

NOVA SCOTIA COURT OF APPEAL

Citation: *Butt v. Patterson*, 2025 NSCA 2

Date: 20250108

Docket: CAC 530310

Registry: Halifax

Between:

April Dawn Butt (MacDonald)

Appellant

v.

David Patterson

Respondent

Judge: The Honourable Justice David P.S. Farrar

Appeal Heard: December 4, 2024, in Halifax, Nova Scotia

Facts: The appellant and respondent were in a common-law relationship for 17 years before separating in October 2020. The appellant sought relief under the Parenting and Support Act, raising issues of spousal support entitlement and division of assets, including the family home (paras [1-4](#)).

Procedural History: • 2023 NSSC 422: The trial judge determined there was no entitlement to spousal support, each party would retain the property in their possession, and the equity in the family home would be equally divided (para [5](#)).

Parties Submissions: • Appellant: Argued that the trial judge misapprehended evidence regarding her income and health, leading to an improper denial of non-compensatory spousal support. She also contended that

the judge erred in not dividing the respondent's pension and in the analysis of unjust enrichment (paras [6-9](#)).

- Respondent: Argued there was no misapprehension of evidence and if there was it was not material to the outcome.

Legal Issues:

- Did the trial judge misapprehend the evidence regarding the appellant's income and health conditions?
- Was there an error in the denial of non-compensatory spousal support?
- Should the debts from the solar panels and heat pump be included in the disposition costs if the property is sold? (paras [9-11](#))

Disposition:

Appeal dismissed with costs awarded to the respondent.

Reasons:

Per Farrar J.A. (Scanlan and Derrick JJ.A. concurring):

The Court found no material misapprehension of evidence by the trial judge. The appellant failed to provide sufficient medical evidence to support her claims of inability to work due to health issues. The judge's finding regarding the appellant's CPP disability benefits was not material to the decision on spousal support. The Court also clarified that if the family home is sold to a third party, the debts from the solar panels and heat pump should be included in the disposition costs, aligning with the trial judge's intention (paras [12-38](#)).

<p><i>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 39 paragraphs.</i></p>

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Judges: Farrar, Scanlan, Derrick, JJ.A.

Appeal Heard: December 4, 2024, in Halifax, Nova Scotia

Written Release: January 8, 2025

Held: Appeal dismissed, with costs, per reasons for judgment of
Farrar, J.A.; Scanlan and Derrick, JJ.A. concurring

Counsel: Peter Gaggi, for the appellant
Meaghan C. Johnston, for the respondent

Reasons for judgment:

Background

[1] The appellant and respondent lived together in a common law relationship for 17 years. They separated in October 2020.

[2] On October 29, 2021, the appellant filed a notice of application seeking relief under the *Parenting and Support Act*.¹

[3] A two-day hearing was held in May 2023 before Justice Cindy G. Cormier.

[4] The issues raised on the application addressed whether the appellant had a compensatory or non-compensatory entitlement to spousal support, and whether there should be an equal or unequal division of all the parties' assets based on an unjust enrichment or a finding that there was a joint venture. The latter issue also included whether the family home would be divided equally.

[5] The judge released her written decision on December 29, 2023.² The decision determined there was no entitlement to spousal support, each party would keep the property in their possession, and the equity in the family home would be equally divided. With the respondent's consent, the appellant was given the opportunity to purchase the respondent's interest in the home. If she was unable or failed to do so, it would be immediately listed for sale.

[6] The appellant appeals the judge's decision regarding spousal support and argues, among other things, that there was a misapprehension of the evidence regarding the appellant's income, leading to an improper analysis of the claim for non-compensatory spousal support.

[7] The appellant's notice of appeal also requested an order dividing the respondent's pension. Upon review of the appellant's factum, this does not appear in the arguments or relief sought.

¹ R.S.N.S. 1989, c 160.

² 2023 NSSC 422.

[8] The notice of appeal sets out the following:

1. The Trial Judge misapprehended the evidence.
2. The Trial Judge failed to properly consider the Appellant's income and disclosure on same.
3. The Trial Judge failed to properly consider the Appellant's evidence.
4. The Trial Judge erred in her analysis on spousal support and imputing an income to the Appellant.
5. The Trial Judge erred in failing to divide the Respondent's pension from his employment with the Canadian Armed Forces.

[...]

