IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR

Citation: *O'Keefe v. O'Keefe,* 2019 NLCA 70
Date: October 25, 2019
Docket Number: 201801H0048 and 201801H0062

BETWEEN:

BRENDA O'KEEFE — APPELLANT/RESPONDENT BY CROSS-APPEAL

AND:

JEROME O'KEEFE — RESPONDENT/APPELLANT BY CROSS-APPEAL

Coram: Welsh, O'Brien and Goodridge JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador
Family Division 201602F0182
(2018 NLSC 100)

Appeal Heard: January 24, 2019
Judgment Rendered: October 25, 2019

Reasons for Judgment by: Goodridge J.A.
Concurred in by: Welsh and O'Brien JJ.A.

Counsel for the Appellant/Respondent by Cross-Appeal: Sharon McKim-Ryan
Counsel for the Respondent/Appellant by Cross-Appeal: Sarah Clarke

Goodridge J.A.:

INTRODUCTION

[1] In an application before the Family Division of the Supreme Court of Newfoundland and Labrador, Brenda O'Keefe sought an order for division of matrimonial property, spousal support, and setting aside, in whole or in part, the separation agreement that she signed with Jerome O'Keefe on March 15, 2011. She had independent legal advice before signing the agreement, and her lawyer witnessed the document. In the applications court, Ms. O'Keefe argued that her signature on the agreement was induced by her husband's nondisclosure of assets, nondisclosure of asset values, nondisclosure of employment income, and undue influence. In a decision filed May 2, 2018, the applications judge rejected those arguments, and declared that Ms. O'Keefe had voluntarily entered into the agreement and that it was valid and enforceable. The judge then proceeded to make determinations as to asset values and amounts owing under the agreement.

[2] Ms. O'Keefe filed a Notice of Appeal challenging the applications judge's declaration that the agreement was valid, and his determination of the asset values. Mr. O'Keefe filed a cross-appeal, challenging the applications judge's determination of amounts owing under the agreement and the costs award.

[3] For the reasons set out below, I would allow the appeal in part, and allow the cross-appeal in part. The judge erred by denying Ms. O'Keefe an adequate opportunity to be heard, during closing submissions, on the issue of spousal support. In particular, the judge erred when he pre-empted Ms. O'Keefe's attempt to argue that the spousal support provision of the agreement was inconsistent with the overall objectives of the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.). Failure to give Ms. O'Keefe the opportunity to be heard on this issue constituted a fundamental procedural error amounting to an error in law. The judge also erred in determining that health insurance payments were an amount owing under the agreement.

ISSUES

[4] The issues of the appeal are addressed by responding to the following questions:

- Did the applications judge err by concluding that the separation agreement was valid and enforceable?

- Did the applications judge err by failing to consider the compensatory model for spousal support?

- Did the applications judge err by excluding relevant evidence in relation to property valuations?

- Did the applications judge err by interpreting section 28 of the agreement to preclude its application to overvalued assets?

- Did the applications judge's interventions during questioning of witnesses undermine procedural fairness by creating a reasonable apprehension of bias?

[5] The issues of the cross-appeal are addressed by responding to the following questions:

- Did the applications judge err by determining that Mr. O'Keefe owed health insurance payments to Ms. O'Keefe?

- Did the applications judge err by determining that Ms. O'Keefe was entitled to the full amount of the property insurance claim relating to the matrimonial home?

- Did the applications judge err by failing to exercise discretion judicially, when he declined to make a costs award in Mr. O'Keefe's favour?

STANDARD OF REVIEW

[6] The standard of review applied by an appellate court depends upon the nature of the matter being reviewed. A pure question of law is reviewed on a standard of correctness and an appellate court is free to replace the opinion of the applications judge with its own. Findings of fact, on the other hand, cannot be reversed unless the judge has made a palpable and overriding error. A palpable error is one that is plain and obvious; an overriding error is one that may well have altered the result. A determination of whether a legal standard was met involves the application of a legal standard to a set of facts, which is a question of mixed fact and law. A question of mixed fact and law is subject to a standard of palpable and overriding error unless it is clear that the judge made some extricable error in principle with respect to the characterization of the standard or its application, in which case the error may amount to an error in law and the applicable standard is correctness. See *Housen v. Nikolaisen*, 2002 SCC

33, [2002] 2 S.C.R. 235, at paras. 8, 10, 11, 23 and 37, and *Courtney v. Cleary*, 2010 NLCA 46, 299 Nfld. & P.E.I.R. 85, at para. 15.

