NOVA SCOTIA COURT OF APPEAL

Citation: *Doncaster v. Field*, 2016 NSCA 25

Date: 20160412
Docket: CA 434858
Registry: Halifax

Between:

Ralph Ivan Doncaster

Appellant

v.

Jennifer Lynn Field

Respondent

Judges: Fichaud, Beveridge and Farrar, JJ.A.

Appeal Heard: December 10, 2015, in Halifax, Nova Scotia

Held: Appeal allowed, in part without costs to either party per reasons for judgment of Farrar, J.A.: Fichaud and Beveridge, JJ.A. concurring.

Counsel: Appellant in person
Janet M. Stevenson, for the respondent

Reasons for judgment:

Introduction

[1] This matter arises out of two appeals filed by Mr. Doncaster. The first relates to the decision of Bourgeois, J. (as she was then), dated August 21, 2014 (reported 2014 NSSC 312). Between the date of the trial and before the order was taken out, Justice Bourgeois was elevated to the Nova Scotia Court of Appeal. As a result, the corollary relief order was issued by Justice James L. Chipman on December 3, 2014.

[2] The second appeal is from the costs award arising from the corollary relief judgment. That matter was heard by Justice Jamie S. Campbell. By order dated July 16, 2015 he ordered Mr. Doncaster to pay Ms. Field $50,000 in costs, inclusive of disbursements.

[3] On September 3, 2015, the two appeals were consolidated to be heard at the same time on December 10, 2015.

[4] On October 30, 2015, Ms. Field filed a Notice of Motion to Introduce Fresh Evidence on the appeal. Mr. Doncaster, on November 30, 2015, filed a Reply objecting to the introduction of fresh evidence and, filing his own motion to introduce fresh evidence should Ms. Field's fresh evidence motion be allowed.

[5] For the reasons that follow, I would dismiss the motion to introduce fresh evidence and allow the appeal, in part. I would not award costs to either party.

Facts

[6] Mr. Doncaster and Ms. Field were married on September 5, 1998. They separated on January 29, 2011; they have four children of the marriage.

[7] Mr. Doncaster filed a Petition for Divorce on February 6, 2012, seeking custody, access, child support, spousal support and division of assets.

[8] Ms. Field filed her Answer to the Petition on March 12, 2012, in turn seeking custody, access, child support, spousal support and division of property. The divorce trial on the issues of property and support proceeded on February 20, 21, 24, April 2 and May 2, 2014. The trial judge's findings may be summarized as follows:

- The property at 251 Thomas Street is a matrimonial asset and not subject to a validly constituted trust;
- The Interactive Brokers account is a matrimonial asset and not subject to a validly constituted trust;
- An equalization payment was owed to Ms. Field in the amount of $105,456.31 based on the following asset division:

Asset Division		
	Mr. Doncaster	Ms. Field
CIBC Line of Credit	$275,908	$172,368
Interactive Brokers	$80,000	
RRSPs – Altimira	$10,000	
RRSPs – Capital Alliance	$10,000	
National Bank	$40,170.61	
Nesbitt Burns		$16,873.99
CIBC Account		$11,710
(Less inheritance)		
Money Order		$50,000
Vehicles	$11,250	$5,500
	$467,328.61	**$256,415.99**

(It became apparent in reviewing the above and the Order that the numbers on Mr. Doncaster's side of the summary do not total $467,328.61 . When added together the numbers total $427,328.61 . This was not raised or addressed by the parties in their written or oral arguments so we asked for submissions from the parties on the issue. After receiving and reviewing the submissions I am satisfied the

> difference is a mathematical error .As a result the equalization payment should have been $85,456.31in favour of Ms. Field.)

[9] Mr. Doncaster appeals from the trial judge's decision with respect to the division of assets alleging, among other things, she erred in failing to find that the property at 251 Thomas Street and the Interactive Brokers account were held in trust for the couple's children. He also alleges various errors in the valuation of the assets. With respect to the costs award, he alleges that Justice Campbell did not have jurisdiction to grant the costs award and even if he had jurisdiction, erred in his determination of the amount of costs that ought to have been awarded.

[10] I will first address the issues on the corollary relief appeal, followed by the costs appeal and finally, I will address the motion to adduce fresh evidence.

Issues

[11] In Mr. Doncaster's facta, the following issues are identified:

1. What assets were held in trust;
2. Did the trial judge err in imputing income;
3. What is the proper accounting of the assets held by Mr. Doncaster;
4. What date should certain assets be valued;
5. Did Justice Chipman have jurisdiction to issue an order; and
6. Did Justice Campbell err in awarding costs on the Corollary Relief Trial to the respondent?

[12] I will address the standard of review when addressing each of the issues.

Issue #1 What assets were held in trust?

