

IN THE SUPREME COURT OF NOVA SCOTIA

**Citation:** Upshaw v. Upshaw, 2003 NSSF 043

**Date:** 20031029

**Docket:** SFHF-26504  
(1201-52939)

**Registry:** Halifax

**Between:**

Cedric Earl Upshaw

Petitioner

v.

Norma Harriette Upshaw

Respondent

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DECISION

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**Judge:** The Honourable Justice Walter R. E. Goodfellow

**Heard:** October 7<sup>th</sup>, in Halifax, Nova Scotia

**Counsel:** Kim A. Johnson and Jennifer Cleversey A/C, for the  
Petitioner  
Kelvin L. K. Gilpin, for the Respondent

**By the Court:**

**BACKGROUND**

[1] Cedric Earl Upshaw issued a petition for divorce the 21<sup>st</sup> of May, 1998. His solicitor was Gordon R. Kelly. The file discloses an affidavit of service on Norma Harriette Upshaw the 3<sup>rd</sup> of July, 1998.

[2] Mrs. Upshaw filed a statement of financial information July 31<sup>st</sup>, 1998 and Mr. Upshaw filed his statement of financial information November 23<sup>rd</sup>, 1998. Nothing else was filed until Mr. Upshaw's present solicitor, Kim A. Johnson, wrote to the Prothonotary June the 9<sup>th</sup>, 2003 asking that the matter be set down for hearing pursuant to *Civil Procedure Rule 57.25(2)*.

[3] The Prothonotary set the matter down for a half day special Chambers hearing July the 23<sup>rd</sup>, 2003. The divorce judgment was issued July 23<sup>rd</sup>, 2003 and the hearing of July the 23<sup>rd</sup>, 2003 was adjourned and came on before me October the 7<sup>th</sup>, 2003.

[4] The parties were married August the 26<sup>th</sup>, 1977 and have two children, Christopher Norman Earl Upshaw, born March the 7<sup>th</sup>, 1980, now 23, and Ashlee Dawne Upshaw, born January the 7<sup>th</sup>, 1984, now 19. The parties separated September the 13<sup>th</sup>, 1993 after having lived together for approximately 16 years.

[5] The parties had a number of matrimonial assets, the main two being Mr. Upshaw's pension with the Halifax Regional Police and the matrimonial home. Apparently, in 1999, the mortgage on the matrimonial home became substantially in arrears and Mrs. Upshaw was represented by Mr. H.A.J. Wedderburn. Negotiations took place between Mr. Wedderburn, on behalf of Mrs. Upshaw, and Kim Johnson, on behalf of Mr. Upshaw, and some of their correspondence has been filed in this matter.

[6] Although there does not appear to be any documentation filed by Mr. Wedderburn in the court file, a notice of change of solicitor from Mr. Wedderburn to Kelvin Gilpin was filed the 11<sup>th</sup> of July, 2003.

[7] There is an affidavit filed by Norma Harriette Upshaw dated August the 27<sup>th</sup>, 2003.

[8] There is an affidavit filed by Cedric Earl Upshaw dated July the 17<sup>th</sup>, 2003.

[9] Both parties declined the opportunity to cross-examine the other on their affidavits.

## **CASE LAW**

[10] There is substantial case law that provides guidance as to the authority of a solicitor to bind a client to a settlement or agreement and when an agreement has been reached or sought, including *Chapman v. Chapman*, [1996] N.S.J. No. 394; *Begg v. East Hants (Municipality) et al* (1986), 75 N.S.R. (2d) 431; *Pineo v. Pineo* (1981), 45 N.S.R. (2d) 576; *Rossiter-Forrest v. Forrest* (1994), 129 N.S.R. (2d) 130; and *Boon v. Boon* (2000), 187 N.S.R. (2d) 143.

## **FINDINGS**

[11] The most telling evidence of the existence of an agreement is the letter from H.A.J. Wedderburn, Mrs. Upshaw's then solicitor, direct to Mr. Upshaw November the 1<sup>st</sup>, 2001 which states:

November 2, 2001

Mr. Cedric E. Upshaw  
91 Mee Road  
Kentville, N. S.  
B2W 1W8

Dear Cedric:

**Re: Upshaw Divorce**

Pursuant to our telephone conversation of yesterday's date, Norma agrees as follows:

1. You shall Quit Claim your interest in 82 Pondicherry Crescent to her.
2. In the divorce settlement, you make no claim on her pension and she will make no claim on yours.
3. You will continue to make maintenance payments of the \$425.00 per month for your son up until October 2002.

