NOVA SCOTIA COURT OF APPEAL
Citation: ***Moore v. Moore***, 2003 NSCA116

Date: 20031104
Docket: CA 188114
Registry: Halifax

Between:

Charice C. Moore

Appellant

v.

Gerald Daniel Moore

Respondent

Judges:	Roscoe, Cromwell & Hamilton, JJ.A.
Appeal Heard:	October 1, 2003, in Halifax, Nova Scotia
Held:	Appeal allowed respecting the $48,831.98 debt; appeal dismissed with respect to the bank account, furnishings and household goods; corollary relief judgment to be amended as contained in ¶ 29; and costs of $1,500 including disbursements awarded to the appellant as per reasons for judgment of Hamilton, J.A.; Roscoe and Cromwell, JJ.A. concurring.
Counsel:	Anthony J. Morley, Q.C., for the appellant Lloyd I. Berliner, for the respondent

Reasons for judgment:

[1] Charice C. Moore appeals the September 24, 2002 decision of Justice J. E. Scanlan of the Supreme Court with respect to the division of property and debt between herself and her ex-husband, Gerald Daniel Moore, at the time of their divorce.

[2] Her grounds of appeal are as follows:

1. That the learned Trial Judge erred by requiring the appellant to pay the respondent $50,242.66 and by requiring the appellant to provide a first mortgage to the respondent on the property located at 6 Stanley Street, North Sydney, for the principal sum of $50,242.66.

2. That the learned Trial Judge erred by misconstruing the provisions of the marriage contract between the appellant and the respondent as it relates to the property at 6 Stanley Street, North Sydney and in particular paragraphs 4.02 and 7.01 of the marriage contract.

3. That the learned Trial Judge erred by using the date of separation as the date for the division of the joint account and by requiring the appellant to account for withdrawals from the joint account amounting to $3,362.00.

4. That the learned Trial Judge erred by limiting the appellant's share of the furnishings, appliances and household goods by not requiring the furnishings, appliances and household goods to be sold and the proceeds divided equally between the appellant and the respondent.

Facts:

[3] The following facts are relevant to her grounds of appeal.

Grounds 1 and 2:

[4] Prior to the parties co-habiting, Ms. Moore lived in a house she owned in North Sydney. Mr. Moore lived in a house he owned in Amherst. Ms. Moore

moved to Amherst and the parties began co-habiting in December, 1996, entered into a marriage contract on September 30, 1998 and married on October 3, 1998. They lived together in Mr. Moore's house in Amherst with Ms. Moore's two children from a prior relationship. Ms. Moore indicated on May 3, 2001 that she was leaving and on May 9, 2001 she and her children moved out. There are no children of the marriage.

[5] The trial judge found that Ms. Moore had purchased her North Sydney house a couple of years prior to co-habitation for $55,000 and that there was little equity in her house at the time co-habitation began. Her house was encumbered by a mortgage in favour of the Royal Bank with an interest rate of 8.5%. Once Ms. Moore moved to Amherst, she rented her North Sydney house to her aunt. The rent was deposited into the parties' joint bank account and was used to pay the expenses relating to her North Sydney house, including the mortgage payments.

[6] During the marriage, in October, 1999, Mr. Moore refinanced some of his assets. As part of that refinancing, Mr. Moore caused the mortgage on Ms. Moore's house to be paid and borrowed an equal amount from his bank on a line of credit in his name only. The trial judge found this was done to reduce the interest expense and save money for the couple. The interest rate on Mr. Moore's line of credit was 4 1/4 % at the time of trial. The rent from Ms. Moore's North Sydney house continued to be deposited to the parties' joint bank account and to be used to pay the house expenses, now including the interest on Mr. Moore's line of credit debt.

[7] The month following separation, Ms. Moore stopped depositing the rent from the North Sydney house into this account. The principal outstanding on the line of credit was $48,813.98 at the date of trial. We are told Mr. Moore has paid the interest on this debt since.