[9] However, the grounds of appeal raised in the notice of appeal differ significantly from the issues argued in the appellant's factum. The issues as identified in the factum are as follows:

1. Did the Learned Trial Judge misapprehend the evidence by finding that Ms. Butt received \$53,541.47 in taxable Canada Pension Plan (CPP) disability benefits in 2022?
2. If the answer to the first question is yes: Did the Learned Trial Judge's misapprehension of Ms. Butt's income lead to an improper denial of Ms. Butt's needs-based non-compensatory entitlement to spousal based on the financial disparity between the parties and her need arising from the breakdown of the relationship?
3. Did the Learned Trial Judge misapprehend the evidence providing Ms. Butt's health challenges, including her diagnosis of cervical cancer and resulting limited capacity to work with Major depressive disorder and Post Traumatic Stress Disorder, thereby improperly imputing an income of \$65,777.00 to Ms. Butt?
4. Did the Learned Trial Judge err in law and fact by failing to find that Mr. Patterson's ability to retire early or begin relying on Ms. Butt financially constitutes a form of economic gain or enrichment?
5. If the answer to the fourth question is yes: Did the Learned Trial Judge err in law and fact by failing to find that Ms. Butt was deprived economically by acting as the household breadwinner, which enabled Mr. Patterson to depend only on his retirement income?
6. If the answer to the fourth and fifth questions are yes: Was there an absence of a juristic reason for Mr. Patterson to retain the benefits derived from Ms. Butt's contributions, thereby warranting a finding of unjust enrichment in her favor?

7. Was the Learned Trial Judge's application of the joint family venture properly applied?
8. If the Lake Echo Property is sold, should the debts from the solar panels and heat pump be included in the disposition costs for the home?

[10] Of the issues raised in the notice of appeal and the factum, only one is common to both – the judge's alleged misapprehension of the evidence. For the reasons I will explain, that is the only ground of appeal that will be addressed.

[11] Although it is not a ground of appeal, I will also address the issue of whether the debt from the solar panels and heat pump should be included in the disposition costs for the home should it not be purchased by the appellant.

Analysis

Issues not raised in the notice of appeal

[12] Rule 90.11(1) of the *Civil Procedure Rules*³ provides:

An Appellant may not rely on any ground of appeal not specified in the notice, unless the Court of Appeal or a judge of the Court of Appeal permits otherwise.

[13] At no time prior to, nor at the appeal hearing itself did the appellant seek the permission of the Court to argue grounds not raised in the notice of appeal.

[14] As a general rule, new issues cannot be raised in the factum of the appellant or in oral argument. An appellate court may depart from this ordinary rule and entertain new issues where the interests of justice require it and where there is a significant evidentiary record and findings of fact to do so.⁴

[15] The appellant has not satisfied us that this is one of those cases where it is in the interests of justice to entertain grounds of appeal not specified in the notice of appeal. As a result, with the exception of the ground of appeal in relation to the solar panels and heat pump, I would decline to address those grounds of appeal not set out in the notice of appeal. As well, I would not address those grounds of appeal in the notice of appeal for which the appellant has provided no argument in her factum.

³ *Nova Scotia Civil Procedure Rules*, 2009, Rule 90.11(1).

⁴ *Shin Han F & P Inc. v. Canada-Nova Scotia Offshore Petroleum Board*, 2014 NSCA 108 at para. 82.

Did the judge misapprehend the evidence?

[16] The appellant raises two instances where she says the judge misapprehended the evidence:

1. With respect to the evidence regarding the appellant's health challenges, including her diagnosis of cervical cancer and resulting limited capacity to work with major depressive disorder and post-traumatic stress disorder;
2. The judge misapprehended the evidence by finding that the appellant received \$53,541.47 in taxable Canada Pension Plan (CPP) disability benefits in 2022.

I will address each of these separately after discussing the standard of review.

Standard of Review

[17] In *Van de Perre v. Edwards*⁵ the Supreme Court of Canada set out the standard of review when the appellant alleges a misapprehension of evidence. The approach was summarized by the Prince Edward Island Court of Appeal in *O.(P.D.) v. W.(S.L.)* as follows:⁶

[39] The approach to appellate review requires an indication of a material error. If there is an indication that the trial judge did not consider relevant factors or evidence, this might indicate that he did not properly weigh all the factors. In such a case, an appellate court may review the evidence proffered at trial to determine if the trial judge ignored or misdirected himself with respect to relevant evidence. ***However, omissions in the reasons will not necessarily imbue the appellate court with jurisdiction to review the evidence heard at trial. The test is that an omission is only a material error if it gives rise to the reasoned belief that the trial judge must have forgotten, ignored, or misconceived the evidence in a way that affected his conclusion.*** Without this reasoned belief, the appellate court cannot reconsider the evidence.

[Emphasis added]

⁵ 2001 SCC 60.

⁶ 2009 PECA 13.

[18] This Court elaborated on the standard in *Novak v. Novak*:⁷

[8] It is not just any misapprehension of evidence that warrants appellate intervention. The appellant must demonstrate that there was a material misapprehension of the evidence that could reasonably have affected the result. ...

[19] It is with this standard in mind that I will review the appellant's allegations that the judge misapprehended the evidence.

Did the judge misapprehend the evidence with respect to the appellant's medical condition?

