Date: 19991112
Docket: C.A. 155011

# NOVA SCOTIA COURT OF APPEAL

[Cite as: Sampson v. Sampson, 1999 NSCA 136]

**Glube, C.J.N.S.; Freeman and Bateman, JJ.A.**

**BETWEEN:**

| | | |
|---|---|---|
| MICHAEL DANIEL SAMPSON<br><br>Appellant<br><br>- and -<br><br>LESLEY DAWN SAMPSON<br><br>Respondent | ) | Ronald D. Richter<br>for the appellant<br><br>David G. Cottenden, Q.C.<br>for the respondent<br><br>Appeal Heard:<br>October 4, 1999<br><br>Judgment Delivered:<br>November 12, 1999 |

**THE COURT:** Appeal is allowed in part without costs, as per reasons for judgment of Bateman, J.A.; Glube, C.J.N.S. and Freeman, J.A., concurring.

**BATEMAN, J.A.:**

[1] This is an appeal from a decision of Justice Charles Haliburton of the Supreme Court in a proceeding for divorce and the division of matrimonial assets.

**BACKGROUND:**

[2] The parties were married July 12, 1980 and separated on March 6, 1997. They have one child, Darcy Elizabeth Sampson, born February 18, 1985. The respondent, Lesley Dawn Sampson is employed with the Annapolis Valley Regional School Board. The appellant, Michael Daniel Sampson, is a survey technician employed by the provincial Department of Transportation.

[3] Post-separation Ms. Sampson remained in the matrimonial home in Lawrencetown, Annapolis County with Darcy. Mr. Sampson moved to Cape Breton where he continues to reside. By agreement, custody of Darcy is with Ms. Sampson with access by Mr. Sampson. Pending divorce, Mr. Sampson paid interim child support at the agreed amount of $348 monthly and was ordered to provide interim spousal support of $275 monthly.

[4] The trial judge determined that Ms. Sampson's gross annual income is $31,757.18 and Mr. Sampson's is $47,553.22 comprised of his basic income of $39,405.60 and a travel and meal allowance of $8,147.62.

[5] For the purpose of calculating child support in accordance with the *Guidelines* the trial judge reduced Mr. Sampson's gross income by $3,600 to reflect his actual, tax deductible travel expenses.

**STANDARD OF REVIEW:**

[6] Chipman, J. A. wrote, for the Court, in **Edwards v. Edwards** (1995), 133 N.S.R. (2d) 8 (N.S.C.A.) at p. 20:

> Having regard to all the evidence and particularly the respective incomes of the parties, I cannot say that the trial judge erred in his assessment. This court is not a fact finding tribunal. That is the role of the trial judge. Ours, as has been said many times, is a more limited role. We are charged with the duty of reviewing the reasons of the trier of fact with a view of correcting errors of law and manifest errors of fact. The degree of deference accorded to the trial judge with respect to factual findings is probably no higher anywhere than it is in matters relating to family law. Hart, J.A., put it well when he said on behalf of this court in *Corkum v. Corkum* (1989), 20 R.F.L. (3d) 197, at 198:
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> > In domestic matters the trial judge always has a great advantage over an appellate court. He sees and hears the witnesses and can assess the emotional aspects of their testimony in a way that is denied to us. Unless there has been a glaring misconception of the facts before him or some manifest error in the application of the law, we would be unwise to interfere.

[7] A similar standard is applicable to appeals from a division of assets made pursuant to the **Matrimonial Property Act**, R.S.N.S. 1989 c. 275.

**ISSUES**:

[8] The appellant raises three issues on appeal. As the first two are related, I will deal with them together:

1. **Did the judge err in postponing the realization of the husband's interest in the matrimonial home and thereby effect an unequal division of assets?**

2. **Did he err in requiring the husband to contribute $250 monthly to the upkeep of the home?**

[9] The modest assets of the parties, excluding the matrimonial home were divided between the parties. Neither party took issue with the inclusion of the debts in this calculation. To equalize the value of assets held by each, payment of $38,759.50 would be required from Ms. Sampson to Mr. Sampson. The payment of $11,259.50 of this total sum was postponed until Darcy reaches 19 years of age. The judge ordered that in the interim it will bear interest of 6% per annum, not specified to be compound or simple. The balance of the equalization payment was to be paid upon eventual disposition of the home, as addressed below.

[10] The judge directed that the matrimonial home be retained as a joint asset until Darcy's 19th birthday at which time the house would be sold and the proceeds divided equally. He provided, as well, that Ms. Sampson could elect at that time to purchase Mr. Sampson's share of the home, valuing it at the current appraised figure less notional real estate commission and legal fees - $50,700. Ms. Sampson was granted exclusive possession of the home until purchased by her or sold. In the interim she is to be responsible for repairs, municipal taxes, fire insurance and mortgage payments (currently totaling about $572 monthly). Mr. Sampson was ordered to contribute $250 monthly to these costs.