[13] Mr. Doncaster does not take issue with the trial judge's identification of the law with respect to the requirements of a valid trust. He argues the trial judge failed to properly apply the law to the facts of his case in finding that the property at 251 Thomas Street and the Interactive Brokers account were not valid trusts for the couple's children.

[14] This ground of appeal involves the trial judge applying a legal standard to a set of facts. It will be reviewed on a palpable and overriding standard (*Gwynne-Timothy v. McPhee*, 2005 NSCA 80 at ¶33).

[15] Mr. Doncaster's argument that 251 Thomas Street is held in trust for the children rests on the fact that the Deed was registered as "Ralph Doncaster and Jennifer Field, in Trust". I will repeat what the trial judge said with respect to Mr. Doncaster's arguments before her, which are the same arguments which he made before this Court:

> [22] Mr. Doncaster asserts that this property is held in trust for the four children of the marriage, and as such should not be subject to a matrimonial property division. Ms. Field argues that such a proposition must fail on a number of grounds.
>
> [23] I agree with the submissions advanced by Ms. Field and find the property at 251 Thomas Street is a matrimonial asset and not the subject of a validly constituted trust. Mr. Doncaster testified that he intended for this property to be held for the benefit of his children however, even if the court accepts this assertion much more is required to find a valid trust. The Court notes in particular that although Mr. Doncaster referenced the existence of a "family trust" no such instrument was ever created. Mr. Doncaster simply operated as if a family trust existed without undertaking the necessary steps in order to create such an entity. This approach had unfortunate financial consequences not only in respect to this property but taxation consequences, as will be discussed further below.
>
> [24] It has long been recognised at law that a valid express trust requires the existence of three certainties namely, certainty of intention, certainty of subject and certainty of object. The deed purportedly creating this express trust is lacking in certainty of intention and object. Though one may assume the property is being held in trust for the four children, this is not explicitly stated. Further, important terms of the trust are lacking. For how long is the trust to be held? At what age is a child entitled to their share? Are the shares intended to be equal? What happens in the event of a child's death in terms of the trust?
>
> [25] The Court is further mindful of section 5 of the *Statute of Frauds*, R.S.N.S. 1989 c. 442 which provides:
>
>> No declaration of any trust in land shall be valid unless it is in writing, signed by the person entitled to create or declare the trust, or by his last will, but this Section shall not extend to any trust in land arising or resulting by implication or construction of law or which may be transferred or extinguished by act or operation of law.
>
> [26] There is no signed document before the Court in which Ralph Doncaster and Jennifer Field purport to declare a trust as is required by the above provision.

[16] I agree with the analysis of the trial judge. The evidence presented by Mr. Doncaster with respect to the creation of a trust in regard to 251 Thomas Street falls far short of the legal requirements.

[17] He also takes issue with the trial judge's alternative finding that even if she were to find the existence of a trust, it would still be subject to division pursuant to s. 4(1)(a) of the *Matrimonial Property Act*, R.S.N.S. 1989, c. 275. It is not necessary to address this argument. The trial judge found no trust existed – I agree – there is no need to do any further analysis.

[18] With respect to the Interactive Brokers account, the trial judge also addressed Mr. Doncaster's argument that those funds were held in trust for the children:

> [32] As noted above, Mr. Doncaster opened an on-line brokerage account with Interactive Brokers (U261955) which he identified, as does (sic) the statements generated there from as funds for "the children of Ralph and Jennifer Doncaster". Based on the evidence, I am satisfied that Mr. Doncaster invested funds in this vehicle which were generated from matrimonial resources. I am further satisfied that Ms. Field had little knowledge relating to the management of this investment vehicle, or what degree of funds were being placed in it. This investment was not a genuine trust for the children, rather Mr. Doncaster's way of avoiding tax liability. As noted earlier, certainty is required to found a valid express trust. These funds, are in my view, matrimonial.

[19] Again, I agree with the trial judge's analysis and conclusions. In rejecting Mr. Doncaster's arguments with respect to the creation of a trust she did not commit any error, let alone a palpable and overriding one.

[20] I would dismiss this ground of appeal.

Issue #2 Did the trial judge err in imputing income to Mr. Doncaster?

[21] This issue involves an exercise of the trial judge's discretion and is entitled to deference. Unless she erred in principle, significantly misapprehended the evidence or made an award that is clearly wrong, this Court will not interfere (*Saunders v. Saunders*, 2011 NSCA 81).

[22] The trial judge imputed income to Mr. Doncaster in the amount of $40,000.00. Mr. Doncaster argues there is a lack of evidentiary basis for imputing that level of income to him.