[20] The appellant refers to the following from the judge's decision to suggest that she misapprehended the evidence.

[80] Mr. Patterson suggested **Ms. Butt earned approximately \$60,000 until 2018**. Ms. Butt stated that she stopped working as a home inspector in or around November 2017 due to "stress and a cancer diagnosis" after which she began receiving CPP disability in or around January 2018. Ms. Butt provided no medical evidence with respect to past, present, or future ability to work.

[Emphasis in original]

[21] In her factum, the appellant says the following about this portion of the judge's decision:

62) In paragraph 80 of the Decision, the Learned Trial Judge found that Ms. Butt did not provide medical evidence regarding her past, present, or future ability to work. We respectfully submit that the Learned Trial Judge misapprehended the evidence concerning Ms. Butt's health challenges and her capacity to earn income, leading to an improper imputation of income.

[22] However, during the appellant's own testimony she indicated she was not receiving disability benefits as a result of her cancer diagnosis. Specifically, her evidence was as follows:

MS. BUTT: The on- I guess I need to clarify it. I'm not on short-term disability because of cancer diagnosis. I'm on short-term dis- or long-term disability rather because I have a major depressive disorder.

MS. JOHNSON: Okay, and you haven't provided any medical documentation in relation to that, correct?

⁷ 2020 NSCA 26.

MS. BUTT: I'm not sure. Can I ask my lawyer? No? We provided some at time of, I think, our settlement conference. We have included the letter from CPP disability stating that I am in fact disabled.

MS. JOHNSON: So, from your medical practitioner, we don't have any updated confirmation of your diagnosis.

MS. BUTT: I do not believe so.

MS. JOHNSON: Okay.

MS. BUTT: Apparently not.

[23] With respect to not being able to work because of a major depressive disorder, the appellant provided no medical evidence confirming this diagnosis.

[24] A careful review of the evidence, submissions and arguments fails to establish the judge misapprehended the evidence. Rather, at the hearing below the appellant failed to adduce evidence that she is unable to work due to medical reasons. The judge could not misapprehend evidence that was not before her.

[25] I would dismiss this ground of appeal.

Did the judge misapprehend the evidence by finding the appellant received \$53,541.47 in CPP disability benefits in 2022?

[26] The appellant alleges the judge misapprehended the evidence by finding the appellant received \$53,541.47 in CPP disability benefits in 2022.

[27] This alleged misapprehension has its origin in an updated Statement of Income sworn by the appellant on May 1, 2023. In that document is a CPP T4A document indicating the appellant earned \$53,541.47 over 12 months in taxable CPP benefits in 2022.

[28] In her trial affidavit filed on May 2, 2023, the appellant references a letter from Service Canada dated January 22, 2022 which stated in part:

CPP is paying \$39,477.20 directly to your insurance company, Life Insurance Company of North America, because you have signed a consent form allowing us to pay them back for the period you were eligible to receive both benefits. This amount is for the period of June 2019 to January 2022.

[29] The judge was concerned about this evidence and, in particular, the appellant's lack of disclosure of financial information. She held:

[113] In her trial affidavit filed May 2, 2023 at paragraph 5, Ms. Butt references Exhibit A as a letter from Service Canada dated January 22, 2023, which is in fact dated **January 22, 2022 (not 2023)**, and states in part:

CPP is paying \$39,477.20 directly to your insurance company, Life Insurance Company of North America, because you have signed a consent form allowing us to pay them back for the period you were eligible to receive both benefits. This amount is for the period of **June 2019 to January 2022**. (my emphasis).

As noted above, the partial Canada Pension Plan T4A (P) is attached to Ms. Butt's Updated Statement of Income filed May 2, 2023, and indicates **that in 2022** [12-month period, most likely Jan 2022 – December 2022], Ms. Butt (Ms. MacDonald) **received disability benefits alone in the amount of \$53,541.47 as taxable CPP benefits**. Ms. Butt suggested her income should be imputed to \$34,000.00.

[114] I am unclear how the letter dated January 2022 (not 2023) referencing the period 2019 – January 2022 helps to clarify what total benefits were received by Ms. Butt in 2020, 2021, 2022, or 2023. ***Without her T1 General Tax and Benefit returns and her T4A(P) returns for 2020, 2021, and 2022, her financial disclosure remains incomplete. Given the lack of disclosure and the multiple incorrect references to documents, I am drawing an adverse inference and finding Ms. Butt's testimony about her income is not credible.***

[Emphasis added – bolding and underlining in original]

[30] The judge did not misapprehend the evidence. She was simply indicating the evidence was insufficient for her to reach the conclusion the appellant wanted her to make.

