NOVA SCOTIA COURT OF APPEAL
Citation: *Green v. Green*, 2022 NSCA 83

Date: 20221216
Docket: CA 507407
Registry: Halifax

Between:

Jamie Todd Green

Appellant

v.

Tara Leah Green

Respondent

Judge: The Honourable Justice Elizabeth Van den Eynden

Appeal Heard: May 24, 2022, in Halifax, Nova Scotia

Subject: Child support (retroactive and prospective); division of matrimonial property; separation agreement set aside for duress; judicial bias; fresh evidence

Summary: Mr. Green appeals, seeking to set aside terms of a Corollary Relief Order. He claims the trial judge made several errors in her child support and property division determinations. He further asserts the trial judge erred in setting aside a separation agreement and that she displayed bias against him. He asks we intervene and provide relief from the support obligations placed on him and correct what he perceives as an unfair division of assets. He also seeks to introduce fresh evidence on appeal.

Issues:

[1] 1. Should the fresh evidence be admitted?

[2] 2. Did the judge demonstrate bias?

[3] 3. Did the judge err in her determinations of retrospective and prospective child support?

[4] 4. Did the judge err in setting aside the partial separation agreement?

[5] 5. Did the judge err in her division of property?

Result: The proposed fresh evidence was inadmissible and motion dismissed. Appellant did not demonstrate any error in the judge's identification of the law or her application of it. Nor did he established any error in her fact finding. There is no merit to the claims of bias. Appeal dismissed with costs of $5000 payable to respondent.

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Respondent

Judges:	Van den Eynden, Fichaud, Beaton, JJ.A.
Appeal Heard:	May 24, 2022, in Halifax, Nova Scotia
Written Release	December 16, 2022
Held:	Appeal dismissed with costs, per reasons for judgment of Van den Eynden, J.A.; Fichaud and Beaton, JJ.A. concurring
Counsel:	Jamie Green, appellant in person Charlotte Edwards, for the respondent

Reasons for judgment:

Overview

[1] The parties to this appeal were unable to resolve issues arising from their separation. Justice Diane Rowe of the Nova Scotia Supreme Court presided over their divorce trial. She rendered an oral decision. The corollary relief order (CRO) addressed parenting arrangements, child support, spousal support, and the division of matrimonial property.

[2] Mr. Green appeals, claiming the trial judge made several errors in her child support and property division determinations. He also alleges she displayed bias against him. He asks we intervene and provide relief from the support obligations placed on him and correct what he perceives as an unfair division of assets.

[3] He also seeks to introduce fresh evidence on appeal. In my view, the proposed fresh evidence does not pass admissibility scrutiny and I would dismiss this motion.

[4] I am satisfied the judge did not commit any of the errors Mr. Green suggests. Further, there is no merit to his allegations of bias. I would dismiss the appeal with costs.

[5] My reasons follow, beginning with a review of the background, the issues raised on appeal and the standard of appellate review.

Background

[6] Mr. Green and Ms. Green lived together for approximately 17 years. They began cohabitating in 2000, married on January 5, 2001, and separated on October 6, 2017. Their divorce trial was on June 9, 2021.

[7] They have two children, a son and a daughter, respectively 20 and 17 years old at the time of trial. The CRO provides for the children to be in the joint custody of their parents with the ability to rotate between their parents' homes at the discretion of the children. These and other parenting arrangements were largely resolved by a consent order issued a few months prior to trial and are not challenged on appeal.

[8] The most contentious issues at trial were child support (both retroactive, prospective, and special and extraordinary expenses) and the division of property and apportionment of debt. Spousal support was not pursued by either party. On appeal, Mr. Green's focus is on setting aside the retrospective and prospective child support awards and on setting aside aspects of the judge's division of property.

Retroactive child support

[9] Ms. Green sought retroactive child support. Although the children were free to come and go between the parents' respective homes, Ms. Green established the children primarily resided with her after separation. More specifically, the parties' daughter lived with Ms. Green from the date of separation and continued to do so at the time of trial. Their son also resided with Ms. Green after separation until October 2019.

[10] Ms. Green resided in the matrimonial home for several months following her separation from Mr. Green. She vacated their home in March 2018 and set up her own residence and claimed retroactive child support to that date. Although she had not made a formal application to the court for interim child support, the record is clear—Mr. Green was certainly aware of her support expectations and requests.