[11] In dealing with the delay in the payout of the assets the trial judge said:

> In the circumstances before the Court, there is no justiciable reason for an unequal division of matrimonial property other than that provided in Section 13(h) of the *Act*: "the needs of a child who has not attained the age of majority".
>
> It is my view that the disruption of family life is a serious matter for a child of Darcy's age. If there is some means to avoid further disruption in her life, that would be extremely desirable. In the circumstances, I find no urgency in ordering either a sale of the matrimonial home or a payout of Mr. Sampson's share in its equity. I, therefore, direct that it be retained as the joint asset of the parties until after Darcy's nineteenth birthday.

[12] As has been recognized by the courts, the postponement of one spouse's realization of a half interest in the marital assets creates an unequal division. The appellant says that the trial judge erred in dividing the assets unequally because he did not expressly state that he would find an equal division to be, in the words of the statute, "unfair or unconscionable". I disagree. The needs of a child of the marriage is a *bona fide* consideration contemplated by s.13(h). In my view the judge was alive to the requirements of s. 13 of the **Matrimonial Property Act**, aware that the postponement of Mr. Sampson's interest amounted to an unequal division and satisfied that other than such an arrangement would be unfair or unconscionable. The judge rejected Mr. Sampson's proposal for immediate sale of the home and division of the proceeds as "unsatisfactory" in that it would leave the mother and child without a home.

[13] Additionally, the appellant says that the judge should have ordered that Ms. Sampson transfer her $15,000 RRSP to Mr. Sampson in part payment of the funds due with the balance paid by an immediate refinancing of the home. At trial the appellant did not propose a rollover of the RRSP and a refinancing but sought a sale of the home.

Accordingly, he presented no evidence on the value of the RRSP should a transfer be ordered. The trial judge accepted that Ms. Sampson was operating a substantial monthly deficit, even after child support. Obviously increasing the mortgage on the matrimonial home was not an option. The judge did consider a transfer of assets in satisfaction of the equalization payment. In this regard he said:

> On the hearing, the Wife has advanced three alternative proposals for an unequal division in her favour. In conjunction with a scheme of child support and spousal maintenance, each of those alternatives, in my opinion, would result in Mrs. Sampson's current proposed budget deficit of $300 increasing to $500 or more. The Husband has proposed with respect to the division of assets only that the house be sold and the proceeds used for the purpose of equalization. Such a result would leave the mother and daughter without a home, facing the necessity of a move. That is unsatisfactory. Mrs. Sampson does have assets which could be used to equalize the matrimonial property: her R.R.S.P. and her pension. Neither party has suggested a transfer of those assets. In the circumstances, the arrangement I am prepared to order will secure Mr. Sampson's equity in the matrimonial property, provide a reasonable degree of stability and security for Mrs. Sampson and Darcy, while assuring the parties that their mutual commitments can be severed when Darcy reaches age nineteen.
> (Emphasis added)

[14] The appellant says that in order to support an unequal division based upon the needs of the child, there must be evidence that a child would suffer an adverse effect if required to move and the judge must determine that no other division of assets would satisfy the Court's desire to allow the child to remain in the matrimonial home. I do not accept the appellant's suggestion that in every case it is necessary for the custodial parent to present evidence of harm to the child should a move occur or to affirmatively demonstrate that other provision for shelter is not adequate. Whether such evidence is necessary will depend upon the circumstances of each case. The matrimonial home here was the only home that Darcy has known. It is near her school

and all of her friends are in the neighborhood. It is reasonable to infer that Darcy would benefit from remaining in the home, if financially feasible. The preservation of stability to the extent possible for children after divorce is always desirable. It is a modest home with a mortgage payment of $300 monthly. Taxes, heat, insurance and power added about another $300 to the monthly cost. The postponement period is relatively short, five years, and sufficient to see Darcy through completion of high school. This, in my view, and obviously in the trial judge's view, is a reasonable horizon.

[15] The judge assumed jurisdiction to preserve the co-tenancy in the home pursuant to **s.11** of the **Matrimonial Property Act** which provides in relevant part:

> *Powers of court respecting matrimonial home*
> 11 (1) Notwithstanding the ownership of a matrimonial home and its contents, the court may by order, on the application of a spouse,
>
> (a) direct that one spouse be given exclusive possession of a matrimonial home, or part thereof, for life or for such lesser period as the court directs and release any other property that is a matrimonial home from the application of this Act;
>
> (b) direct the spouse to whom exclusive possession is given under clause (a) to pay such periodic or other payments to the other spouse as is prescribed in the order;
>
> (c) direct that the contents of a matrimonial home that are matrimonial assets, or any part thereof, remain in the home for the use of the person given possession;
>
> (d) determine the obligation to repair and maintain the matrimonial home and to pay for other liabilities arising in respect of the matrimonial home;
>
> (e) authorize the disposition or encumbrance of the interest of a spouse in a matrimonial home who has not been granted exclusive possession;
>
> . . .