[23] With respect, there was ample evidence before the trial judge which would allow her to impute this level of income to Mr. Doncaster. If anything, the estimate of his ability to earn income is conservative. After setting forth the law

on imputing income in considerable detail, the trial judge reviewed the evidence and concluded:

> [64] I have no doubt that Mr. Doncaster has the necessary intellect, skills and abilities to make a tidy income. In the past he has earned a very good living undertaking computer consulting, has run his own businesses, and has managed an investment portfolio in excess of a million dollars. In my interactions with him, I have found him to be highly intelligent, articulate and engaging. He is highly employable if he chooses to be.

[24] Mr. Doncaster also argued that his status as a self-represented litigant was an impediment to being able to obtain gainful employment. The trial judge found this argument to be without merit – so do I. I need only repeat what she said:

> [66] In my view, Mr. Doncaster could have, and should have, sought out employment in order to support the children and himself. Many self-represented litigants appear before the Court, while juggling employment obligations. The vast majority of these individuals do not possess the level of skill and intellect shown by Mr. Doncaster. As noted above, Mr. Doncaster has advanced litigation and undertaken appeals which have been found to be moot. He has unnecessarily increased the time burden upon himself in terms of these pursuits. As noted by Saunders, J.A. every right must be balanced against obligations. In this case, Mr. Doncaster has an obligation to financially support his children, and he has unfortunately placed a higher priority upon advancing causes before the court. In these circumstances, it is reasonable to impute income to Mr. Doncaster. Ms. Field submits that an imputed income of $40,000 per annum is reasonable. If anything, that quantum is conservative. Mr. Doncaster's past levels of remuneration and skill set could justify a higher amount, however, I am prepared to set his income at that level at this point in time, due in part to the difficulties he may encounter re-engaging in the work force after an absence.

[25] The trial judge's imputation of income to Mr. Doncaster in the amount of $40,000.00, on the circumstances of this case, is entirely justifiable. I would dismiss this ground of appeal.

Issue #3 What is the proper accounting of the assets held by Mr. Doncaster?

[26] Like the previous issue, the valuation of assets by a trial judge is entitled to deference.

[27] In the Asset Division Statement which I set out earlier, RRSPs in Altimira and Capital Alliance formed two of the line items totalling $20,000.00. In her decision, the trial judge said the following with respect to these two accounts:

> [34] In this Statement of Property dated October 17, 2012, Mr. Doncaster identified holding two RRSP accounts with Altamira and Capital Alliance, each with an estimated value of $10,000. These investments no longer appeared on Mr. Doncaster's subsequent Statement of Property filed October 10, 2013 and he testified these funds no longer exist. No documentation has been provided to the Court as to the exact valuation, or what ultimately happened to these funds.

[28] With respect, although there is not a lot of evidence on this point, Mr. Doncaster did give evidence that these two accounts no longer existed at the date of trial.

[29] Mr. Doncaster, in giving his evidence, on two occasions made reference to the Altimira and Capital Alliance accounts. This occurred while being cross-examined by Ms. Field's counsel in trying to explain the difference between his previous Statements of Property and his most recent ones. Ms. Field's counsel was attempting to introduce into evidence the National Bank records. Mr. Doncaster did not object to the introduction of the records but wanted to be clear that there should not to be a double accounting of the National Bank RRSPs, the Altimira and Capital Alliance RRSPs. The following exchange took place:

> **MS. STEVENSON:** Tab 3, Mr. Doncaster, please? And these are statements from your RRSP account...
>
> **A**. Hm..mm.
>
> **Q**. ...with National Bank Securities, if you have objections with them admitted into evidence?
>
> **A.** Not so much objection. I want to...some...I have a bit of a problem though, is that it seems in your...in your submissions that you seem to claim there's other RRSPs, which is a complete misrepresentation, and even I've on the record and said that National Bank bought...I think it's Manulife Financial and Manulife Financial had bought Altamira, and that you seem to be claiming that where I said before I had RSPs in Capital Alliance and Altamira, that you've added that to the value of these RSPs. So I think I had said at $10,000 and $10,000, a total of $20,000 I think it was I said on my initial estimate of my financial disclosure, on the very first one that was filed. And in the most recent one I made it clear that it was something like $38,000 or $40,000 in that range, with National Bank. So I want to be clear that this...1 there is no Altamira 2 anymore …

[30] There was other discussion among counsel, the Court and Mr. Doncaster and it appears from the record that there was some confusion about Mr. Doncaster's position. Read in context, Mr. Doncaster was not objecting to the National Bank records going into evidence, however, he wanted it to be clear that there would not be a double accounting. The cross-examination continues and the following exchange took place:

> **THE COURT**: ...or what weight should be put to them. The...my understanding of what Ms. Stevenson is trying to achieve is just whether these documents are being acknowledged as being true copies of documents from National Bank Securities.
>
> **A**. Sure. I perfectly understand the purpose.
>
> **THE COURT**: Okay.
>
> **A.** However, I think it would be unfair to me to restrict me from giving cross examination evidence, so questions that I'm properly allowed to make on...the statements I'm...and evidence I'm properly allowed to give on cross, especially where I am still self-represented, and so let's say I...I...I just take a note of this and then when I'm doing argument I forget about that, and heaven forbid you just take her argument and say, oh, there's still another $10,000 in Altamira and another $10,000 in Capital Alliance in addition to this $40,000, and so I end up getting screwed basically because, oh, you know, I wasn't allowed to give that evidence at the time when I remembered it.