[7] Issues of procedural fairness are reviewable on a correctness standard. See *Khela v. Mission Institution*, 2014 SCC 24, [2014] 1 S.C.R. 502, at para. 79; *Canada (Minister of Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, at para. 43.

ANALYSIS

APPEAL

Did the applications judge err by concluding that the separation agreement was valid and enforceable?

[8] In the applications court, Ms. O'Keefe attempted to have the entire agreement set aside on several grounds: nondisclosure of asset values, nondisclosure of employment income, lack of knowledge of legal consequences of the agreement, lack of voluntariness, undue influence, and noncompliance with the overall objectives of the *Divorce Act*.

Nondisclosure of asset values

[9] Regarding the alleged nondisclosure of assets and values, the applications judge found that there were no undisclosed matrimonial assets and that Ms. O'Keefe knew the value of the matrimonial assets. In making these findings of fact, the judge rejected Ms. O'Keefe's version of events and found her evidence, that she was ignorant of the assets and values, to be misleading and evasive. The judge relied on a hand-written document prepared by Ms. O'Keefe, prior to signing the agreement, which supported a conclusion that she was aware of the matrimonial assets, and that she had taken responsibility for valuing several of those assets, including the home, cottage, land, and vehicle.

[10] It is the role of a judge to assess credibility and make determinations on credibility and fact. Heightened deference will be accorded on matters of credibility (*R. v. Gagnon*, 2006 SCC 17, [2006] 1 S.C.R. 621, at para. 20). Here, the applications judge gave reasons for his determinations. There is no basis on which to conclude that he erred.

Nondisclosure of employment income

[11] The applications judge found that Ms. O'Keefe was aware of Mr. O'Keefe's employment income because she had access to the family bank account that displayed the automatic bi-weekly salary deposit, and access to the home office where Mr. O'Keefe's tax returns and salary records were kept.

[12] The judge accepted the testimony of Mr. O'Keefe that Ms. O'Keefe had unrestricted access to the joint family bank account and the home office; the judge described Ms. O'Keefe's testimony that she did not have access as self-serving and not credible.

[13] Here again the applications judge made determinations on credibility and fact, and provided reasons. There is no basis on which to conclude that he erred.

Lack of knowledge of legal consequences, lack of voluntariness, undue influence

[14] Regarding the alleged lack of knowledge of legal consequences, lack of voluntariness, and undue influence, the applications judge found that Ms. O'Keefe was aware of the legal consequences, voluntarily entered into the agreement, and was not a victim of undue influence.

[15] Ms. O'Keefe testified that she signed the agreement only because of dominance and pressure from Mr. O'Keefe. She downplayed the role of her lawyer in giving independent legal advice and testified that her lawyer explained nothing. The judge rejected Ms. O'Keefe's testimony that she was not aware of the nature and effect of the separation agreement, that she had not read the agreement before signing it, and that she did not sign voluntarily. He found her evidence to be "self-serving and unbelievable" (para. 83).

[16] The judge preferred the evidence of Ms. O'Keefe's lawyer, and gave reasons for preferring that evidence. The lawyer, Gladys Dunne, had been practicing law since 1991 almost exclusively in the area of family law, and provided about three independent reviews of this type weekly. The judge explained, at paragraphs 79 to 81:

> [79] Ms. Dunne testified that she "definitely" would have remembered a client who was crying or hyperventilating, and said it is her usual practice to explain the agreement and not just read it verbatim. Her role is to "make sure" that her party understands the agreement. Although she does not always do DivorceMate calculations, she will do so if there is a clear entitlement, and will advise her client on the DivorceMate range of support.

> [80] Ms. Dunne further testified that if she feels a client does not understand or gives any indication they are uncomfortable in any way with the agreement, she would not witness a signature or sign the certificate. Therefore, she concludes that her client did understand the agreement and was not reluctant to sign same.
>
> [81] Ms. Dunne also witnessed the execution by Ms. O'Keefe of the deeds of conveyance of the matrimonial home, the vacant land, and the cabin, all of which were contemplated by the parties in the separation agreement. She states that she would not have witnessed these deeds if she had any indication that a client didn't understand the documents or was reluctant to sign.