[31] In any event, any alleged misapprehension was of no consequence. Later in the judge's reasons she again addressed the CPP issue and found, even if she was mistaken about the receipt of the CPP disability benefits in 2022, it had no impact on her decision:

[216] As noted above, it appears Ms. Butt received \$53,541.47 in disability benefits in 2022, and she was in receipt of rental income from her daughter or should have been if her daughter was residing with her. Mere disparity in the parties' incomes does not necessarily result in an award of spousal support.

[217] ***If I am wrong, then I find Ms. Butt has failed to file sufficient evidence establishing her needs and / or her means, and / or she has failed to prove she cannot work and / or she has failed to prove she has looked for employment commensurate with her past income earning potential and her current circumstances.***

[Emphasis added]

[32] The evidence was not material to the judge's conclusion the appellant was not entitled to spousal support. It was the lack of financial information from the appellant that resulted in the denial of spousal support, not the receipt of CPP disability benefits.

[33] I would deny this ground of appeal.

If the Lake Echo property is sold to a third party, should the debts from the solar panels and heat pump be included in the disposition costs of the home?

[34] As noted earlier, although this is not a ground of appeal, a careful reading of the judge's order and decision indicates an intention to deduct the costs of the solar panels and heat pump from the proceeds of the sale, should the house be sold to a third party. I will start with the order, which provides for the two contingencies, i.e., if the house is purchased by the appellant, and if it is sold to a third party.

3. If April Butt chooses to retain the family home, the following conditions shall apply:

a. April Butt shall pay the sum of \$87,461.21 representing David Patterson's equal share of the net equity of the home, calculated as follows:

Appraised Value: \$352,000.00

Less mortgage: \$160,797.58

Less Realtor Fees 4% plus HST: \$16,192.00

Less Legal Fees \$1,000.00

Total Equity: \$174,010.42

Each parties' share: \$87,005.21.

Cost of Appraisal (Paid by David Patterson): \$920.00 total/2 =
\$460.00

Total owed to David Patterson: \$87,465.21

b. David Patterson shall forthwith transfer to April Butt by way of Quit Claim Deed all right, title, and interest in the family home, which will be held by April Butt's lawyer and not registered until David is released from the mortgage and is provided his equalization payment.

c. April Butt shall make all reasonable efforts to have David Patterson released from the mortgage against the family residence and will

provide David Patterson with a solicitor's undertaking to register the Quit Claim Deed only concurrent with David's release from the covenants of the mortgage. April must provide David with a copy of all registered releases and the registered quit claim deed.

- d. David Patterson shall not be responsible for any payments April Butt has made towards the family home since the parties separated and for clarity, David Patterson shall not be responsible for reimbursing April Butt for the heat pump and solar panel loans.
- 4. ***If April is not able to release David from the covenants of the mortgage, the family home shall be immediately listed for sale. The net proceeds of sale shall be equally divided between the parties after the usual adjustments on closing as between the purchaser and vendor, real estate commission, legal fees and disbursements on migrating title and closing, and payments of the outstanding mortgage.***

[Emphasis added]

[35] The order provides that if the property is sold to a third party, the usual adjustments on closing would be made. In this case, the record and reasons of the trial judge support the debt associated with the heat pump and solar panels falling within the closing adjustments.

[36] This interpretation is supported by the judge's reasons where she, again, makes a distinction between the property being sold to a third party and the appellant retaining it herself:

[189] Mr. Patterson disagreed that the upkeep / payments on the solar panels or heat pump since separation should be a consideration in dividing the equity in the home. On one hand, he argued that Ms. Butt provided no objective evidence or supporting documents regarding the cost of upkeep for the home. Further, he argued that if Ms. Butt purchased the home, she would retain the benefit of the heat pump and the solar panels. Arguably, if the parties sell the home they will benefit from any added value to the home. ***I agree with Mr. Patterson, and the balances for the solar panels and heat pump will not be deducted from the final price of the home or from the amount owed by Ms. Butt to Mr. Patterson if she chooses to buy out his half interest in the property.***

[Emphasis added]

[37] Contrary to the submissions of both parties on this appeal, the judge did address the circumstance where the property was sold to a third party. If retained by the appellant, there would be no reduction for the debt relating to the solar panels and heat pump. This makes sense as the appellant would receive the benefit

of these items in the future. If sold to a third party, there would be a reduction. Again, this makes sense considering the value of the house would presumably be increased as a result of the solar panels and heat pump. To burden the appellant with the debt associated with them would be unfair, as it would decrease her share of the equity.

[38] As pointed out by Ms. Johnston on behalf of the respondent, there may have been an increase in the debt as a result of the failure of the appellant to make payments during the time that she has been residing in the home. If that is in fact the case, hopefully the parties can come to an agreement. If not, it will have to be addressed in the court below.

Conclusion

[39] For these reasons the appeal is dismissed. Costs in the amount of \$5,000.00 are awarded to the respondent inclusive of disbursements.

Farrar, J.A.

Concurred in:

Scanlan, J.A.

Derrick, J.A.