[11] At trial, Mr. Green acknowledged that he refused to pay child support to Ms. Green. However, he argued that he should be excused from any retroactive award primarily because he paid some monies directly to the children and/or covered some of their miscellaneous expenses and paid certain debts for the benefit of the family. He further argued that he did not have the ability to pay. Prior to trial, Mr. Green indicated an intention to pursue an undue hardship claim, which he abandoned at trial.

[12] Ms. Green provided the judge with the following chart. It reflected the annual amount of child support Mr. Green should have paid pursuant to the applicable *Federal Child Support Guidelines* retroactive to March 2018:

	2018	2019	2020	2021
Mr. Green's Income	$87,427.57	$82,253.41	$87,024.12	$87,024.12
For 2 Children	$12,448.10	$10,398.51	-	-
For 1 Child	-	$ 2,218.39	$8,966.52	$3,736.05

[13] The total claimed in the above chart was $37,767.57. The judge was satisfied this was a proper case to award retroactive support and accepted Ms. Green's calculations of the amount owing. I review the judge's reasoning for this award in more detail in my analysis.

[14] The CRO directed the retroactive support award, attributed to each child, to be paid into a RESP (registered education savings plan) which aligned with Ms. Green's position, given the educational plans/needs for both children. The CRO provides:

> 10. Jamie Green has a retroactive child support obligation in the amount of $37,767.57. Jamie Green shall make payments of $786.82 monthly for a period of 48 months starting the first date of each month effective July 1st, 2021 to be placed in an RESP to be established with the children as the beneficiaries and both parents as contributors.
> 11. Jamie Green has a retroactive child support obligation for [his son] in the amount of $11,423.31, and for [his daughter] in the amount of $26,344.27. As a result, the proportionate share of the payments attributable to [his son] is $236.05 and to [his daughter] is $550.77.

[15] As noted above, Ms. Green's claim for retroactive support for their son was for a shorter period (March 2018 to October 2019). Ms. Green acknowledged that after October 2019, their son lived independently for a period and then returned to live with Mr. Green while pursuing post secondary education. Given these circumstances, the judge determined Ms. Green also had a retroactive support obligation in relation to the parties' son and directed the amount be paid to the RESP. The CRO provides:

> 12. Tara Green has a retroactive child support obligation to Jamie Green in the amount of $5041.85. Within 30 days of the matrimonial assets being divided, Tara Green shall make a contribution to the children's RESP in this amount.

[16] The judge also provided for the adjustment of the retroactive awards respecting the parties' son. He was employed for part of the relevant time frame and the judge was satisfied he should make some contribution of his own towards his education. The amount was not ascertained at trial but the CRO provided:

> 13. [The son] shall contribute to the costs of his support and education, in keeping with his employment while attending post secondary studies. A reduction of the payable amount shall be determined, reflective of his employment income, with [the son] disclosing his earnings amounts to determine an adjusted amount payable for the months in which support is payable by either parent.

Prospective child support

[17] The judge determined Mr. Green to have an annual income of $87,024 and Ms. Green to have an annual income of $54,041 for the purpose of prospective child support.

[18] As noted, the parties' daughter continued to reside with Ms. Green at the time of trial; however, the daughter planned to attend university in the fall of 2022. Ms. Green sought the table amount of child support ($747.21) for their daughter—adjusted to reflect her post-secondary education plan. Ms. Green's pre-hearing submissions articulated:

> [Ms. Green] is seeking the full table amount be paid while [her daughter] is a minor child of the marriage. This would be until September 2022, at which time, Ms. Green seeks that should [her daughter] continue to be going to school in Antigonish and coming home to reside with her Mother in the summer months, that from September to April, 50% of the table amount be awarded during the school months of September - April and during the summer months where [her daughter] returns home to reside with her, the full table amount be ordered.