Ground 3:

[8] There is no dispute there was $206.76 in the parties' joint bank account on May 9, 2001. Ms. Moore did not deposit any amounts into the account after May 9. She does not deny she took approximately $3,362 from this bank account after May 9 to pay for personal expenses including expenses relating to her North Sydney house, her car, groceries and the apartment she moved into. On May 17 Mr. Moore transferred the account into his name alone.

Ground 4:

[9] When Ms. Moore left the Amherst home the parties lived in during marriage, she took with her certain furnishings and household goods and left others with Mr. Moore. The trial judge found that an appraisal was done of some of the goods taken by Ms. Moore and of all of the goods left in the Amherst home with Mr. Moore. Mr. Moore gave evidence with respect to the furnishings and household goods taken by Ms. Moore and kept by himself and their value. He indicated that if the parties kept the furniture and household goods in their possession at the date of trial that he would owe Ms. Moore an equalization payment of $1,867.50 to effect an equal division of the parties' furnishings and household goods. Ms. Moore gave no evidence with respect to the division or value of these goods.

Trial Judge's Findings:

[10] With respect to the $48,813.98 debt, the trial judge ordered Ms. Moore to pay this amount to Mr. Moore, and as security, to grant a mortgage to Mr. Moore on her North Sydney house. He did this after considering the effect of clause 4.02 of the marriage contract and determining that it did not preclude this. He does not appear to have considered clause 7.01(c) of the marriage contract.

[11] With respect to the joint bank account, the trial judge rounded the balance in the account on the date of separation to $200, and divided the account as of that date, ordering that one half be paid to Ms. Moore. He also ordered Ms. Moore to repay Mr. Moore $3,362 she took from the joint bank account after May 9, the date of division.

[12] With respect to the furnishings and household goods, noting the absence of any evidence from Ms. Moore on this issue, the trial judge accepted Mr. Moore's evidence and ordered that an equal division would be achieved by the parties retaining the furniture in their possession at the time of trial and by Mr. Moore paying Ms. Moore $1,867.50.

[13] Child and spousal support were also dealt with by the trial judge but are not under appeal.

Standard of review:

[14] The applicable standard of review in this case is as stated at ¶ 9 of **Hill v. Hill** (2003), 213 N.S.R. (2d) 185:

> Generally, support and matrimonial property orders are deserving of substantial deference. This Court will intervene only if the order reflects a material error, a significant misapprehension of the evidence, an error of law or is clearly wrong. We are not entitled to intervene simply because we would have made a different decision or have balanced the factors differently. (Edwards v. Edwards (1994), 133 N.S.R. (2d) 8 (C.A.); Rafuse v. Conrad (2002), 205 N.S.R. (2d) 46; 2002 NSCA 60; Roberts v. Shotton (1997), 156 N.S.R. (2d) 47 (C.A.) and Hickey v. Hickey, [1999] 2 S.C.R. 518)

Analysis:

[15] Ms. Moore has satisfied me that the trial judge erred in ordering her to pay the $48,813.98 debt. She has not satisfied me that he erred in dividing the joint bank account as of May 9 and ordering her to reimburse Mr. Moore for the amounts she withdrew thereafter, or in dividing the furnishings and household goods as he did.

[16] The issues on appeal all relate to the division of property between the parties. Normally this would be governed by the **Matrimonial Property Act**, but in this case the parties agreed the marriage contract governed and focussed on its provisions. As a result there was almost nothing in the record about the other assets and debts of the parties or their value. The parties' focus on the marriage contract was appropriate given the clear indication in the marriage contract that it, rather than the **Matrimonial Property Act**, would govern the division of assets in the event of a divorce. Consider for example clauses 2.02, 2.03, 4.01 and 6.01:

> 2.02 The husband and wife each have decided to determine by agreement his and her rights and obligations with reference to the ownership of or interest in property should they marry, during marriage, and if cohabitation ceases, upon separation or dissolution of their marriage, or upon death.
>
> 2.03 It is the over-riding intention of the husband and the wife that, unless they hold property jointly, all property shall remain the sole property of one or the other of them regardless of how many years they have cohabited or

been married and one party shall not claim an interest in the property of the other unless this has specifically been confirmed by way of written agreement.