[31] In reading the transcript and the submissions of the parties in context, it is clear that Mr. Doncaster did, in fact, explain what happened to the funds and that there was now only one RRSP account, being the National Bank account.

[32] There is also documentary evidence from National Bank Security which shows that the National Bank account was subsumed into Altimira funds.

[33] In the end, I am satisfied that the trial judge misapprehended the evidence, which resulted in a double accounting. The Statement of Assets should be reduced by $20,000.00 to account for this error.

Valuation of the CIBC Line of Credit Account

[34] The trial judge had this to say about the CIBC account:

> [30] Mr. Doncaster had a Line of Credit with the CIBC which he appeared to use as the main depository of funds coming in from mortgage investments, and would transfer funds from here to both an on-line brokerage account (Interactive

> Brokers) and other accounts. Typically, this account carried a significant positive balance. As of January 29, 2011, this account had a balance of $137,961. The evidence further discloses that from January 29, 2011 to December of 2011, an additional $299,623.34 was deposited to this account, with further deposits in the amount of $10,697.71 being made in 2012. I am satisfied that the probable source of these added funds were from the payout of mortgage investments.
>
> [31] I agree with the submission of Ms. Field that a total of $448,276.05 is subject to division in terms of this asset. Ms. Field received the sums of $122,367.88 and $50,000 in April of 2011 and March of 2012 from Line of Credit funds, for a total of $172, 368, with $275,908 being retained by Mr. Doncaster.

[Emphasis added]

[35] The number of $448,276.05 comes from the submissions of Ms. Field's counsel where, in a footnote, she makes the following comment:

> … It is submitted on behalf of Ms. Field that the balance as of the date of separation, $137,961, plus deposits into this account from the date of separation, $310,315.05 for the total of $448,276.05 is subject to division. …

[36] The trial judge assumed that the deposits to the account were from the payout of mortgage investments. However, a closer examination of the accounts reveals that is not the case.

[37] In order to explain the trial judge's error, it is necessary to review the exhibits in some detail.

[38] There were submitted into evidence a number of mortgage investments which Mr. Doncaster held over the years. Three of those mortgages are significant for the purposes of this issue.

[39] The first mortgage is dated September 7, 2007, with Cho Kanghun and Sang Mee Ahn. The monthly payment on that mortgage was $3,245.00.

[40] The second mortgage is with Mark & Deborah Smith. That mortgage was renewed on October 26, 2006, and called for payments of $720.00 per month.

[41] Finally, there is a mortgage with The Morrisburg Park Association dated April 14, 2008. The payments on that mortgage are $2,750.00 per month.

[42] All of the mortgage payments were interest only.

[43] The records from the CIBC Personal Line of Credit that were entered into evidence date from January 7, 2010 to January 10, 2013 (with the exception of the January, 2012 statement which is missing).

[44] The trial judge determined the date of separation to be January 29, 2011.

[45] A review of those records show payments corresponding to the mortgages that I have just identified. After January 29, 2011, there are seven payments made on the Cho Kanghun mortgage totalling $22,715.00; 20 payments made on the Smith mortgage totalling $14,400.00; and three payments on the Morrisburg Park mortgage totalling $8,250.00. These mortgage payments total $45,365.00. Contrary to the trial judge's assumption, these amounts are in the nature of income and not from the payout of mortgage investments.

[46] There are other miscellaneous deposits to that account ranging from approximately $48.00 up to $4,500.00, none of which would represent a mortgage payout. I am of the view that the value of the CIBC Line of Credit has been significantly over-valued by including amounts which were not matrimonial assets after the date of separation – January 29, 2011.

[47] The only entry which can be traced to a matrimonial asset is the amount of $241,814.00 on October 28, 2011 relating to the payout of the Cho mortgage. I would, therefore, reduce the value of the CIBC Line of Credit to $379.775.00 being the value of the account on January 29, 2011 plus the payout of the Cho mortgage in the amount of $241,814.00. From this account Ms. Field has received $172,368.00.