[19] Mr. Green was opposed to paying any prospective child support for his daughter, particularly if the money was to be paid directly to Ms. Green. The judge was satisfied that Ms. Green's proposal was appropriate, as reflected in these provisions of the CRO:

> 8. Jamie Green shall pay child support to Tara Green in the amount of $747.21 on the first date of each month effective July 1, 2021.
>
> 9. From September 1 to April 30 each year for so long as [their daughter] is enrolled in university, Jamie Green shall pay child support to Tara Green in the amount of $373.61, and the full table amount of $747.21 will be payable from May 1-August 31 each year where [their daughter] returns home and resides with her Mother. Child support will continue to be payable on the first date of each month.

[20] Given their son's circumstances at the time of trial (completed education course and employed) no prospective support was sought or ordered for him.

[21] Ms. Green advanced a claim for a proportionate sharing of retroactive and prospective special and extraordinary expenses for the children (s. 7 of the *Federal Child Support Guidelines*). The judge declined to make an award for expenses prior to trial because she found the evidence lacking but ordered prospective

sharing of agreed expenses with Ms. Green's proportionate share to be 42% and Mr. Green's 58%.

Division of property and validity of partial separation agreement

[22] Before deciding how the assets should be divided, as a preliminary matter, the judge was called upon to adjudicate the validity of a Partial Separation Agreement (the "Agreement") signed by the parties on January 28, 2018. If found to be binding upon the parties, its terms would impact the division of property.

[23] The Agreement dealt with various items such as how the family home would be disposed of, payment of mortgage and other expenses pending sale and the division of proceeds upon sale. It also dealt with miscellaneous property.

[24] It is clear from the record there was considerable conflict between the parties leading up to and following their separation. This was especially so during the period after separation when they both resided in the matrimonial home. The Agreement was signed by the parties during this period. It was not witnessed. The judge set aside the Agreement. Having set the Agreement aside the judge went on to determine the division of matrimonial property. I will set out the judge's reasons for setting aside the Agreement and the details of the property division award in my analysis.

[25] Mr. Green also seeks to introduce fresh evidence on appeal. I will explain the nature of this evidence when setting out my reasons for rejecting it.

[26] I will provide supplemental additional background in my analysis as needed.

Issues

[27] Mr. Green was self represented below and on appeal. He formulates his grounds of appeal as follows:

> (1) Exhibits entered as evidence by the petitioner's counsel during cross examination, not pre-disclosed, were incomplete and inaccurate. This evidence was quoted by, and had a direct impact on, Justice Rowe's decision by way of reasonable apprehension of bias. The Appellant will be making motion to introduce the complete and clarifying evidence.
>
> (2) Justice Rowe, through her assistant, emailed a request and expectation that both parties be able to speak on the recently released Supreme Court of Canada decision, Colucci v. Colucci 2021 SCC 24. A decision that does not

fully or accurately reflect the circumstances of Green v. Green, yet the forwarding of such a decision two days before hearing suggests a reasonable apprehension of bias and predetermined outcome and prejudice against Mr. Green.

(3) Of all the exhibits entered into evidence regarding income, debts, retro-active support amounts and the remaining "children of the marriage", that Justice Rowe failed in taking into consideration Mr. Green's hardship of managing matrimonial debts during the marriage and after separation. As such, the division of assets, not only in proportional total amounts, but in monthly payments moving forward, is grossly unreasonable.

(4) The Appellant maintains that comments made within an email that was entered into evidence directly offended Justice Rowe creating an overly reasonable apprehension of bias against Mr. Green. A complaint has since been filed with the Canadian Judicial Council.

(5) That Justice Rowe failed to accept a partial separation agreement signed by both parties directing the proceeds of the sale of matrimonial home to pay out the matrimonial debt. While not witnessed, as required by the *Matrimonial Property Act*, the Appellant maintains the Agreement is a binding contract between both parties. Evidenced in that the Agreement was mutually discussed and agreed upon, signed and dated by both parties and that the terms of that contract have been abided by both parties since being signed in January 2018.

(6) That the Appellant was not acting in a blameworthy conduct or in bad faith and that support of his children was maintained, albeit not directly to Ms. Green, and that years worth of previously submitted documentation supporting this, including expense statements and affidavits, were not considered in any calculation of retroactive child support. Justice Rowe simply agreed with Ms. Green's counsel's table of calculations taken from her Pre-Trial Brief.