4.01 Except as provided in this Agreement or other written Agreement of the parties:

(a) property presently recorded, registered, filed, owned or otherwise acquired by or in the name of the husband or the wife shall be and shall always remain the sole property of the husband or the wife and no claim shall be made for any reason at any time by either party for an interest in the property of the other;

(b) no property which either the husband or the wife own now or hereinafter acquires shall be a matrimonial asset within the meaning of the **Matrimonial Property Act**, S.N.S. 1980, c. 9 or any successor.

6.01 All rights and obligations of the husband and the wife, whether arising during marriage either before or after separation, or upon or after divorce or annulment or death, including the rights and obligations of each with respect to:

(a) possession of property, and

(b) ownership in or division of property, are governed by this Agreement which prevails over all provisions of the Matrimonial Property Act, S.N.S. 1980, c. 9 or any successor.

[17] The detail provided in clause 10.03 with respect to the matrimonial home at 17 Birchwood Place is a further indication of the great lengths the parties went to to agree between themselves on how their property was to be dealt with rather than have the **Matrimonial Property Act** apply:

10.03 The husband is the sole owner of a property located at 17 Birchwood Place, D'Orsay Road, East Amherst, Nova Scotia. The following provisions shall apply in the event of the separation of the parties or upon the death of the husband.

(a) Should the husband and the wife have cohabited for (5) five years or less, the provisions of this Marriage Contract shall apply and the wife shall not claim nor have any interest in this property.

(b) Should the husband and the wife have cohabited for a period of five (5) years but less than ten (10) years, the wife shall have a Twelve point five percent (12.5%) interest in this property.

> (c) Should the husband and the wife have cohabited for a period of ten (10) years but less than fifteen (15) years, the wife shall have a Twenty-five percent (25%) interest in this property.
>
> (d) Should the husband and the wife have cohabited for a period of fifteen (15) years or more, the wife shall have a Fifty percent (50%) interest in this property.

[18] Thus the division of property was to be determined by the trial judge interpreting the marriage contract.

Debt:

[19] With respect to the $48,813.98 debt, I am satisfied clause 7.01 of the marriage contract precludes Ms. Moore being required to pay this debt and therefore I will not deal with clause 4.02 of the marriage contract that the trial judge interpreted as not precluding his ordering Ms. Moore to pay this debt. Clause 7.01 of the marriage contract provides:

> 7.01 Except as provided in this Agreement, the husband and wife each release and discharge all rights to and interest in property owned by the other, that he or she has or may acquire under the laws of any jurisdiction, and in particular under the Matrimonial Property Act, S.N.S. 1980, c. 9 or any successor in the Province of Nova Scotia, including all rights to an interest in:
>
> (a) ownership in property;
>
> (b) division of property; and
>
> (c) compensation by payment of any amount of money, or by an award of any share of property for contributions of any kind, whether direct or indirect, made to property. (emphasis mine)

[20] Clauses 1.01 and 1.03 are also instructive:

> 1.01 "Property" means real or personal property or any interest existing or claimed therein.
>
> 1.03 "Interest in property" means:

> (a) an ownership interest;
>
> (b) a right to receive monetary compensation; (emphasis mine)
>
> (c) a possessory interest.

[21] By paying Ms. Moore's mortgage in October, 1999, I am satisfied Mr. Moore made a contribution within the broad language on clause 7.01(c):

> (c) compensation by payment of any amount of money, or by an award of any share of property for contributions of any kind, whether direct or indirect, made to property.

That being so, the effect of clause 7.01 is that Mr. Moore released any right he may otherwise have had to recover payment of this contribution from Ms. Moore. By failing to consider this clause or by considering it and not finding it precludes Ms. Moore from being required to pay the $48,813.98 debt, I am satisfied the trial judge erred.