[48] Mr. Doncaster also asks that we take into account the payments made out of the CIBC Line of Credit for Ms. Field's VISA and AMEX credit cards. In his factum, and in his oral submissions before us, Mr. Doncaster made very detailed arguments regarding which amounts in the CIBC Line of Credit account related to Ms. Field's VISA and American Express credit cards. He asks us to make certain assumptions, for example, that it would be reasonable to assume that 50% of the AMEX charges would relate to Ms. Field's credit card. Following his submissions the following exchange took place between Mr. Doncaster and Justice Beveridge:

> Justice Beveridge: Did you make these arguments to Justice Bourgeois that you are making to us now?
>
> Mr. Doncaster: Ahh, not in the exact same way but I certainly did make the argument saying that I disagreed with the conclusion that Ms. Stevenson made

> saying that all of the deposits that were made to the – every bit of money that went into the CIBC account counted as matrimonial assets post-separation. So I had stated that was wrong. I may not have broken it down and said, well, you know, here is the page where I spoke in the transcript but again, if I said it's wrong I don't have to – like I am precluded from advancing argument by, just because if I didn't say, oh here's the spot in February 20th when I said this was the Cho mortgage. So I said no, I didn't get to this amount of detail. But I certainly did say no, this is not, you know, I don't accept her argument that you start with what was in the CIBC account on January 31st and then add up all the money that went into it and say that was matrimonial funds.

[49] The parties were invited to submit to the panel any pre or post-hearing submissions that they made to Justice Bourgeois to see if Mr. Doncaster made these arguments to the trial judge. The submissions received do not contain arguments relating to the amount of the AMEX and VISA charges on the account. Although Mr. Doncaster was quite capable of making the argument before the trial judge, he did not do so and I am not prepared to entertain it for the first time on this appeal. The trial judge made no palpable and overriding error in failing to consider an argument which was not made to her. In the end result, I would not credit Mr. Doncaster for the approximately $23,000.00 he seeks for payment of these credit cards out of the line of credit.

[50] I would allow this ground of appeal, in part.

Issue #4 What date should certain assets be valued?

[51] Mr. Doncaster argued that the trial judge erred in the determination of the valuation date for certain assets. This involves consideration of the Interactive Brokers account and the valuation of Mr. Doncaster's and Ms. Field's RRSP accounts.

[52] The evidence disclosed that between January 31, 2011, and August 31, 2013, the market value of the Interactive Brokers account decreased from $80,556.04 to $37,861.89 (Decision, ¶33). For the purposes of valuation, the trial judge chose the value as of the separation date of approximately $80,000.00. She said this:

> [33] According to a Statement entered into evidence, the value of the IB account At January 31, 2011 was $80,556.04. The value according to a statement, as of August 31, 2013, was $37,861.89. The evidence at trial suggests that the current balance of the IB account may be lower still, although no current statement was provided. At trial, Mr. Doncaster testified there was "about $40,000" currently remaining in that investment.

[53] She goes on to value the Interactive Brokers account at $80,000.00 without any discussion as to why the Interactive Brokers account was valued as of the date of separation instead of the date of trial. One can only assume that she felt that Mr. Doncaster, who had control of the account, had done something to cause its value to decrease. However, the activity statements for the Interactive Brokers account indicate that the decrease in the value of the account was due to market fluctuation. There is nothing to indicate that Mr. Doncaster continued to trade with or withdraw funds from this account.

[54] Courts strive to be fair to the parties and as a result, different rationales apply to choosing valuation dates for different assets; a trial judge need not apply the same valuation date to all assets, or even to all the assets of a particular class. In *Reardon v. Smith*, 1999 NSCA 147, this Court underlined the discretion of the trial judge in deciding how to create fairness between the parties and noted that the judge need not use the same valuation date for every asset:

> [14] The Court can interfere with the exercise of discretion by the trial judge if the judge gave no weight or insufficient weight to the considerations he ought to have weighed (**Roberts**, p. 57) or misdirected himself or is so clearly wrong as to amount to an injustice. (**Elsom v. Elsom**,), [1989] 1 S.C.R. 1367; **Heinemann v. Heinemann** (1989), 91 N.S.R. (2d) 136 (C.A.); **Ellis v. Ellis** (1999), 175 N.S.R. (2d) 268 (C.A.); **Connolly v. Connolly** (1999), 172 N.S.R. (2d) 382 (C.A.)).
>
> [...]
>
> [37] The case law in Nova Scotia does not set any specific valuation date. The Court decides what is fair and just (see **Stoodley v. Stoodley** (1997), 172 N.S.R. (2d) 101 (S.C.)). (For decisions on various valuation dates: **Mason v. Mason** (1981), 47 N.S.R. (2d) 435 (C.A.) says it is at the time of trial; **Lynk v. Lynk** (1989), 92 N.S.R. (2d) 1 (C.A.) and **Tibbetts v. Tibbetts** (1992), 119 N.S.R. (2d) 26 (C.A.) say it is at the commencement of the proceedings subject to variation according to the evidence; and **Ray v. Ray** (1993), 121 N.S.R. (2d) 340 (S.C.) says it depends on the nature of the asset and it could be the date of the divorce.)
>
> [38] Although Ms. Reardon is not asking that the valuation date chosen by the trial judge be overturned, she objects to his choosing different dates for different assets without any indication of why. I know of no requirement in Nova Scotia to assign a single valuation date for all matrimonial assets.

