NOVA SCOTIA COURT OF APPEAL
Citation: *Crosby v. Crosby,* 2003 NSCA 52

Date: 20030520
Docket: CA 186653
Registry: Halifax

Between:

Lawrence Gene Crosby

Appellant

v.

Linda Margaret Crosby

Respondent

Judges:	Saunders, Chipman & Hamilton, JJ.A.
Appeal Heard:	May 15, 2003, in Halifax, Nova Scotia
Written Judgment:	May 20, 2003
Held:	Appeal dismissed with costs, including disbursements, of $1,000 to the respondent, as per oral reasons for judgment of Saunders, J.A.; Chipman and Hamilton, JJ.A. concurring.
Counsel:	Milton J. Veniot, Q.C., for the appellant Roseanne M. Skoke, for the respondent

Reasons for judgment:

[1] After 28 years of marriage and two children the parties separated in February 2001, having acquired matrimonial assets which the trial judge valued, net of associated debt at $367,762.75, and ordered be divided equally. This resulted in an equalization payment from the respondent, Mrs. Crosby to the appellant, Mr. Crosby, of $86,962, after first deducting the appellant's share of a Royal Bank line of credit which the respondent was willing to assume.

[2] The trial judge, Supreme Court Justice Hilroy S. Nathanson, ordered that the matrimonial home be listed for sale forthwith (the closing is set for May 22, 2003) to enable the respondent to settle the balancing payment owed to the appellant in a way that would reduce or perhaps avoid the respondent's need to deplete her savings and pension accounts in order to do it.

[3] While we agree there appears to be an unexplained discrepancy in the trial judge's determination that the assets said to be in the hands of the appellant totalled $93,919 whereas, taking into account those particular assets:

Honda Motorcycle	$1,800.00
RRSP	74,900.00
Cash Value Life Insurance	13,019.82
Joint Bank Account	1,250.00
the total value of those would be:	$90,969.82,

we accept for the purposes of this appeal counsels' agreement and stipulation before us that the correct figure was $90,969.82 and that we proceed on that basis. In any event it is not a mistake that would in any way be determinative of a material issue in this case.

[4] The appellant is described in his counsel's factum as a self-employed carpenter who, according to the evidence, also kept busy as a painter and wall-paperer. His annual income was fixed by the trial judge at $32,000 per year. His expenses were found to be $21,456 per year leaving an annual surplus of $10,544.

[5] The respondent is a bank officer at the Royal Bank of Canada in Westville. Their's was a marriage with both parties working full time outside the home throughout the years they spent together. The trial judge set the respondent's

income at $35,500 per year. He reduced her claimed annual expenses, found to be exaggerated and not credible to $44,256, leaving an annual deficit of $8,756.

[6] The Crosby's two children, at the time of trial, were both adults, aged 24 and 19 respectively. Both had left school and were employed. The question of continuing dependency was restricted to Lori-Anne, the younger of the two children who stopped attending school on account of extreme anxiety and what was described by the respondent as "school-based phobia." Each of the parties testified as to their daughter's situation and abilities and whether or not in their view she was still a legitimate dependant of their household. In a thorough, well-reasoned analysis Justice Nathanson said this:

> [8] Lori-Anne is 19 years old. Her mother testified that she was very nervous and had a school-based phobia since grade seven, at which time she stopped attending school. Her mother also testified that Lori-Ann had been seen by a family doctor and other professionals, but no expert evidence was presented to indicate her medical or psychological condition. Her father clearly thinks that she was unwilling rather than unable to go to school. She works part time as a clerk at Poulain's Pharmacy where she earns $6.25 an hour for 66 hours bi-weekly. She has an annual gross income of approximately $10,725. She resides with her mother but does not pay board; she does pay occasional small amounts to her mother. Her mother pays for her food, car insurance, dental care, eye glasses, occasional clothing, hairdos and gifts. Her relationship with her father has been poor but has improved in the past few months. Her father does not support her but says that he gives her occasional small amounts. She has few friends and no best girlfriend. She socializes such as by going out to a pub upon occasion. Her boyfriend sometimes lives with her at home, but he does not contribute to the expense of his living there. She visits her boyfriend at college, and goes to Halifax with a friend upon occasion.
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> [9] I find that she is of the age of majority and that she is partially self-supporting and, therefore, still under the charge of her parents. I am inclined to believe that she may have an illness or disability or other cause that keeps her dependent. However, the evidence was incomplete and unsatisfactory; the absence of expert evidence as to any medical or psychological condition was particularly bothersome. It was submitted that the respondent did not fulfill the burden of proof on this issue. I am not persuaded that the burden of proof rested upon the wife or, if it did, that she has not carried it. In any event, this is too important an issue upon which to base a decision on the narrow question of the burden of proof.

