NOVA SCOTIA COURT OF APPEAL
Citation: ***Blois v. Blois***, 2013 NSCA 130

Date: 20131115
Docket: CA 408553
Registry: Halifax

Between:

Steven Wade Blois

Appellant

v.

Arden Memory Blois

Respondent

Judges:	Hamilton, Beveridge and Farrar, JJ.A.
Appeal Heard:	September 25, 2013, in Halifax, Nova Scotia
Held:	Appeal is dismissed with costs payable forthwith by the appellant to the respondent in the total amount of $3000.00 including disbursements, per reasons for judgment of Hamilton, J.A.; Beveridge and Farrar, JJ.A. concurring.
Counsel:	Kim A. Johnson, for the appellant Lloyd I. Berliner, for the respondent

Reasons for judgment:

[1] Mr. Blois appeals from the September 28, 2012 Corollary Relief Order of Justice Robert W. Wright that (1) declared the January 12, 2007 Separation Agreement between him and his wife was valid and representative of the full and final resolution of the division of property pursuant to the **Matrimonial Property Act**, R.S.N.S. 1989, c. 275 and (2) ordered Mr. Blois to return certain items to Ms. Blois.

[2] The evidence that was before the judge is set out in detail in his reasons (2012 NSSC 273). It is not necessary to repeat it here. In summary, after approximately 23 years of marriage where Ms. Blois was predominantly a stay at home mother, the parties separated when Ms. Blois moved out of the matrimonial home on April 1, 2006 with their daughter. She then moved back into the matrimonial home in late summer or early fall of 2006.

[3] On January 12, 2007, while continuing to live in the matrimonial home, Mr. and Ms. Blois signed a Separation Agreement providing for a complete division of matrimonial property. Over the next eleven months, while still living together, everything required to give effect to the division of property in the Separation Agreement was implemented.

[4] The Separation Agreement contained the following clause:

> 2(a) This Agreement shall constitute a separation agreement for all purposes provided that if the parties, with their mutual consent, cohabit as husband and wife for a single period of less than one year with reconciliation as the primary purpose of their cohabitation, the provisions contained in this Agreement and any payment, conveyance or act made or done pursuant to the provisions contained in this Agreement will not be affected. **If the parties, with their mutual consent, cohabit as husband and wife for a period of one year or more with reconciliation as the primary purpose of the cohabitation, the provisions contained in this Agreement will become void.** [Emphasis added]

[5] Despite executing and implementing the Separation Agreement, the parties continued to cohabit until Mr. Blois moved out in January of 2010, some months after Ms. Blois requested him to leave. The judge accepted Ms. Blois' evidence that the parties slept in separate bedrooms for the most part:

> [29] It was the evidence of Ms. Blois that once construction of the house was substantially completed in December, 2008 she then moved into it by herself, with Mr. Blois continuing to live in the Bass River home. However, in January of 2009 when Mr. Blois was not working and with his businesses in decline, she said that she agreed that he could move into the Parkwood Drive home as well on a temporary basis. She said that she agreed that he could stay there, with a separate bedroom, under the same living arrangement they had maintained at the Bass River home.
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> ...
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> [74] Additional corroborating factors consistent with this finding are that at no time after they resumed cohabitation was Ms. Blois' name restored to the joint bank account they had previously operated together (her husband having removed her from it after their initial separation in 2006). Also, Ms. Blois never again wore her wedding ring after that initial separation. I also accept her evidence that she and her husband maintained separate bedrooms at both the Bass River and Parkwood Drive homes, at least for the most part. I further note that in her income tax returns for the years 2007-2009, Ms. Blois listed her marital status as "Separated".

[6] During the period they cohabited Ms. Blois (1) completed her diploma in Business Administration; (2) obtained full-time employment in September of 2009; (3) was removed from the joint bank account the parties shared before separation; (4) did not wear her wedding ring and (5) filed her tax returns on the basis she was separated. Mr. Blois (1) acted as general contractor for the home Ms. Blois decided to build for herself and (2) was involved in her rental properties and in her blueberry business. The parties also took a week's vacation together in Cuba and participated as a couple in family gatherings, such as their 25th wedding anniversary organized as a surprise party by other family members.

[7] Ms. Blois' explanation of why Mr. Blois acted as her general contractor was to keep costs down and because Mr. Blois wanted to get started in the construction business. She indicated his involvement with the rental properties continued because the mortgagee would not release him as a mortgagor when these properties were transferred to her pursuant to the Separation Agreement. She explained her reason for the continued cohabitation and participation as a couple in family events as being for the benefit of their two children, to avoid

embarrassment in the community as a result of living together while legally separated and as being financially convenient (at first hers and later his).