[55] In *Simmons v. Simmons*, 2001 CanLII 4617 (NSSF), Justice Campbell determined that financial assets should be valued as follows:

> 18 If one of the parties holds investments or RRSP accounts at separation date, that spouse may account to the other by way of an inter-spousal rollover in an

> amount sufficient to equalize their positions or the owner spouse may retain that position and settle with a cash transfer. I would refer to the date of that rollover or the cash transfer as the "division date". The division date may be prior to trial or after the trial. Had it been possible to effect the rollover or cash transfer on the very day of separation, and ignoring any difference in investment performance that the one spouse might have achieved as compared to the other, they would in theory have separately achieved whatever combined gain or loss was actually achieved by the owner spouse as of the division date. The non-owning spouse cannot complain that he or she could have made better use of the asset if it had been divided sooner or that the investment lost value in the market. The parties must accept the particular makeup of their asset mix and the investment decisions of the owner spouse (both of which are normally the function of agreement or acquiescence of the spouses) until such time as they finalize the separation of that asset.
>
> 19 It would be unfair to allow the owner to fail to share that growth with the non-owner spouse because, had the investment been divided on separation date, there would have been shared growth. Similarly, if the investments decreased in value as compared to separation date, it would be unfair for the non-owner spouse not to share in that loss. The post-separation delay in settling this type of asset would have therefore affected the spouses equally by using the division date value. If there were post-separation contributions made to that investment account, it along with its increase or decrease in value should belong to the party contributing to it under the principle of section 4(1)(g) of the *Act*.

[My emphasis]

[56] A review of the case law indicates that, in general, financial assets of a couple are valued as of the disposition date, unless one or the other party cause the value of the asset to decrease by making withdrawals from the asset. The rationale for this is self-evident. If the asset increased in value between the date of separation and the date of disposition, there would be no reason why the parties should not share in the increase. Conversely, if the asset has decreased, as it has here, solely due to market conditions, fairness dictates that it be valued as of the disposition date. In my view, the trial judge erred in valuing the Interactive Brokers account as of the date of separation. Her rationale for doing so is not evident in her reasons.

[57] I would reduce the amount of the Interactive Brokers account, for the purposes of the division of assets, to $37,861.89.

RRSP Accounts

[58] The trial judge valued Mr. Doncaster's RRSP account at $40,170.61, as of May 31, 2013. She valued Ms. Field's RRSP account as of January 2, 2012 at $16,837.99.

[59] Mr. Doncaster says this is unfair in that it values Ms. Field's RRSP account at its lowest and his at its highest. He urges us to use the valuation closest to the separation date. For his RRSP that is $37,134.73.

[60] The trial judge valued the RRSPs based on the most recent information she had closest to the date of trial. With respect to Ms. Field it was January 2, 2012. With respect to Mr. Doncaster it was May 21, 2013.

[61] In choosing these dates, based on the information before her, the trial judge did not commit any palpable or an overriding error and I would not interfere with her decision.

Conclusions on Asset Valuation

[62] In summary, as a result of Mr. Doncaster's success on this aspect of the appeal I would recalculate the division of asset as follows:

Asset Division		
	Doncaster	Field
CICB Line of Credit	$207,407	$172,368
Interactive Brokers	$37,861.69	
RRSPs – Altimira	0	
Capital Alliance	0	
National Bank	$40,170.61	
Nesbitt Burns		$16,873.99
CIBC Account		$11,710.00

Bank Draft (referred to as a money order by the trial judge)		$50,000.00
Vehicles	$11,250.00	$5,500.00
	$296,689.30	**$256.451.99**
Difference $40,237.31		

[63] This results in a reduction of the equalization payment to Ms. Field to the amount of $20,118.66.

Issue #5 Did Justice Chipman have jurisdiction to issue an order?

[64] Mr. Doncaster makes the following argument in his factum:

> 55. Following the appointment of Justice Bourgeois to the Court of Appeal, Chief Justice Kennedy, pursuant to CPR 82.19, appointed Justice Jamie Campbell to case manage the proceeding and complete the work of Justice Bourgeois. This gave Justice Campbell the sole authority to issue an order, and therefore Justice Chipman had no jurisdiction to complete the work of Justice Bourgeois.