Yours truly,

(Signed)  
H.A.J. Wedderburn

HAWJ/lf

[12] This was followed up by a further letter from Mr. Wedderburn dated November the 7<sup>th</sup>, 2001 to Mr. Upshaw wherein he advised,

I enclose my account for services rendered with regard to the above-captioned. When I have received one-half of the total amount from each of you, I will proceed with the Quit Claim Deed and the Mortgage.

[13] This letter contained a statement of account directed to Cedric and Norma Upshaw entitled "final account".

[14] Prior to these letters in November 2001, Mrs. Upshaw's solicitor, Andrew Pavey, corresponded with Mr. Upshaw's solicitor, Kim Johnson, in negotiations which clearly recognized the value of the pension was greater than the value of the matrimonial home and, at least until late 1999, Mrs. Upshaw was looking for a lump sum equalization payment. Mr. Wedderburn then, as noted, dealt directly with Mr. Upshaw and was very clear in his communications as to the basis of the settlement and Mr. Upshaw in his affidavit confirms that both he and his then wife each paid one-half of Mr. Wedderburn's final account of November the 7<sup>th</sup>, 2001. Mr. Upshaw's lawyer in her letter of May the 30<sup>th</sup>, 2002, read in isolation, suggests that she was simply forwarding a draft agreement seeking confirmation that it was acceptable. She did, however, indicate that she would forward good copies for execution. On the totality of the evidence and having carefully reviewed the affidavits of both parties, it is clear that there was, in fact, a complete, total and final settlement of the matrimonial property claims with respect to the pension and

matrimonial home based upon Mr. Upshaw retaining all benefits of his pension and Mrs. Upshaw receiving all of whatever equity existed in the matrimonial home.

Mrs. Upshaw, in her affidavit, indicates that in June 2003 she retained Mr. Gilpin and refused to sign the draft agreement because she believed she was entitled to a division of Mr. Upshaw's pension on the basis of the mortgage being paid off in return for a Quit Claim Deed of Mr. Upshaw's interest in the matrimonial home.

The correspondence from her previous solicitor leading up to the settlement initially looked to Mr. Upshaw to pay off the mortgage but, very clearly, her previous solicitor was instructed to change her position in that regard and in July of 1999 her position was a willingness to settle for an equalization payment of \$17,848.00 and not an amount equal or related to the mortgage. A copy of the annual mortgage statement dated December the 31<sup>st</sup>, 1997 is attached to Mrs. Upshaw's affidavit and it showed a balance outstanding in the mortgage at that time of \$58,504.00.

[15] Mrs. Upshaw does not, in her affidavit, specifically contradict the clear language used by her solicitor, Mr. Wedderburn, in November 2001 which brought about a settlement of all the corollary relief issues relating to the pension and matrimonial home.

[16] I conclude that Mr. Upshaw has met the requirement of establishing, on a balance of probabilities, that settlement was entered into in November 2001 between Mr. Wedderburn on Mrs. Upshaw's instructions and on her behalf with Mr. Upshaw.

### **RESULT**

[17] A corollary relief judgment shall be issued setting out that the corollary relief issues of the pension and matrimonial home have been settled pursuant to the agreement between the parties of November 2001.

### **COSTS**

[18] Normally, I would hear counsel with respect to the issue of costs. Normally, costs would follow the event which would provide Mr. Upshaw with a degree of indemnification of his expenses; however, given the fact that the problem arises, in part, by the delay of Mr. Upshaw in having counsel finalize the matter and his not instructing his counsel to confirm in unequivocal terms what had transpired resulted in the settlement of November 2001. Had there been no delay in finalizing the matter, then quite likely there would have been a finalization rendering this application unnecessary. I find that, in all the circumstances, an appropriate



exercise of judicial discretion is for each party to bear their own costs of the application. I await the corollary relief judgment from Ms. Johnson.

J.