[17] The judge referred, at paragraph 73, to the following certification issued by the lawyer following her provision of independent legal advice:

> I have advised the said Brenda Anne O'Keefe (King), with respect to the contents of this Separation Agreement and I believe she is fully aware of the nature and effects of the Separation Agreement on and in light of [its] present and future circumstances and has voluntarily signed the Separation Agreement.

[18] The findings of fact made by the applications judge, and his reasons, support the conclusion that Ms. O'Keefe had knowledge of the legal consequences, voluntarily entered into the agreement, and was not a victim of undue influence. There is no error in the judge's conclusion on these points.

Compliance with the overall objectives of the *Divorce Act*

[19] I agree with the applications judge that the circumstances here do not justify an order to set aside the separation agreement in its entirety. However, I am of the view that the spousal support provision of the agreement must be reconsidered because the judge pre-empted counsel's attempt to argue that the provision was non-compliant with the overall objectives of the *Divorce Act*.

[20] *Miglin v. Miglin*, 2003 SCC 24, [2003] 1 S.C.R. 303, at paragraphs 64 to 87, discusses a test to inform the exercise of the court's discretion in deciding whether to set aside the spousal support provision of a separation agreement. The *Miglin* test includes consideration of whether the agreement represents a significant departure from the general objectives of the *Divorce Act*. During closing submissions, counsel for Ms. O'Keefe attempted to argue that the spousal support provision of the agreement represented a significant departure from the overall objectives of the *Divorce Act*. This was one of the main issues at the hearing before the applications judge.

[21] The judge interrupted counsel's attempt to argue that issue and stated, "I think you can move off of that, I agree with this". With that direction, counsel moved onto other matters. The judge did not clarify or make further comment as to what he meant. The exchange, reproduced below, illustrates that the judge pre-empted counsel's argument on this point:

> **Counsel for Ms. O'Keefe:** Next, I would like to move on in terms of the inconsistency with the objectives of the *Divorce Act*. The Applicant submits that the quantum and duration of spousal support is inconsistent with the objectives of the *Divorce Act*. Owing to almost a 40-year marriage, we submit that the amount should have been in the mid to high range for an indefinite period of time.
>
> **Court:** I think you can move off of that, I agree with this.
>
> **Counsel for Ms. O'Keefe:** Okay.
>
> **Court:** I would like you to deal more with the fact that changes of circumstances – changes of income.

(Application Transcript, March 22, 2018, at 109.)

[22] The fact that Ms. O'Keefe's counsel moved onto other matters indicates that she understood the judge had agreed that quantum and duration of spousal support were inconsistent with the objectives of the *Divorce Act*. The judge did not correct any misunderstanding, but he took a different position in his ultimate decision. At paragraph 156 of his decision the judge found, in apparent contradiction, that the "agreement substantially complies with the *Divorce Act* with respect to spousal support". In the circumstances, the judge should have advised both counsel, before rendering his decision, that he was reconsidering what he had stated at the hearing, and allowed counsel the right to be heard on the issue.

[23] Procedural fairness and natural justice required that Ms. O'Keefe have opportunity to make submissions on the key issue of whether the quantum and duration of spousal support were inconsistent with the objectives of the *Divorce Act*. The applications judge's direction to counsel for Ms. O'Keefe, that it was unnecessary to make submissions on the issue was an error, and a denial of procedural fairness. The direction caused a denial of Ms. O'Keefe's right to a full and fair hearing. In *R. v. Abdalla*, 2013 ONCA 233 the failure of the applications judge to give counsel an opportunity to be heard in closing submissions constituted a fundamental procedural error amounting to an error in law.

[24] It will be necessary for the parties to return to the Family Division of the Supreme Court for a hearing on the issue of whether, applying the principles set out in *Miglin*, it is appropriate to set aside the spousal support provision and impose a new spousal support order.

Did the applications judge err by failing to consider the compensatory model for spousal support?