[65] To put Mr. Doncaster's argument in context, it is necessary to review some of the procedural history in the court below. On September 9, 2014, Chief Justice Joseph P. Kennedy appointed Justice Campbell, pursuant to *Civil Procedure Rule* 89.12 to take over as case management judge in relation to this file. Section 82.19(1) provides as follows:

> 82.19 (1) The Chief Justice may designate a judge to complete the work of a judge who presides at a trial or hearing and ceases to be able to complete the trial or hearing or to render a decision following a completed trial or hearing.

[66] Mr. Doncaster then filed a motion seeking to have Justice Campbell recused.

[67] Pending the hearing of the recusal motion, Justice Chipman was assigned to settle the form of the corollary relief order.

[68] Mr. Doncaster's recusal motion was heard and dismissed on March 11, 2015 (decision now reported 2015 NSSC 79). Ironically, following his failed recusal

motion, Mr. Doncaster took the position that Justice Chipman ought to deal with the issues of costs as well. This argument was dismissed by Justice Campbell in correspondence sent to the parties on May 21, 2015.

[69] Mr. Doncaster's argument that Justice Chipman was without jurisdiction to issue the order is entirely without merit.

[70] He was given full opportunity to argue any issues that arose as a result of the decision of the trial judge. His allegations all relate to the trial judge's decision and do not call into question the Order of Justice Chipman dated December 3, 2014 (note: the original order of Justice Chipman omitted the inclusion of the CRA debt as a matrimonial debt that omission was corrected by the Order of Justice Jamie Campbell dated September 17, 2015).

[71] It was entirely appropriate for Justice Chipman to be assigned the file pending the recusal motion being heard. In addition to having no legal merit, the argument has no practical implication. All of the issues arising from the Order of Justice Chipman have been fully canvassed on this appeal.

[72] I would dismiss this ground of appeal.

[73] I will now turn to the issue of costs at trial.

Issue 6 What is the appropriate amount of costs to be awarded for the trial?

[74] As explained in *O'Brien v. Clark*, 1995 NSCA 232, because we have allowed the appeal, in part, the costs award on which it was based must be set aside. Accordingly, the usual standard of review in such matters no longer applies. We need not defer to the exercise of the trial judge's discretion and can assess costs anew.

[75] Although we do not owe any deference to Justice Campbell's award of costs, that does not mean we completely ignore what he had to say in his decision.

[76] In his decision, which was sent to the parties by correspondence dated July 8, 2015, Justice Campbell made a number of observations of the issues at trial and the relative success of the parties. I summarize them as follows:

- Mr. Doncaster questioned the date when the parties separated – Ms. Field was successful on that issue.
- Ms. Field's inheritance was not found to be a matrimonial asset – Ms. Field was successful on that issue.
- Ms. Field's property at 33-35 Kaylee Lane was found not to be a matrimonial asset – Ms. Field was successful on that issue.
- The property at 251 Thomas Street was argued by Mr. Doncaster to be in trust for his children – it was found to be a matrimonial asset – Ms. Field was successful on that issue.
- The Interactive Brokers account was argued by Mr. Doncaster to be in trust for his children – it was found to be a matrimonial asset – Ms. Field was successful on that issue.
- Mr. Doncaster argued that the CRA debt was a matrimonial asset – he was successful on this issue.
- Ms. Field sought to have income imputed to Mr. Doncaster – Ms. Field was successful on this issue.
- Mr. Doncaster claimed spousal support – he was unsuccessful on this issue.

[77] As a result, on this appeal, the only issues that changed from the trial judge's decision were the value of the Interactive Brokers account; the valuation of CIBC Line of Credit account and the elimination of the RRSP accounts relating to Altimira and Capital Alliance. That resulted in a reduction of the amount of the equalization payment from Mr. Doncaster to Ms. Field from the amount of $105,456.00 to $20,118.66.

[78] Justice Campbell concluded that, conservatively, the amount involved in this case was between $500,000.00 and $750,000.00. Taking into account all of the factors that I have outlined above, I agree with his conclusion. The result is that the Tariff amount would be $37,313.00. Justice Campbell then went on to add an additional $14,000.00 ($2,000.00 per day, 7 days of trial) for the time spent in trial.

[79] The matters in which Mr. Doncaster has been successful on this appeal took very little time before the trial judge. Indeed, the issues of the Interactive Brokers account, the CIBC valuation and the RRSP accounts were given very little attention by Mr. Doncaster at trial. The issues could only be determined on this

appeal by a review of the record which was submitted to the trial judge with very little comment or argument.

[80] I am in agreement that the amount of $50,000.00, inclusive of disbursements, is the appropriate amount of costs to award for the trial.