*Conditions for order for possession*
*(*4) The court may only make an order for possession of the matrimonial home under subsection (1) or (3) where, in the opinion of the court,

(a) other provision for shelter is not adequate in the circumstances; or

(b) it is in the best interests of a child to make such an order.

. . .

[16] The parties did not address the interface between **s. 11** and **s. 15** which states:

*Powers of court upon division*
15 On an application for the division of matrimonial assets, the court may order

(a) that the title to any specified property granted by the court to a spouse be transferred to or held in trust for that spouse for such period, or absolutely, as the court may decide;

(b) the partition or sale of any property;

(c) that payment be made out of the proceeds of a sale ordered under clause (b) to one or both spouses, and the amount thereof;

(d) that any property forming part of the share of either or both spouses be transferred to or held in trust for a child to whom a spouse must provide support;

(e) that either or both spouses give such security, including a charge on property, that the court orders, for the performance of any order made under this Section;

(f) that one spouse pay to the other spouse such amount as is set out in the order for the purpose of providing for the division of the property,

and make such other orders and directions as are ancillary thereto. R.S., c. 275, s. 15.

[17] **Section 11** is most commonly used only on interim applications. The more conventional, and perhaps preferable approach when a final division is sought, is to fix

ownership of the matrimonial home as between the parties pursuant to **s. 15**. If postponement of sale of the home is a desirable end, the Court can grant to the non-owner spouse a mortgage back in a fixed amount, bearing interest or not, depending upon the circumstances (**Nolet v. Nolet** (1985), 68 N.S.R. (2d) 370 (N.S.C.A.)). Maintenance of a co-tenancy can be problematic particularly as requirements for periodic mortgage renewals occur and when major repairs are necessary.

[18] As neither the appellant nor the respondent suggested that the Court lacked jurisdiction, on the division of assets, to order continued co-tenancy, this is not an appropriate case in which to consider that issue. For the purposes of this appeal, the judge's jurisdiction to make such an order is assumed, without being decided.

[19] The matrimonial home was appraised at $55,000. It was subject to a mortgage of $11,354, responsibility for the payment of which was credited to Ms. Sampson on the asset division.

[20] The appellant says that, here, the judge's order preserving the co-tenancy works considerable hardship on Mr. Sampson, unwarranted by the facts. Although Mr. Sampson continues to be an owner, Ms. Sampson's option to purchase at current value prevents him from realizing any appreciation in the worth of the home. The appellant argues, as well, that his $250 monthly contribution to the home is, in essence, spousal support.

[21] To a limited extent I would agree with this submission. In dividing the assets, equally as to value, although postponing the realization of the equalization payment, the judge credited Ms. Sampson with the value of the mortgage payout. By ordering Mr. Sampson to contribute to the upkeep of the home, implicitly including some contribution to the mortgage payment, the judge, in my opinion erred. He apparently did not appreciate that in so doing, he was obliging Mr. Sampson to contribute to the retirement of the mortgage for which he had given Ms. Sampson credit in the division of assets.

[22] Similarly, in providing Ms. Sampson with the opportunity to purchase the property five years hence, at its current value, the trial judge effected a result more financially onerous than dictated by the circumstances. Should the home appreciate in value, there is no reason why the appellant should not share in that appreciation if he remains a co-owner.

[23] Having found error, I would allow these grounds of appeal and order that Mr. Sampson transfer to Ms. Sampson his interest in the matrimonial home in return for a mortgage back in the total amount of $38,759.50 (which includes the balancing payment on the non-home assets). The mortgage will be payable at the earliest of the sale of the matrimonial home, Darcy's 19th birthday, or Darcy ceasing to be a "child of the marriage" as defined in **s. 2** of the **Divorce Act,** R.S. 1985, c.3. It shall bear interest at the rate of 5% compounded annually but not payable until the principal is due. Interest shall run from March 18, 1999, the date of the Corollary Relief Judgment. Mr. Sampson shall postpone the mortgage in favour of any renewal of the first mortgage now in place,

provided the principal amount of the first mortgage shall not be increased without Mr. Sampson's consent. Ms. Sampson shall have the right to prepay all or part of the mortgage granted to Mr. Sampson without bonus or penalty.

[24] Ms. Sampson had sought spousal support at trial. The judge, having awarded her the monthly contribution of $250 toward household expenses, found that Ms. Sampson was not further entitled to maintenance.