[28] These complaints are better framed as:

1. Did the judge demonstrate bias?

2. Did the judge err in her determinations of retrospective and prospective child support?

3. Did the judge err in setting aside the partial separation agreement?

4. Did the judge err in her division of property?

Fresh Evidence

[29] I will address the fresh evidence before setting out the standard of review and my analysis of the remaining issues.

[30] As noted, the matrimonial home was listed for sale in March 2018 but did not sell until May 2020. There was evidence tendered at trial of various listing agreements, offers and counter offers that transpired during that time, including offers for an amount higher than the actual selling price of $210,000. Mr. Green now complains that the evidence Ms. Green put forward was incomplete. He wants to supplement the record with a signed version of one exhibit (a counteroffer because the one tendered at trial only had Ms. Green's signature on it), plus a multitude of other communications that transpired between the parties respecting the sale of the home.

[31] Mr. Green contended this evidence should be admitted to establish he did in fact sign the counteroffer although the potential buyers did not accept it.

[32] In addition to these documents, he also references and appends numerous documents, some already put in evidence at trial and some related to a claim of undue hardship, which he abandoned at trial.

[33] Ms. Green does not oppose a signed copy of the counteroffer being tendered for completeness of the record but asserted it would not have affected the result. The proposed evidence did not negate Ms. Green's evidence that there was an offer of $215,000 and had it been accepted, the property would have sold much earlier.

[34] *Civil Procedure Rule* 90.47(1) permits this Court to admit fresh evidence where there are "special grounds". As explained in *Armoyan v. Armoyan*, 2013 NSCA 99 (leave to appeal to the SCC denied):

> [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.

[35] In *Barendregt v. Grebliunas*, 2022 SCC 22 the Supreme Court of Canada re-affirmed the application of the *Palmer* test in the family law context.

[36] In my view, the proposed fresh evidence fails to meet the test for admissibility in several ways. The evidence does not meet the due diligence requirement as it was readily available at trial and some of it is plainly not relevant to the issues the judge was asked to determine. Further, I am satisfied the fresh evidence could not reasonably affect the result of this appeal.

[37] I would dismiss the motion.

Standard of Review

Support, validity of the Agreement and property division

[38] The standard of review applied to my assessment of whether the trial judge erred in her support, validity of the Agreement and property division determinations, was explained in *Laframboise v. Millington*, 2019 NSCA 43:

> [14] The standards of appellate review in cases such as this are so well-known as to hardly require elaboration. Questions of law are reviewed on a standard of correctness. When interpreting and applying the law the judge must be right. On questions of fact, or inferences based on accepted facts, or questions of mixed law and fact where the legal point is not readily extricable, a trial judge's factual findings will only be disturbed if they evince palpable and overriding error. "Palpable" means obvious. "Overriding" means dispositive; a mistake so serious as to have likely influenced the outcome. In appeals from a trial judge's exercise of discretion, deference is owed. We will only intervene if we are satisfied that in the exercise of that discretion the judge erred in law or the outcome is patently unjust. Unless an appellant can persuade us that the trial judge either erred in law, or erred in fact, or erred in the exercise of discretion in the ways I have just described, the appeal will fail. See generally, *Housen v. Nikolaisen*, 2002 SCC 33 at ¶8 *ff.*; *Gwynne-Timothy v. McPhee*, 2005 NSCA 80 at ¶31-34; *Laushway v. Messervey*, 2014 NSCA 7 at ¶27-29; *Homburg v. Stichting Autoriteit Financiële Markten*, 2016 NSCA 38 at ¶18-19; and *McPherson v. Campbell*, 2019 NSCA 23 at ¶17-20.

[39] It has been long recognized that owing to the discretionary nature of the exercise of determining support, appellate courts are to apply a deferential standard

of review. In *Hickey v. Hickey*, [1999] 2 S.C.R. 518, the limitations on appellate review were explained:

