

SUPREME COURT OF NOVA SCOTIA

Citation: Andrist v. Andrist, 2011 NSSC 58

Date: 20110303

Docket: 1204-005025

Ken No. 064361

Registry: Kentville

Between:

Sharon Elaine Andrist

Petitioner

v.

Michael Douglas Andrist

Respondent

Judge: The Honourable Justice C. Richard Coughlan

Heard: December 21, 2010, in Halifax, Nova Scotia

Written Decision: March 3, 2011

Counsel: Thomas R. MacEwan, for the Petitioner
Angela A. Walker, for the Respondent

Coughlan, J.:

[1] A decision issued July 20, 2010 dealt with the divorce of Sharon Elaine Andrist and Michael Douglas Andrist. However, a number of issues concerning the division of matrimonial assets remained outstanding, as follows: how the value of the Big Island property is to be determined; the value of the household furniture; valuation of the Centreville, Kings County property; the balance owing on the Scotia Mortgage Corporation mortgage at the time it was paid out; the amount Ms. Andrist paid on Mr. Andrist's MBNA Mastercard credit card; and costs. A hearing to deal with these matters was held December 21, 2010.

[2] The parties agree the net proceeds of the sale of the Centreville property was \$106,236.46, which figure is to be used in the division of the matrimonial assets.

[3] Mr. Andrist was to reimburse Ms. Andrist the \$100.00 per month she was to pay on Mr. Andrist's MBNA Mastercard credit card pursuant to the separation agreement dated November 16, 2007. At the hearing on December 21, 2010, Ms. Andrist's counsel stated there was no record of payments on the credit card account by Ms. Andrist. Consequently, there will be no amount for MBNA Mastercard credit card payments by Ms. Andrist when calculating the division of assets.

[4] At the December 21, 2010 hearing, a mortgage payout statement concerning the payment of the Scotia Mortgage Corporation mortgage on the Centreville property was entered into evidence, which showed the payout of the mortgage as \$175,762.06. I accept the payout of the Scotia Mortgage Corporation mortgage on the Centreville property was \$175,762.06.

[5] The parties agree the real property at Big Island (Merigomish Island), Pictou County, Nova Scotia has a value of \$98,000.00. In determining the value for the purposes of division, disposition costs are to be deducted from the \$98,000.00. The disposition costs include real estate commission, which at five percent of \$98,000.00 is \$4,900.00, plus H.S.T. of \$735.00, for a total real estate commission of \$5,635.00. The Big Island property was acquired by the parties in 2007 and therefore already migrated to the land registration system. I allow \$1,000.00 as the amount of legal fees, together with H.S.T. of \$150.00, totalling \$1,150.00. The total disposition costs are \$6,785.00, which results in a value of the Big Island property of \$91,215.00 for the purpose of division of matrimonial assets,

[6] Household furniture and furnishings is a matrimonial asset. I was not provided with any formal appraisals of the household furniture and furnishings, and am left to assign a value with limited knowledge. Mr. Andrist provided what appears to be an unrealistic valuation of the household furniture. He says the value is \$50,000.00.

[7] Ms. Andrist testified the value of the household furniture at the time the house was sold was less than \$15,000.00, and when the value of the furniture she had prior to her relationship with Mr. Andrist was excluded, the value was less than \$6,000.00.

[8] I have no confidence in the estimates of the value of the household furniture.

[9] Ms. Andrist submits some of the household furniture was owned by her prior to the marriage and is not a matrimonial asset by virtue of the marriage contract between the parties. Paragraph (a) under the heading "Assets" of the Marriage Contract provides:

ASSETS

(a) Sharon and Michael agree that they shall each retain the personal and real property, cash, investments and assets in his or her name or in which they have a beneficial interest in or claim to at the time of making this Agreement. The parties agree that neither will make any claim at common law or pursuant to the *Matrimonial Property Act* for possession or ownership of the items retained by the other or for compensation by payment of an amount of money or a share of the property for contributions of any kind whether direct or indirect, made to the property.

[10] The items which were Ms. Andrist's prior to the marriage are not matrimonial assets by virtue of the marriage contract.