[8] In December of 2009 Mr. Blois filed for bankruptcy. In his statement of property he indicated that he had no interest in any real property, which would have been inaccurate if the Separation Agreement had ceased to be in effect. His trustee in bankruptcy also prepared his 2007 to 2009 tax returns on the basis he was separated during those years.

[9] The issue before the judge was the interpretation and application of clause 2(a) of the Separation Agreement; i.e., did the parties mutually consent to cohabit as husband and wife with reconciliation as the primary purpose of their cohabitation for a period of one year or more.

[10] Mr. Blois testified that he cohabited with reconciliation as the primary purpose for a period of one year or more. Ms. Blois, on the other hand, gave evidence that she did not cohabit for this purpose for a period of one year or more.

[11] The judge preferred the evidence of Ms. Blois when it conflicted with that of Mr. Blois. He found, after considering the subjective stated intentions of both parties and the objective evidence, that notwithstanding their continuing cohabitation and the joint activities in which they engaged for some three years after signing the Separation Agreement, Ms. Blois never intended to cohabit with Mr. Blois as husband and wife with reconciliation as the primary purpose for a period of one year or more. Finding an absence of mutuality, stipulated by the Separation Agreement in order to nullify its terms, he found it remained valid and the property division provided for in it governed the division of property at the time of divorce.

[12] I agree with the parties that the judge stated the correct legal test he was to apply in determining intention:

> [41] The actual intent of the parties in their continued cohabitation for a period of some three years after the Separation Agreement was signed and implemented must be garnered from what they say in their evidence measured against their conduct. Those two measures are very difficult to reconcile in this case in what can only be described as a very confounding relationship over the three year period.

[13] Mr. Blois' first argument is that the judge erred by misapplying this test. He argues that he gave undue weight to Ms. Blois' stated subjective intention in resuming and continuing cohabitation (that she did not intend to reconcile) and insufficient weight to the objective evidence of her intentions (the conduct of the parties). He argues this caused the judge to make an overriding and palpable error in finding there was no mutual intention to reconcile for one year or more.

[14] I am not satisfied the judge made a palpable and overriding error. It was his job to weigh the evidence about the unusual circumstances disclosed by the evidence. His reasons make it clear that he was alive to those circumstances. He weighed all of the evidence in reaching his decision, including Mr. Blois' stated intention that he intended to reconcile, Ms. Blois' stated intention that she did not intend to reconcile, and the objective evidence of their conduct *vis-a-vis* each other from the time Ms. Blois moved back into the matrimonial home in the late summer/early fall of 2006 until Mr. Blois left the Parkwood house in January 2010.

[15] He recognized the inconsistency between Ms. Blois' stated intention and the appearance of the parties' relationship to their family and the outside world. He also recognized the inconsistency between Mr. Blois' stated intention to reconcile and the fact he did not declare any interest in real property in his statement of property in connection with his bankruptcy and filed his 2007 to 2009 tax returns on the basis he was separated during those years. It is for the judge to weigh this evidence and make his finding. It is not for this Court to re-weigh the evidence and retry the case; **Gallant v. Gallant**, 2009 NSCA 56, para 9; **Myatt v. Myatt**, 2005 NSCA 72, para 10.

[16] I am satisfied the first ground of appeal should be dismissed.

[17] Mr. Blois' second argument is that the Order does not reflect the judge's reasons. In his reasons (para 80) the judge states that Mr. Blois is "to forthwith return to Ms. Blois any and all items wrongfully taken from the Parkwood Drive home, including the diningroom chairs, the medicine cabinet, any cabinet doors or furniture drawers still missing, and any personal items owned by Ms. Blois." The Order provides that Mr. Blois shall forthwith return to Ms. Blois any and all items wrongfully removed from the Parkwood Drive home by Mr. Blois, "including **but**

not limited to the dining room chairs, the medicine cabinet, the cabinet doors or furniture drawers, and all personal items owned by" Ms. Blois. [Emphasis added]

[18] I am not satisfied the judge erred by adding the bolded words to the Order. In the context of this case, there is no substantive difference between the words the judge used in his reasons and the words in the Order. I would also dismiss this ground of appeal.

[19] Accordingly, I would dismiss the appeal and order Mr. Blois to pay costs to Ms. Blois forthwith in the amount of $3,000 including disbursements.

Hamilton, J.A.

Concurred in:

Beveridge, J.A.

Farrar, J.A.