> 10 When family law legislation gives judges the power to decide on support obligations based on certain objectives, values, factors, and criteria, determining whether support will be awarded or varied, and if so, the amount of the order, involves the exercise of considerable discretion by trial judges. They must balance the objectives and factors set out in the *Divorce Act* or in provincial support statutes with an appreciation of the particular facts of the case. It is a difficult but important determination, which is critical to the lives of the parties and to their children. Because of its fact-based and discretionary nature, trial judges must be given considerable deference by appellate courts when such decisions are reviewed.
>
> […]
>
> 12 There are strong reasons for the significant deference that must be given to trial judges in relation to support orders. This standard of appellate review recognizes that the discretion involved in making a support order is best exercised by the judge who has heard the parties directly. It avoids giving parties an incentive to appeal judgments and incur added expenses in the hope that the appeal court will have a different appreciation of the relevant factors and evidence. This approach promotes finality in family law litigation and recognizes the importance of the appreciation of the facts by the trial judge. Though an appeal court must intervene when there is a material error, a serious misapprehension of the evidence, or an error in law, it is not entitled to overturn a support order simply because it would have made a different decision or balanced the factors differently.

[40] As recognized in *MacQuarrie v. MacQuarrie*, 2019 NSCA 37 determining a division of property also "requires the exercise of judicial discretion in light of the specific facts of the case and a multitude of relevant considerations" and "[t]he standard of appellate review of the trial judge's findings of fact and exercise of discretion is a deferential one" .

Bias

[41] In *Wewaykum Indian Band v. Canada*, 2003 SCC 45, the Supreme Court of Canada explained that the apprehension of bias must be a reasonable one:

> 60 In Canadian law, one standard has now emerged as the criterion for disqualification. The criterion, as expressed by de Grandpré J. in *Committee for Justice and Liberty v. National Energy Board, supra*, at p. 394, is the reasonable apprehension of bias:

> …the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."…

[42] As stated by this Court in *R. v. Potter*; *R. v. Colpitts*, 2020 NSCA 9 where there is a finding of a reasonable apprehension of bias, the offending judge's decision results in an error of law:

> [753] If a reasonable apprehension of bias arises from, or an actual bias is found in, a judge's words or conduct, then the judge has exceeded his or her jurisdiction and erred in law.

[43] The burden on a party claiming a reasonable apprehension of bias or actual bias on the part of a judge is onerous. There is a strong presumption of judicial impartiality that must be overcome by a claimant. The inquiry is also fact-specific and the claimant must present cogent evidence establishing serious grounds (see *Wewaykum* at paras. 76-77 and *R. v. Teskey*, 2007 SCC 25 at para. 21).

Analysis

Did the judge demonstrate bias?

[44] Mr. Green suggests the judge exhibited bias towards him regarding certain conclusions she drew respecting the sale of the matrimonial home. In her oral decision the judge said "There is evidence that the sale of the house could have occurred in an earlier time and it is very unfortunate that did not occur". There was evidence to that effect before her and she was entitled to make this observation.

[45] Mr. Green suggests that a communication the parties received from Justice Rowe's office bringing to their attention a recent decision of the Supreme Court of Canada and requesting the parties be prepared to speak to it demonstrated bias towards him. He said in his factum:

> Justice Rowe, through her assistant, emailed a request that both parties be able to speak about Colucci v. Colucci 2021 SCC 24 at trial which was not to occur until two days later. This creates a reasonable apprehension of bias, as well as sense of impartiality, by Justice Rowe, before the trial even began.

[46] He points to comments the judge made at the beginning of the trial, alleging they too demonstrate bias. Justice Rowe said:

> **THE COURT**: ... I'd also sent an email concerning the most recent Supreme Court of Canada decision in ***Colucci and Colucci***, and in having read the brief that was filed, response back and forth, there may be some issues that are tangential to this. I mean, ***Colucci*** is a little bit different in that you're looking at a variation application, but there are some statements made by the Supreme Court of Canada that are very instructive, but also very instructive, and certainly in terms of the preamble around the responsibilities and obligations of parents in relation to their children that I thought may be germane to this proceeding. So later, and in terms of either a...perhaps in terms of a summation or in terms of my questions as we move forward, I may touch on some of the issues that were brought forward in that decision; okay?

[47] As Ms. Green aptly points out, the trial judge was simply doing her job. The SCC released *Colucc*i on June 4, 2021 and the parties trial started June 9, 2021. Mr. Green was also a self-represented litigant. The judge was being proactive to ensure the parties were aware of the decision. She can not be faulted for that. Furthermore, there is absolutely nothing in the record to suggest that she had pre-determined any issue.