[11] Ms. Andrist also says some of the furniture listed in the moving manifest exhibited to Mr. Andrist's affidavit deposed to December 9, 2010 were purchased after separation and therefore not matrimonial assets. I agree. Any furniture purchased after separation is not a matrimonial asset.

[12] I accept Ms. Andrist's evidence as to the items of furniture she had prior to her marriage to Mr. Andrist, as well as the items of furniture purchased subsequent to the parties' separation. Ms. Andrist confirmed she and Mr. Andrist purchased some antiques together: a small bedroom dresser purchased at Halls Harbour, a German wool rug purchased at Bargain Harold's for \$100.00 and a vanity or makeup table purchased in Annapolis Royal for \$400.00.

[13] In his affidavit of December 9, 2010, Mr. Andrist agrees certain items listed on the packing list from United Vanlines contained furniture which belonged to Ms. Andrist's daughters and were not matrimonial assets. Mr. Andrist highlighted the items on the list he considered belonged to the daughters. Although Mr. Andrist testified the only items of furniture he received at the time of the sale of the matrimonial property were a sundial and picnic table, he had in November, 2007 rented a U-Haul and moved other furniture to his apartment.

[14] I find the household furniture which is subject to division, that is, excluding furniture Ms. Andrist owned prior to her marriage to Mr. Andrist and items purchased after separation, have been equally divided between the parties.

[15] The separation agreement dated November 16, 2007 provided Mr. Andrist was to pay Ms. Andrist support, "commencing November 1, 2007 and November 15, 2007, and thereafter \$900.00 on the first and fifteenth of each month".

[16] In the decision dated July 20, 2010, I found the separation agreement unconscionable and unduly harsh on Mr. Andrist, and set it aside. Mr. Andrist is to be reimbursed the amount he paid to Ms. Andrist as support pursuant to the separation agreement.

[17] Ms. Andrist says the amount paid by Mr. Andrist directly to her as support was \$34,600.00. Mr. Andrist says the amount he paid directly to Ms. Andrist was \$36,000.00. I find starting December 14, 2007 and ending April 30, 2009, Mr. Andrist deposited \$900.00 twice a month into the joint account in both their names. The payments totalled \$30,600.00. In reviewing the statements for the account, the amount was deposited by way of payroll deposits of \$900.00 from "Canada". Mr. Andrist was employed as a member of the Royal Canadian Navy. The statement for the end of March, 2008 was missing, so I assumed the \$900.00 was paid for the pay period including March 31, 2008. In addition, payroll deposits marked "Canada" were made November 30, 2007 of \$1,244.48; November 15, 2007 of

\$1,285.99; October 31, 2007 of \$1,265.56, which together with the \$30,600.00 total \$34,396.03.

[18] Considering the submission of Ms. Andrist, and after reviewing the statements of the joint bank account, I find Mr. Andrist paid support directly to Ms. Andrist pursuant to the separation agreement in the amount of \$34,600.00.

[19] Ms. Andrist submits there should be deductions from the amount to be reimbursed to Mr. Andrist as maintenance he paid. Firstly, she says she made payments in excess of what was required by Scotia Mortgage Corporation on the mortgage on the Centreville property and she should be given credit for the amount of the mortgage overpayments, as the overpayments reduced the amount owing on the mortgage when it was paid out. The overpayments increased the net proceeds on the sale of the Centreville property. Secondly, she submits Mr. Andrist made use of the joint bank account and the amount should be reduced by the amount he took out of the account.

[20] The cost of borrowing disclosure statement, which was part of the application for the Scotia Mortgage Corporation mortgage on the Centreville property, shows the bi-weekly payment amount to be \$738.46. The payments being bi-weekly, there would be twenty-six payments per year, totalling \$19,199.96 or \$1,600.00 per month. During the period November, 2007 to May 1, 2009, mortgage payments totalling \$32,010.42 were made from the parties' joint bank account or \$1,778.36 per month. Approximately \$178.36 more per month was paid on the mortgage than required. During the period November, 2007 to April, 2009, eighteen months, \$3,210.48 more than required was paid. The extra payments did reduce the payout of the Scotia Mortgage Corporation mortgage. The amount of support Ms. Andrist is to reimburse Mr. Andrist is to be reduced by \$3,210.48, the amount of the overpayment of the mortgage.