[25] The **Divorce Act** provides:

> **15.2** (1) A court of competent jurisdiction may, on application by either or both spouses, make an order requiring a spouse to secure or pay, or to secure and pay, such lump sum or periodic sums, or such lump sum and periodic sums, as the court thinks reasonable for the support of the other spouse.
>
> . . .
>
> (6) An order made under subsection (1) or an interim order under subsection (2) that provides for the support of a spouse should
>
> (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
>
> (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
>
> (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
>
> (d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.
> (Emphasis added)

[26] The judge was satisfied that it was appropriate for Ms. Sampson to maintain the matrimonial home for Darcy and that, in so doing, she would continue to incur a

monthly deficit. This is a financial consequence arising from the breakdown of the marriage, and one not totally addressed by the amount of child support required by the *Guidelines*. But for her continued obligation to Darcy, Ms. Sampson would be free to move from the home and obtain less costly accommodation for herself. The judge referred, as well, to the fact that Ms. Sampson had alone borne the joint responsibility for the fixed expenses of the home since separation, although receiving an indirect contribution through spousal maintenance for a part of that time. He accepted that the costs of "ownership alone . . . total substantially more than $500 per month". In my view these financial consequences qualify within **s. 15.2(6)(b)** and **(c)** above. Had he not ordered the continued co-tenancy and monthly contribution to household upkeep, the judge would necessarily have found Ms. Sampson to be entitled to maintenance.

[27] I am satisfied that Ms. Sampson requires spousal support, over and above the child support, for the limited period of time that Darcy remains in her care. Accordingly, I would order that Mr. Sampson pay to Ms. Sampson spousal support in the amount of $275 monthly until the payout of his mortgage interest on the matrimonial home as contemplated above. At such time his obligation to pay spousal support shall cease absolutely. In so ordering, I have assumed that neither party will, in that time frame, experience a material change in financial circumstances. Should such a change occur, then either is free to apply to the Court to vary the spousal support payable. Although I cannot fetter the discretion of a future court on variation, as circumstances currently exist, I would expect that the time frame for the payment of the spousal

support shall not be extended in that Ms. Sampson's requirement for spousal support is linked to her obligation to provide a home for Darcy.

**3. Did he err in ordering the husband to contribute $750 to the wife's costs.**

[28] On costs the judge said:

> Costs are a matter in the discretion of the judge in matrimonial matters as well as other matters. Again, there is no evidence before the Court persuasive of the Petitioner's right to costs. No formal offer to settle was apparently made and the proposals contained in the submission to the Court were unacceptably favourable to her in the result. Nonetheless, she was successful on an interim application for spousal support and both parties were interested in having the matter litigated, involving, undoubtedly, the expenditure of reasonable funds. Costs are ordered to the Petitioner in the amount of Seven Hundred, Fifty ($750) Dollars.

[29] The costs of the interim proceeding were ordered to be "in the cause". It is the appellant's submission that the trial judge, having found neither party entitled to costs in the final proceeding, should not have made an award of costs. Clearly, the $750 award related solely to Ms. Sampson's success on the interim application. I would agree with the appellant. Where a Chambers judge has awarded "costs in the cause" in an interlocutory proceeding, then costs for that application go to the party who is successful on costs at trial. Here, neither party was awarded costs in relation to the trial. Accordingly, the judge could not order that Mr. Sampson pay to Ms. Sampson costs of the interlocutory proceeding. I would allow this ground of appeal.

**NOTICE OF CONTENTION:**

[30] The respondent raised two issues in a Notice of Contention:

(1) The appeal should not proceed because the appellant had not complied with **Civil Procedure Rule 62.02(2)** in that he failed to serve a copy of the Notice of Appeal on the respondent within the required time. The Notice was served but outside the 30 day period mandated by the Rule. The respondent does not suggest that she was prejudiced by this. The appellant says, and I would accept, that the omission was attributable to oversight and no improper motive. In the circumstances the failure should not be an impediment to the appeal.

(2) The trial judge reduced the appellant's gross income for the purpose of determining child support, by $3,600 to reflect a portion of his necessary work related travel costs. The respondent says that he erred in so doing. I do not agree with that submission. The appellant was in a new job and had not yet filed a T1 return. The question of how his travel expenses would be treated for tax purposes was not established at trial. Accordingly, the judge did the best he could on the evidence before him. I cannot say that in so doing he committed reversible error.

**DISPOSITION:**

[31] I would allow the appeal to the extent outlined above. As there has been mixed success, I would order no costs on the appeal. If the parties are unable to agree to an amended form of Corollary Relief Judgment, incorporating the results of this appeal, then either may apply to this Court to have the form of Order settled.

Bateman, J.A.

Concurred in:

Glube, C.J.N.S.

Freeman, J.A.