[48] Bias is also alleged on the basis of a comment in her oral decision about a very long letter Mr. Green emailed to Ms. Green and others which he appended to his affidavit. It is unnecessary to repeat any of it here other than to say it appears to express nothing but Mr. Green's negative opinion of Ms. Green and his view on other things such as what is referred to as the "MeToo" movement.

[49] After addressing the s. 7 child support issue the judge said:

> Communication between the parties on an expense prior to its occurring is very important. And I'll note, email communications have been very difficult for the parties. **I have read the email communication that was referenced and was attached to the affidavit evidence of Ms. Green, and while not expressly threatening, it was quite concerning in content.** In any event, I encourage both parties to neutralise their communications to just the facts, not unlike that old TV show from the sixties, "Just the facts, ma'am." Neutralise it as they relate to one another by email to the needs of the child, without reference to any personal circumstances or emotions, however difficult that may be.

[50] Mr. Green contends that the judge's above bolded comment demonstrates she was biased against him. I reject this. The judge was observing what was

apparent on the record and offering the parties some guidance in their future communications regarding the children. It cannot be said this is indicative of bias.

[51] And finally, Mr. Green makes a general complaint that the judge had predetermined the case. He asserts her bias towards him is evident in that she essentially ignored the arguments and evidence he advanced and accepted Ms. Green's positions. But that is not so. Although the judge's reasons could have been more detailed, the record indicates she understood and considered the respective positions of the parties and the evidence before her.

[52] The judge accepted much of Ms. Green's evidence. Doing so, and deciding several issues in Ms. Green's favour is not in and of itself indicative of bias or partiality.

[53] Returning to the standard of review, a claim for a reasonable apprehension of bias or actual bias on the part of a judge requires Mr. Green to present cogent evidence establishing such a serious claim. Mr. Green has failed to identify any, let alone cogent evidence, that might support such a claim.

[54] In short, there is no merit to Mr. Green's claims of bias and I would dismiss this ground.

Did the judge err in her determinations of retrospective and prospective child support?

[55] In my view, there is no basis to interfere with either the award for retroactive or prospective support.

[56] As to the prospective support, the judge determined the applicable table amount for the parties' daughter. On appeal, Mr. Green alludes to changes in the daughter's circumstances occurring after the trial that might warrant variation but that is not before us. If Mr. Green wishes to seek a variation of support that is for him to address in a variation application in the court below.

[57] As to retroactive support, the judge had before her detailed submissions, supported by an evidentiary foundation, as to why a retroactive award was warranted. She referred to the legal principles that guide a judge's determination of a claim for retroactive support, including *DBS v SRG*, 2006 SCC 37, *Michel v. Graydon*, 2020 SCC 24 and *Colucci*. After considering the relevant factors the

judge was satisfied this was a proper case to award retroactive support and accepted Ms. Green's calculations of the amount owing.

[58] Mr. Green has not demonstrated any error either in the judge's identification of the law or her application of it. Nor has he established any error in her fact finding. It is obvious he does not like the support outcomes and asks that we change them—but an appeal is not a retrial.

Did the judge err in setting aside the partial separation agreement?

[59] Mr. Green contended the Agreement should still bind the parties. It contained provisions that would have favoured his position at trial—such as Ms. Green's obligation to contribute to household expenses (even though she moved out and he remained living there) and that contentious debts be paid from the proceeds of sale. He attempted to persuade the judge that Ms. Green's partial performance (such as keeping pets, a car and other items) was indicative of her intention to be bound by the Agreement.

[60] On appeal, Mr. Green essentially advances the same arguments. I do not find them to be persuasive.

[61] It is clear from the record there was considerable conflict between the parties leading up to and following their separation. This was especially so during the period after separation when they both resided in the matrimonial home. The Agreement was signed by the parties during this period. It was not witnessed.

[62] Before the trial judge, Ms. Green contended the Agreement should not bind her as it did not comply with s. 24 of the *Matrimonial Property Act*, R.S.N.S. 1989, c. 275. Section 24 provides "[a] marriage contract or a separation agreement is void unless it is in writing and is signed by the parties and witnessed".

[63] In addition to this defect, Ms. Green argued the Agreement should be set aside because when it was signed:

- She did not have legal advice.