Joint Bank Account:

[22] The parties' joint bank account is governed by clause 5.01 of the marriage contract which provides as follows:

> 5.01 Should the husband or the wife register or otherwise record, file or invest any property in the joint names of the husband and the wife, the right to an equal division of this property shall apply and neither party, regardless of the amount or nature of direct or indirect contribution made to the acquisition or purchase of that property, shall claim a greater interest in that property than a one-half share.

[23] With respect to the joint bank account, Ms. Moore argued that the bank account should be divided as of May 17 instead of May 9. On May 17 the balance was $2,338.02, as opposed to a balance of $206.76 on May 9. Ms. Moore argued she is therefor entitled to one-half of $2,338.02. Since all cheques and withdrawals that the trial judge ordered Ms. Moore to reimburse Mr. Moore for were made before May 17, Ms. Moore also argued that with the later division she should not be required to reimburse Mr. Moore for these withdrawals.

[24] A good review of the rationale behind the choice of valuation dates is contained in **Simmons v. Simmons** (2001), 196 N.S.R. (2d) 140 (NSSC) ¶'s 9 to 36 inclusive. Paragraph 9 states as follows:

> 9. The Matrimonial Property Act, S.N.S., 1980, c.9 (the "Act") does not specify a date for valuation. This is left to the discretion of the trial judge. The case law in this province suggests that such discretion is a positive thing so that a fair and equitable result can be obtained on a case by case basis. The Act is based on the principle of fundamental fairness in the division of assets. In an unreported case of MacDonald v. MacDonald, [1991] N.S.J. No. 639, August 23, 1991, Judge Daley of the Family Court in his capacity as a referee stated:
>
> > "The key in valuating the matrimonial property is an orderly and equitable settlement of the spousal affairs, and whatever the date has to be to accomplish this purpose, it is the proper date."

[25] In the case at hand the trial judge exercised his discretion and decided May 9 was the appropriate date to value and divide the joint bank account. Given the nature of this asset, a chequing account with a small balance used by the couple to pay ongoing expenses as opposed to save money, the division of this account on the date of separation does not indicate the trial judge acted on any wrong principle of law or disregarded or misapprehended the material evidence such as would justify this court's interference.

[26] Having not been satisfied the trial judge erred in determining that May 9 was the appropriate date of division for the account, Ms. Moore has also not satisfied me the trial judge erred in ordering her to reimburse Mr. Moore for the amounts she took from the account after that date.

Furniture:

[27] The furniture and household goods were governed by clause 10.04 of the marriage contract that provides as follows:

> 10.04 All furnishings, appliances, and household goods shall be owned jointly by the husband and the wife regardless of who purchased these items.

[28] With respect to the furnishings and household goods, the trial judge had little option but to make his decision on the evidence before him. Without any

evidence from Ms. Moore on this issue, which absence is confirmed by the record, he did not err in accepting the evidence of Mr. Moore and making his order on that basis. **Newham v. Newham** (1993), 87 B.C.L.R. (2d) 48 (BCCA) ¶ 22.

Conclusion:

[29] Accordingly I would allow that part of the appeal relating to the $48,831.98 debt and dismiss the other two grounds of appeal dealing with the bank account and the furnishings and household goods. I would amend the Corollary Relief Judgment dated October 21, 2002 by deleting ¶'s 2 to 5 inclusive and substituting the following:

> 2. The Petitioner, Charice C. Moore, shall pay $1,410.68 to the Respondent, Gerald Daniel Moore, on or before November 30, 2003.
>
> 3. Other than as provided in paragraph 2 above, there has been a full and final division of all matrimonial assets and debts.
>
> 4. Deleted.
>
> 5. Deleted.

[30] Given the substantial success of Ms. Moore, Mr. Moore shall pay costs of $1,500 including disbursements.

Hamilton, J.A.

Concurred in:

Roscoe, J.A.

Cromwell, J.A.