[81] Mr. Doncaster, in his factum filed on the costs appeal, raises the issues of his ability to pay, the divided success of the parties at trial and the fact that he was representing the interests of the children. With all due respect to his arguments, they do not justify the time nor the effort that his submissions necessitated before the trial judge. This was a relatively straightforward matrimonial case with the division of property, imputation of income and child support as issues. It was complicated by the unfocused approach taken by Mr. Doncaster which was to simply put information before the trial judge hoping that she would be able to make determinations in his favour without the benefit of proper submissions on the issues.

[82] With respect to his ability to pay, as noted previously, the trial judge imputed income to Mr. Doncaster, conservatively, in the amount of $40,000.00. He was also able to post $15,000.00 in costs on this appeal, despite pleading impecuniosity which he said was evidenced by his creditor proposal and the information contained in his affidavit filed on that proceeding (see. *Doncaster v. Field*, 2015 NSCA 83).

[83] I am satisfied that Mr. Doncaster has the ability to pay.

[84] As to the divided success of the parties at trial, I have previously outlined the success which Ms. Field had on the matters of substance in the proceeding. By any account, Ms. Field was the successful party at trial.

[85] Finally, Mr. Doncaster says that he was representing the interests of his children and that should be a factor that should be taken into account. Mr. Doncaster's argument that certain assets were held in trust for his children was meritless. Rather than being a positive factor in his favour in the determination of costs, it is a negative factor. He has continued to make the same meritless arguments throughout this appeal.

[86] For all of these reasons, I am of the view that the amount of $50,000.00 is the appropriate amount of costs to award for the trial.

Costs on Appeal

[87] On this appeal Mr. Doncaster was again unsuccessful on the issue of the assets held in trust for his children, the imposition of income by the trial judge and the determination of the valuation dates for the RRSPs. However, he was successful in having the amount of the equalization payment reduced. In my view, the success on this appeal was divided and as a result I would not make any award as to costs.

Fresh Evidence

[88] Ms. Field sought to introduce fresh evidence on this appeal. We provisionally admitted the fresh evidence and reserved reasons upon its ultimate admissibility.

[89] The test for fresh evidence was recently reviewed by Fichaud, J.A. in *Armoyan v. Armoyan*, 2013 NSCA 99:

> [131] Rule 90.47(1) permits the Court of Appeal to admit fresh evidence on "special grounds". The test for "special grounds" stems from *Palmer v. The Queen*, [1980] 1 S.C.R. 759, at p. 775. Under *Palmer*, the admission is governed by: (1) whether there was due diligence in the effort to adduce the evidence at trial, (2) relevance of the fresh evidence, (3) credibility of the fresh evidence, and (4) whether the fresh evidence could reasonably have affected the result. Further, the fresh evidence must be in admissible form. *Nova Scotia (Community Services) v. T.G.*, 2012 NSCA 43, paras 77-79, leave to appeal denied [2012] S.C.C.A. 237, and authorities there cited. *McIntyre v. Nova Scotia (Community Services)*, 2012 NSCA 106, para 30.
>
> [132] This Court's practice is to (1) receive (without necessarily admitting) the fresh evidence at the appeal hearing, (2) hear counsel's submissions for or against admission, (3) hear the submissions on the merits of the appeal, (4) reserve on both the admissibility of the fresh evidence and the merits, then (5) issue one decision that rules on the fresh evidence motion and the merits of the appeal: *Nova Scotia v. T.G.*, paras 74-75; *R. v. Stolar*, [1988] 1 S.C.R. 480, at pp. 491-2. This means that, at the hearing, counsel must be prepared to argue the appeal's merits on both assumptions - that the fresh evidence is admitted and that it is disallowed.

[90] In this case, the fresh evidence sought to be introduced consists of documents relating to Mr. Doncaster's consumer proposal, an RRSP statement from National Bank showing that he has withdrawn money from an RRSP account

and a statement of the Interactive Brokers account which shows that Mr. Doncaster has withdrawn funds from that account which he alleges is in trust for his children.

[91] In my view, the evidence is not admissible. There was ample evidence before the trial judge to conclude that the monies were not held in trust for Mr. Doncaster's children or anyone else. We would have reached a similar conclusion on this appeal without the necessity of having to resort to the fresh evidence. In my view, it could not reasonably be said to have affected the result. For these reasons, it is not necessary to receive it nor, if received, would it affect the result.

[92] The motion to adduce fresh evidence is dismissed.

Conclusion

[93] The appeal is allowed in part, the amount of the equalization payment owing from Mr. Doncaster to Ms. Field is reduced to $20,118.65. Both parties shall bear the costs of this appeal.

Farrar, J.A.

Concurred in:

Fichaud, J.A.

Beveridge, J.A.