[25] The applications judge assumed the parties had agreed that there was entitlement to spousal support based on the non-compensatory model alone. The record from the hearing indicates that counsel for Mr. O'Keefe agreed that there was entitlement under both the compensatory and non-compensatory models:

> **The Court**: But I thought counsel conceded the compensatory [entitlement], if we got to that point. Compensatory is conceded. Did I not understand that correctly?
>
> …
>
> **Counsel for Mr. O'Keefe:** Yes, that was conceded.
>
> **Counsel for Ms. O'Keefe:** It was? Thank you.
>
> **The Court:** Yes.
>
> (Application Transcript, March 21, 2018, at page 179.)
>
> **The Court**: Non-compensatory entitlement [to spousal support] is conceded and agreed?
>
> **Counsel for Mr. O'Keefe:** Absolutely.
>
> (Application Transcript, March 22, 2018, at page 5.)

[26] Considering the concessions, it was an error for the applications judge to refer only to the non-compensatory model, and disregard the compensatory model. This is not a significant error since entitlement to spousal support was conceded and the *Spousal Support Advisory Guidelines* may be engaged for either or both models. However, it is a matter that will need to be addressed at the spousal support hearing in the Family Division.

Did the applications judge err by excluding relevant evidence in relation to property valuations?

[27] Ms. O'Keefe sought to rely on written opinion letters and reports, prepared in 2016 and 2017, on values of matrimonial assets. The authors of the reports were not called as witnesses and there was no consent that the letters and reports could be entered for the truth of the contents. The applications judge advised counsel during hearing that the opinions would be given little or no weight without the testimony of the authors. In his decision, the judge gave no weight to the letters and reports. That was not an error. It is a rule of evidence that expert reports (with opinion evidence) require properly qualified experts (*R. v. Mohan*, [1994] 2 S.C.R. 9, 114 D.L.R. (4th) 419, at para. 21). For these opinions, there were no properly qualified experts, and no consent by Mr. O'Keefe to admission of the letters and reports for the truth of the contents. The judge made no error in concluding, "I will not, therefore, admit these valuations to establish the truthfulness of same" (para. 123).

[28] The values of matrimonial assets, that the judge accepted, were the ones that the parties agreed upon and included in the separation agreement. At paragraph 48 of his reasons, the judge stated: "I conclude that on a balance of probabilities, the parties agreed on the valuation of the matrimonial home, the vacant land, and the cabin …"

Did the applications judge err by interpreting section 28 of the agreement to preclude its application to overvalued assets?

[29] Section 28 of the separation agreement allows either party to make an application to court for "one-half of the undisclosed assets or understated value of any asset". The section makes no mention of overvalued assets. Ms. O'Keefe claims that the applications judge erred in law when he found that "this clause does not allow the parties to reduce the value of an overvalued asset".

[30] Ms. O'Keefe had argued that real estate she acquired through the agreement was an overvalued asset, and that the judge could rely on section 28 to reduce the value and order Mr. O'Keefe to make a compensatory payment to restore a 50/50 asset division. This is a moot point on this appeal, because there is no evidence that real estate was overvalued. The judge excluded the opinion letters and reports suggesting that real estate was overvalued, and there was no error in doing so.

Did the applications judge's interventions during questioning of witnesses undermine procedural fairness by creating a reasonable apprehension of bias?

[31] Intervention by a judge in the questioning of a witness to the extent that the judge appears to be taking on the role of counsel will result in a finding of apprehension of bias.

[32] The applications judge's interventions during witness questioning were frequent. During examination-in-chief, cross-examination, and re-direct, the judge intervened to ask questions of his own, to call a witness to order, to clarify matters, to question the relevance of questions, and to confirm agreement on non-contentious matters. There was no objection from either counsel to these interventions.

[33] Ms. O'Keefe maintains that the judge's interventions, and the tone of those interventions, during her examination-in-chief, gave rise to a reasonable apprehension of bias.

[34] In *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484, 151 D.L.R. (4th) 193, at paragraph 111, L'Heureux-Dubé and McLachlin JJ. for the majority (adopting comments by de Grandpré J. from *Committee for Justice & Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369, 68 D.L.R. (3d) 716, at p. 394**)** set out the test to be met to demonstrate that the conduct of a judge gives rise to a reasonable apprehension of bias:

> [T]he 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. ... [The] test is "what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude...."

[35] The test is an objective one. The application record must be assessed in its totality and the interventions complained of must be evaluated cumulatively rather than as isolated occurrences.