> [10] After considering the evidence, such as it is, I have come to the conclusion that Lori-Anne is still a "child of the marriage" and therefore the husband has a continuing legal obligation to pay child support for her. Because she is working and partially able to support herself, the Guideline figures are not particularly helpful and would appear to be excessive. I set the amount at $100 per month. The husband shall pay that amount to the wife for the benefit of their daughter on the same dates as payments of periodic spousal support.
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> [11] Because she is already beyond the age of majority, there is a question as to how long her father ought to be required to continue payments. That depends upon the nature of her condition. If she is indeed suffering from a medical or psychological condition which has prevented her from attending school and, consequently, of being trained or educated for work, in my view it would be appropriate that the payments continue indefinitely into the future.
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> [12] On the other hand, if Lori-Anne is simply unwilling to attend school or be trained, the payments should terminate after a relatively brief period of time. I would consider one year to be an appropriate period. Her parents, particularly her mother, shall forthwith arrange for all appropriate or necessary medial, psychiatric and psychological examinations to be conducted and for the reports of the experts to be filed in court without delay. If any of these reports disclose the existence of a medical, psychiatric or psychological problem, an application should be made to the appropriate court for a hearing for directions as to the quantum and duration of payments in the future. If the reports are not completed and filed, and if notice of an application is not given, within a period of one year from the date of this decision, her father's duty to make payments for her support will automatically terminate at the end of the one-year period.

Thus, based on his assessment of the evidence, the trial judge fixed nominal child support of $100 per month, open to further application upon proper medical evidence, but subject to termination after one year should such application and medical assessment not be forthcoming.

[7] The trial judge also found as a fact that the appellant could afford to pay spousal support. After properly considering the factors and objectives set out in s. 15 of the ***Divorce Act***, he directed the appellant to pay the respondent spousal support of $500 per month, such payments to begin immediately. In addition to such periodic payments, Nathanson, J. ordered the appellant to make a lump sum spousal support of $13,000. This sum might, at the option of the respondent, be applied to reduce the equalization payment of $86,962 owing to the appellant.

[8] The lump sum spousal award was based on the trial judge's finding that the respondent had been without any form of spousal support or child support during the approximately 18 months following separation. Moreover, their daughter Lori-Anne whom Justice Nathanson found to be a child of the marriage, still resided with her mother, who bore the major responsibility for her support, something the judge said would "likely continue even after the matrimonial home is sold." Because the appellant had a girlfriend upon whom he could "lean for moral support and some financial contribution to a common household," Mrs. Crosby was said to: ". . . have an increasingly urgent need for financial support."

[9] The eleven distinct grounds set out in the appellant's notice of appeal may be reduced to four main points. First, that the trial judge erred in his calculation, treatment and distribution of matrimonial assets, including the proper valuation of RRSP's and other investments, and failing to credit for occupancy rent, such that what was purported to be an equal distribution in fact amounted to an unequal division. Second, in finding that in law and on the evidence Lori-Anne Crosby was still a child of the marriage entitled to on-going child support, and that she or the respondent were obliged to provide the results of further medical assessments in order to sustain the daughter's claim for continuing support beyond the calendar year. Third, in deciding that the respondent was entitled to either periodic or lump sum spousal support. Fourth, in not reserving on the question of costs until after he had rendered his decision, as had been requested by the appellant.

[10] We are not persuaded by the appellant's arguments and see no basis for disturbing Justice Nathanson's decision. Our role in cases of this kind is limited to correcting errors of law or manifestly erroneous findings of fact ***Hickey v. Hickey***, [1999] 2 S.C.R. 518. Justice Nathanson is a senior and experienced judge. Considerable deference is owed to his conclusions. After carefully considering the record and the detailed written and oral submissions of counsel we are unanimously of the view that the appellant has failed to discharge the heavy burden of raising any manifest error of fact or error of law that might be considered as determinative of any issue in this case. ***Read v. Read*** (2000), 183 N.S.R. (2d) 181.

[11] For all of these reasons the appeal is dismissed with costs including disbursements of $1,000 awarded to the respondent.

Saunders, J. A.

Concurred in:

Chipman, J.A.

Hamilton, J.A.