- She did not have full financial disclosure.

- She signed at a time when she was under tremendous pressure and experiencing high conflict between herself and Mr. Green as they were still living in the matrimonial home together.

> -Mr. Green has always had a substantially higher income, and she was at an economic disadvantage preventing her from leaving the home.
>
> -The terms unfairly required her to be responsible for expenses related to the home when the home was not sold until May 2020 and she was not residing there after March 2018 Mr. Green was. Further, she was struggling to maintain a home for the children without any child support from Mr. Green.

[64] Both parties filed detailed affidavits and were cross-examined. The tenor of Ms. Green's evidence, even on cross-examination, was that she signed the Agreement under duress given the very stressful and conflictual period the parties were living through.

[65] Although Mr. Green acknowledged the parties were experiencing a stressful time when the Agreement was signed, in his affidavit he stated:

> 10. … well the Applicant swears …that the separation agreement should not be upheld, as it was without legal advice at a time when conflict was unbearable in our household, it should be noted that it was not unbearable enough for her to move out until over a month later.

[66] The judge also had the benefit of Ms. Green's submission respecting the legal principles that governed her decision making, including *Miglin v. Miglin*, 2003 SCC 24.

[67] The judge made a specific finding that the end of the marital relationship was "marked by significant conflict". She accepted Ms. Green's evidence that she signed the Agreement under duress. After summarizing the positions of the parties, she concluded:

> I have reviewed the document [the Agreement] and it appears to me to be an interim arrangement, predicated on Ms. Green remaining in the home. … I accept Ms. Green's submissions on the circumstances of its creation and find it to be of no binding effect regarding the final disposition of the matrimonial assets.

[68] Again, while it would have been helpful for the judge to have provided more detailed reasons, I am satisfied her reasoning is sound and Mr. Green has not demonstrated any error.

Did the judge err in her division of property?

[69] The parties had resolved a few issues prior to trial – the division of certain bank accounts, motor vehicles, household contents and pensions. These agreed terms were referenced in the CRO, and a pension division order was issued.

[70] The main issues in contention were:

> - Substantial withdrawals Mr. Green made from an RRSP account in his name: This was a matrimonial asset and Ms. Green did not consent to the withdrawals. In fact, she pursued and obtained an *ex parte* preservation order restraining Mr. Green from making any further withdrawals without her written agreement or further court order. She also maintained Mr. Green should be responsible for any tax consequences arising from his withdrawals. Further, Ms. Green claimed that the division of assets must be adjusted to reflect Mr. Green's unauthorized investment withdrawals.
>
> - Distribution of the matrimonial home sale proceeds: The house was listed for sale in February 2018 and finally sold in May 2020 for $210,000. The net proceeds of sale (after payout of the real estate commission, mortgage and closing cost) were $104,753.04. At the time of trial, the proceeds remained held in trust as the parties could not agree on how they would be disbursed. They disputed what further debts should be paid from the proceeds and whether Mr. Green should retain any equity given the mortgage payments and other expenses he covered after separation.

[71] The judge had the benefit of detailed affidavits, statements of property, the *viva voce* evidence of the parties and their detailed submissions. The judge took the parties debts into consideration and ordered certain debts to be paid from the matrimonial home sale proceeds and that Mr. Green to be responsible for his own (Visa) debt. She also considered Mr. Green's depletion of matrimonial assets.

[72] On this ground, there is considerable overlap with Mr. Green's complaints of bias. It is clear he finds the division of property and assignment of debt responsibility unreasonable. He maintains that his evidence was not considered because the judge was biased against him. And had the judge considered his evidence, she would have had to arrive at a division less favourable to Ms. Green. Simply saying so does not make it so.

[73] I am not persuaded the judge committed an error. Mr. Green is unsatisfied with the result and wishes to effectively retry the matter on appeal to arrive at a different result. I would also dismiss this ground.

Conclusion

[74] I would dismiss the motion for fresh evidence and dismiss the appeal with costs payable forthwith by Mr. Green to Ms. Green in the amount of $5,000.00 inclusive of disbursements.

Van den Eynden, J.A.

Concurred in:

Fichaud, J.A.

Beaton, J.A.