[36] A review of the application record reveals that there were a significant number of interventions by the applications judge, on both sides. There were more interruptions during the questioning of Ms. O'Keefe. In some instances, the judge reminded Ms. O'Keefe of her obligation to answer the questions asked, and that she was under oath. Judges can, and on occasion must, intervene in the adversarial system to effectively and fairly manage the hearing process. However, applying the principles discussed below, many of the interventions by the judge were inappropriate. That said, when the record from the hearing is assessed in its totality the interventions did not give rise to a reasonable apprehension of bias.

[37] This conclusion should not be interpreted to condone the judge's practice of interrupting counsel during questioning of witnesses, to ask questions of his own.

[38] Questions from a trial judge are permitted (see *R. v. Brouillard*, [1985] 1 S.C.R. 39, 16 D.L.R. (4th) 447). The questions should generally be put after counsel has completed the examination of the witness; and the witness should never be cross-examined by the judge during examination by counsel (see *R. v. Valley* (1986), 26 C.C.C. (3d) 207, 13 O.A.C. 89 (Ont. C.A.), at p. 230.) White J.A. at paragraph 36 of *R. v. Churchill*, 2016 NLCA 29, 381 Nfld. & P.E.I.R. 1 (adopting comments found in *R. v. Stucky*, 2009 ONCA 151, at paras. 64 to 65), provided guiding principles, in the context of a criminal trial, as to the timing and nature of interventions that a judge may make:

> [64] In *R. v. Valley* (1986), 26 C.C.C. (3d) 207 (Ont. C.A.), at p. 230, leave to appeal refused, [1986] 1 S.C.R. xiii (S.C.C.), Martin J.A. set out three situations in which questions put by a trial judge to a witness may be justified, namely: to clear up ambiguities and call a witness to order; to explore some matter which the witnesses' answers have left vague; or, to put questions which should have been asked by counsel in order to bring out some relevant matter, but which were nonetheless omitted. He noted, however, that questions put by a trial judge to a witness should generally be put after counsel has completed his or her examination of the witness and, further, that the witness should not be cross-examined by the trial judge during examination-in-chief: *Valley* at p. 230. These comments provide guidance as to the timing and nature of interventions that a trial judge may make.
>
> [65] The first two situations of permitted interventions by the trial judge set out in *Valley* are self-explanatory. The third situation in which a trial judge is permitted to intervene, namely, to ask questions that should have been asked by counsel, is not an open-ended invitation to the trial judge to usurp the role of Crown counsel. The judge cannot leave his or her position of neutrality as a fact-finder and become the cross-examiner …

[39] The same principle, that a trial judge may not leave his or her position of neutrality by excessive interventions during examination or cross-examination of witnesses, was stated, in the context of civil trials, in *Yuill v. Yuill*, [1945] 1 All E.R. 183, and in *Jones v. National Coal Board*, [1957] 2 All E.R. 155:

> When a Judge intervenes in the examination or cross-examination of witnesses, to such an extent that he projects himself into the arena, he of necessity adopts a position which is inimical to the interests of one or other of the litigants. His action, whether conscious or unconscious, no matter how well intentioned or motivated, creates an atmosphere which violates the principle that "justice not only be done, but appear to be done". Intervention amounting to interference in

> the conduct of a trial destroys the image of judicial impartiality and deprives the Court of jurisdiction. The right to intervene is one of degree and there cannot be a precise line of demarcation but if it can be fairly said that it amounted to the usurpation of the function of counsel it is not permissible.
>
> (My Emphasis.)

[40] *Yuill* and *Jones* were followed and applied in *Majcenic v. Natale*, [1968] 1 O.R. 189, 66 D.L.R. (2d) 50 (Ont. C.A.) and *Sloboda v. Sloboda*, 2007 SKCA 15.

[41] I am alive to the distinction between criminal and civil proceedings, and especially the challenging position of judges presiding in family matters where some leeway will be appropriate on occasion, depending on the context. However, in the context of any hearing, whether civil or criminal, consideration of the principles discussed above will minimize the risk to judges of creating a reasonable apprehension of bias, and will ensure respect for the role of counsel in conducting the hearing and questioning the witnesses.

CROSS-APPEAL

Did the applications judge err by determining that Mr. O'Keefe owed health insurance payments to Ms. O'Keefe?