[21] In the decision of July 20, 2010, I found the joint bank account to be a matrimonial asset which did not appear to have a balance for division at the time of separation. Subsequent to the separation it was used by Ms. Andrist. Mr. Andrist deposited money into the account - the deposit of a portion of his salary. I also found Mr. Andrist withdrew \$18,500.00 from the joint account on May 8, 2009. Ms. Andrist testified about other withdrawals and purchases she said Mr. Andrist made from the account. Ms. Andrist submits Mr. Andrist's use of the account was \$8,915.47. I am not satisfied that Mr. Andrist made all of the withdrawals which

Ms. Andrist testified he made. For much of the period, Ms. Andrist was regularly visiting Mr. Andrist in Dartmouth, Nova Scotia and could have made some of the withdrawals or purchases herself. However, I am satisfied Mr. Andrist made withdrawals and purchases from the joint account, for example, the \$18,500.00 withdrawal made on May 8, 2009. To allow for Mr. Andrist's use of the joint account, excluding the \$18,500.00 withdrawal of May 8, 2009, the sum of \$7,000.00 is to be deducted from the support to be reimbursed to Mr. Andrist by Ms. Andrist.

[22] Therefore, Ms. Andrist is to pay to Mr. Andrist the sum of \$24,389.52 as reimbursement of the support Mr. Andrist paid directly to her pursuant to the separation agreement dated November 16, 2007, which is \$34,600.00, less mortgage overpayment of \$3,210.48, and allowance of \$7,000.00 concerning Mr. Andrist's use of the joint account.

[23] To effect an equal division of the matrimonial assets, I order the Big Island property be conveyed to Mr. Andrist.

[24] The following is a summary of the division of assets, repayment of maintenance made by Mr. Andrist and reimbursement of funds:

SUMMARY

MATRIMONIAL ASSETS AND REPAYMENT OF FUNDS

	Ms. Andrist	Mr. Andrist
Matrimonial home, Centreville, Nova Scotia	\$ 106,236.46	
Property, Big Island, Pictou County, Nova Scotia		\$91,215.00
2002 Dodge Caravan	4,000.00	
Smart Car		15,000.00
Money withdrawn from Joint Account - May 8, 2009		18,500.00
Money paid to Mr. Andrist - August, 2008		7,000.00
Reimbursement of maintenance paid directly to Ms. Andrist by Mr. Andrist, less mortgage overpayments and allowance re Mr. Andrist's use of joint account	24,389.52	
Sub-Total	\$134,625.98	\$ 131,715.00
Equalization Payment	(\$1,455.49)	\$1,455.49
Total	\$133,170.49	\$133,170.49

[25] Ms. Andrist is to pay to Mr. Andrist an equalization payment of \$1,455.49.

[26] I turn now to the issue of costs.

[27] Mr. Andrist was successful in having the separation agreement between the parties and the quit claim deed to the Big Island property set aside, as well as a

determination the Centreville property was a matrimonial asset. Much of the evidence and time at trial was directed toward the date of separation. Ms. Andrist's position was the parties separated during the Thanksgiving weekend in October, 2007. Mr. Andrist's position was the separation took place much later, on April 15, 2009. Ms. Andrist was successful concerning the date of separation, in that I determined Mr. and Mrs. Andrist separated on October 8, 2007.

[28] The matrimonial assets and other amounts to be divided between the parties total \$266,340.98.

[29] I fix the "amount involved" as between \$200,001.00 and \$300,000.00, and the length of trial as four days. This was not a complex proceeding and the Basic Scale 2 is the appropriate scale. These calculations would result in costs in the amount of \$30,750.00.

[30] Mr. Andrist will have costs because of his success in setting aside the separation agreement and the quit claim deed, and determination the Centreville property was a matrimonial asset.

[31] However, in making an award of costs I must take into consideration the majority of time at trial was directed toward the date on which the parties separated. On that issue, Ms. Andrist was successful. I found the date of separation was October 8, 2007.

[32] Considering the facts of this case and to do justice between the parties, this is an appropriate case for a lump sum award of costs instead of tariff costs. Mr. Andrist will have his costs in the amount of \$10,000.00, including disbursements.

Coughlan, J.