costs being determined by way of written submissions; and
- He was not prevented from making written submissions on the issue of costs—he chose not to do so.

[45] The trial judge was not obligated to hear oral submissions on costs, most notably in the absence of a request from Mr. Hurley to do so. If Mr. Hurley wanted to object to submissions being by way of writing, his opportunity to do so was in the court below, not here. This ground of appeal is devoid of merit.

Disposition

[46] I would allow the appeal in part and direct the trial judge's order rescinding the deed from Mr. Hurley to his parents be set aside. In all other respects, the trial judge's order arising from the proceedings, including the award of costs to Ms. Tobin, should remain unchanged.

[47] Mr. Hurley has had partial success on this appeal. However, most of his arguments were entirely without merit. As such, I would decline to award him costs on appeal and direct each party bear their own costs.

Bourgeois J.A.

Concurred in:

Scanlan J.A.

Derrick J.A.