[42] The applications judge found that Mr. O'Keefe agreed to include Ms. O'Keefe under his health insurance policy as long as she lived and ordered that Mr. O'Keefe make a lump sum payment of $21,216, being the present value of the premium cost for health insurance. There was nothing in the separation agreement creating this obligation, and there was no collateral oral agreement creating this obligation. At most, the evidence supported a loose understanding that Mr. O'Keefe would keep Ms. O'Keefe on his health care coverage for a finite period – "as long as I could" – and Ms. O'Keefe would put him on her plan once he retired. In an email of January 26, 2011, Ms. O'Keefe promised, "If you keep me on your insurance I will put you on mine when you retire". Mr. O'Keefe did keep Ms. O'Keefe's name on his employer's group health insurance plan, but ended that coverage on his retirement September 1, 2017.

[43] In his reasons, the judge acknowledged that "the separation agreement is silent on whether Mr. O'Keefe would maintain Ms. O'Keefe on his health insurance plan" (para. 160), and that there was "no evidence on the duration of this obligation" (para. 162). Despite these acknowledgements, the judge found, in apparent contradiction, that Ms. O'Keefe was entitled "under the terms of the

separation agreement" to be reimbursed for costs incurred to obtain health insurance. No such obligation arose under the terms of the separation agreement. In addition, no such obligation arose under any collateral oral agreement. In the circumstances, the applications judge erred when he found that Mr. O'Keefe owed health insurance payments to Ms. O'Keefe.

Did the applications judge err by determining that Ms. O'Keefe was entitled to the full amount of the property insurance claim relating to the matrimonial home?

[44] There was flood damage to the matrimonial home a few weeks prior to the separation. The parties negotiated a cash settlement with the insurance company, with intent that the settlement funds would be used to effect repairs. The settlement of $12,855.40, received on January 28, 2011, was deposited into an account registered to Mr. O'Keefe alone. When final adjustments were made on asset division Mr. O'Keefe retained $4,000 of the settlement funds for himself, even though the separation agreement gave sole ownership of the matrimonial home to Ms. O'Keefe. Mr. O'Keefe testified (during examination-in-chief) that there was an agreement allowing him to retain $4,000 of the insurance settlement; Ms. O'Keefe testified (during cross-examination) that she had no recall of any such agreement. The separation agreement was silent on the issue. The applications judge preferred and relied on the evidence of Ms. O'Keefe, and found that there was no agreement allowing Mr. O'Keefe to retain $4,000 from the insurance settlement. In the result, the judge found that Ms. O'Keefe, as owner of the matrimonial home, "is entitled to the entire amount of the insurance proceeds under the terms of the separation agreement".

[45] There was no error by the judge in making the finding of fact that there was no agreement on the split of insurance settlement funds, and no error in his finding that Ms. O'Keefe, as owner of the matrimonial home, was entitled to receive the funds under the terms of the separation agreement.

[46] The judge referenced section 28 of the agreement – "pursuant to section 28 of that agreement, Ms. O'Keefe is entitled to receive compensation of $4,000". That section applies to undisclosed or undervalued assets, and allows either party to make application for one-half of an undisclosed or undervalued asset. The section is not engaged here; however, the judge's error referring to this section is of no consequence. The agreement gave the matrimonial home to Ms. O'Keefe, making her the beneficiary of the insurance settlement funds for remediation of the flood damage.

[47] There was no error by the applications judge in determining that Ms. O'Keefe was entitled to the full amount of the property insurance claim relating to the matrimonial home.

Did the applications judge err by failing to exercise discretion judicially, when he declined to make a costs award in Mr. O'Keefe's favour?

[48] Rule F33.02 of the *Supreme Court Family Rules*, empowers judges, in the exercise of discretion, to award costs to a litigating party. There is a presumption that a successful party is entitled to the costs of a proceeding. Mr. O'Keefe agrees that there was divided success on this matter, but argues that the applications judge erred by failing to exercise discretion judicially. Mr. O'Keefe says that, in exercising discretion judicially, the judge was obliged to consider factors associated with unreasonable behaviour (as set out in rule F33.03 (2), of the *Supreme Court Family Rules*) and was obliged to give greater weight to the relative degree of success.

[49] In closing submissions Mr. O'Keefe's counsel had asked the judge to consider unreasonable behaviour – counsel described Ms. O'Keefe's behaviour during hearing of the application as reprehensible – and to make a costs award in her client's favour on a solicitor and client basis. Counsel argued that unreasonable behaviour justifies a costs award in Mr. O'Keefe's favour, regardless of the ultimate outcome on the substantive issues. Rule F33.03 (2) gives a listing of factors related to unreasonable behaviour that a judge may consider before making a costs award.

[50] The judge, in his reasons, commented on Ms. O'Keefe's behaviour, describing her as "evasive and misleading on much of her evidence" (para. 45). He did not rely on that finding when making the costs award, and did not refer to any of the factors listed in rule F33.03 (2). The judge referred only to the divided success as his justification for making no order as to costs.

[51] Arbour J., for the Court, set out the law pertaining to appeals of costs awards in *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9, [2004] 1 S.C.R. 303, at paragraph 27:

> A court should set aside a costs award on appeal only if the trial judge has made an error in principle or if the costs award is plainly wrong (*Duong v. NN Life Insurance Co. of Canada* (2001), 141 O.A.C. 307 (Ont. C.A.), at para. 14).

[52] White J.A., for the court, repeated the same principle in *Coast to Coast Contractors Inc. v. Millbrook Development Company Inc.*, 2017 NLCA 47, at paragraph 26:

> Case law invariably confirms that costs awards are discretionary and should only be interfered with if the trial judge made an error in principle or was clearly wrong. Apportioning costs according to success is not a requirement. The trial judge indicated that she did consider the level of success as well as the issues that had to be decided in the case.

[53] Welsh J.A., for the court, in *Stoodley v. Stoodley*, 2019 NLCA 10, at paragraph 2, noted that in exercising discretion judicially on costs the judge is required to comply with applicable rules of court:

> … an award of costs is discretionary and will not be interfered with lightly on appeal. However, in exercising discretion on costs the judge is required to comply with applicable rules of court and to act judicially on the facts of the case … (citations omitted)

[54] There is no obligation that a judge list in written reasons every factor that was considered in the exercise of discretion in awarding taxed costs. It was evident from the exchange with counsel, during closing submissions, that the applications judge was considering, and questioning, the argument of costs entitlement based on unreasonable behavior by an opposing party. Indeed both sides had argued unreasonable behavior by the other. Ultimately, the judge did not rely on this as a factor to justify the costs award. That does not mean it was not considered. In the final exchange with counsel, after hearing argument about costs penalties based on behavior, the judge stated that he would be allocating costs based on the totality of relief granted to each party. In my view, the record suggests that the judge considered the alleged unreasonable behavior but elected not to rely on it for the costs award.

[55] There are costs rules that list factors that a judge "must consider" in the exercise of discretion, such as rule F33.05 which allows a judge to order payment of a fixed sum in lieu of taxed costs. The costs rule that Mr. O'Keefe refers to, rule F33.03 (2), lists factors that a judge "may consider". There was no obligation on the judge to address each of these latter factors.

[56] The applications judge provided his justification for exercising discretion on the taxed costs award; it was adequate justification in the context. No error in principle was demonstrated, nor was the costs award plainly wrong. I would not disturb the award.

DISPOSITION

[57] I would allow the appeal in part, and allow the cross-appeal in part.

[58] On the appeal, the applications judge erred by denying Ms. O'Keefe an adequate opportunity to be heard, during closing submissions, on the issue of spousal support. In particular, the applications judge erred when he pre-empted Ms. O'Keefe's attempt to argue that the spousal support provision of the agreement was inconsistent with the overall objectives of the *Divorce Act*. Failure to give Ms. O'Keefe the opportunity to be heard on this issue constituted a fundamental procedural error amounting to an error in law. I would remit the matter to the Family Division for a rehearing on the issue of whether to set aside the spousal support provision and impose a new spousal support order.

[59] On the cross-appeal, the applications judge erred in determining that health insurance payments were an amount owing under the agreement. I would set aside the order that Mr. O'Keefe pay $21,216 for Ms. O'Keefe's health insurance.

[60] Like at application hearing, there has been divided success on this appeal. Under the circumstances, there shall be no order as to costs.

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W. H. Goodridge J.A.

I concur: _____

B. G. Welsh J.A.

I concur: _____

F. P. O'Brien J.A.