



**IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR**

Citation: *Shannahan v. Clowe-Shannahan*, 2022 NLCA 57

Date: October 18, 2022

Docket Number: 202001H0045

BETWEEN:

JAMES GERARD SHANNAHAN

APPELLANT

AND:

**MICHELLE KATHLEEN
CLOWE-SHANNAHAN**

RESPONDENT

Coram: Welsh, Goodridge and Butler JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador
Family Division 201802F0483
(2020 NLSC 81)

Appeal Heard: October 12, 2022

Judgment Rendered: October 18, 2022

Reasons for Judgment by: Butler J.A.

Concurred in by: Welsh and Goodridge JJ.A.

Counsel for the Appellant: Brian D. Wentzell

Counsel for the Respondent: Catherine E. Boyde

Authorities Cited:

CASES CITED: *Phillips v. Phillips (No. 2)* (1985), 56 Nfld. & P.E.I.R. 229, 168 A.P.R. 229; *Wong v. Li*, 2018 BCSC 745; *Wilson v. Wilson*, 2016 BCSC 1315.

STATUTES CONSIDERED: *Family Law Act*, RSNL 1990, c. F-2, sections 18(a), 18(c), 19 and 29.

MEMORANDUM OF DISPOSITION

Butler J.A.:

INTRODUCTION

[1] On this appeal the Appellant challenges the following conclusions made by the trial judge under the *Family Law Act*, RSNL 1990, c. F-2 (the “Act”):

- characterization of a proprietorship known as M & L Enterprises (“M & L”) as a business asset; and
- conclusion that the evidence did not support her ability to divide either the assets or debts of the proprietorship.

BACKGROUND

[2] On the evidence which the judge accepted, M & L commenced operations in this Province in March of 2017. The parties agreed that M & L was unincorporated and was operated as a sole proprietorship in the Respondent’s name because it was the Appellant’s intention to declare bankruptcy.

[3] The parties were also in agreement on how M & L operated. The Appellant would seek work, prepare estimates and the Respondent would type these for presentation to potential customers. If the estimate was accepted, the Appellant (together with tradespeople he would hire) would do the necessary work. The Respondent would gather all bills and present them to the bookkeeper with whom both parties were familiar and she would pay invoices

and do the payroll. No financial statements for M & L were presented at trial and the bookkeeper was not called by either party as a witness.

[4] M & L had a “business account” at the Mount Pearl branch of Scotiabank in the name of the Respondent and into which all payments for services rendered were deposited; the Respondent also maintained a personal Scotia One account. Transfers between the two accounts were frequent and the funds were intermingled for business and personal purposes.

[5] On November 16, 2017, the house occupied by the Appellant and containing the parties’ household contents was severely damaged by fire while the Respondent was in Calgary, Alberta. The Respondent was suspicious about the Appellant’s involvement in this event and decided she wanted nothing further to do with the relationship. The judge determined that this was when the parties’ separation occurred (Decision, at para. 72).

[6] The home insurers accepted the parties’ contents claim and paid \$58,062.61 in two instalments of \$7,500 on November 24, 2017, and \$50,562.61 on January 24, 2018 (Decision, at para. 74).

[7] At trial the Appellant claimed that the Respondent had spent or redirected funds in the two accounts (including the insurance proceeds) to which he asserted the parties were equally entitled and he sought an order reimbursing him for half of \$122,536.00.

[8] The Respondent claimed that the Appellant had already been partially reimbursed for the insurance claim, that M & L income had been used for both business and personal expenses and that M & L had debts due to CRA, Workplace NL and a potential liability associated with a civil law suit to be set off against the value of any assets of M & L.

ISSUES

Characterization of M & L as a Business Asset

[9] The Appellant asserts that the judge erred in characterizing M & L as a business asset and in applying an incorrect standard of proof for its valuation.

[10] Subsections 18(1)(a) and (c) of the *Act* provide:

18.(1) In this Part

(a) "business assets" means property primarily used or held for or in connection with a commercial, business, investment or other income or profit producing purpose;

...

(c) "matrimonial assets" includes all real and personal property acquired by either or both spouses during the marriage, ...

[11] On the unusual facts of this case I conclude that it was immaterial whether M & L was characterized as a business or a matrimonial asset.

[12] The only property asserted to have been owned by M & L was the business account at Scotiabank. Had M & L been characterized as a business asset, pursuant to section 29 of the *Act*, the Appellant would have been required to establish that he had "contributed work, money or money's worth in respect of" the proprietorship in the Respondent's name in order to be entitled to relief. On the evidence presented to the judge, the Appellant's contribution to M & L was established.

[13] Had M & L been characterized as a matrimonial asset, the Appellant was presumptively entitled to an equal division under section 19 of the *Act* which states:

The purpose of this Part is to recognize that child care, household management and financial support are the joint responsibilities of the spouses and that there is a joint contribution by each of the spouses, financial and otherwise, that entitles each spouse to an equal division of the matrimonial assets acquired during the course of the marriage.

[14] The Respondent agreed that M & L should be treated as a matrimonial asset and that the Appellant was entitled to a one-half interest in it (Transcript, December 4, 2019, at 101-102).

[15] The judge's characterization of M & L did not therefore materially affect her decision that M & L should be divided equally between the parties.

Valuation of the Proprietorship

[16] Regarding the value of M & L, however characterized, the judge cautioned the parties and their counsel on numerous occasions during the trial on the need for evidence and pleadings to support their requests for relief.

[17] Specifically she advised them that she needed a clear and concise list of assets and debts for the date of separation together with values or balances attributed to each asset and debt (Transcript, December 3, 2019, at 233). The judge explained that M & L's value would depend on evidence presented of the assets and debts of M & L on whatever valuation date was established as appropriate and that M & L may be worth nothing at all once the debts were considered (Transcript, December 4, 2019, at 101-104). The judge repeated this again, as noted in the Transcript for December 6, 2019, at 164-167.

[18] The trial judge's directions went unheeded. The business bank account records showed a balance of \$1,333.18 as of October 31, 2017, and \$7.15 on December 29, 2017. The balance on the date of separation was never established.

[19] Regarding the \$122,536.87 established as either transferred by the Respondent from the business account to her personal account or deposited to her personal account in the period from June 2017 to June 2018, this included \$37,606 in transfers that the Appellant conceded at the appeal hearing, had predated the parties' separation. It also included the \$58,062.61 insurance claim proceeds that the Respondent had agreed should be divided equally (Appellant's Factum, Tab 4).

[20] The judge concluded that of the \$58,062.61 contents claim, the Appellant had received \$9,950 and she ordered that the Respondent reimburse the Appellant \$19,081.31 (Decision, at para. 91). This was also acknowledged by the Appellant at the appeal hearing.

[21] The amount sought by the Appellant to be divided would therefore be reduced to \$26,868.26 ($\$122,536.87 - (\$37,606 + \$58,062.61)$) before consideration of any debts of M & L.

[22] The judge concluded that it had not been established that the Respondent had misdirected or misused funds or when and how M & L's debts arose. In light of this she concluded that she had no reliable evidence on which to determine the net value of M & L and that she could not therefore make an order

that would equally distribute M & L's net value between the parties (Decision, at paras. 108, 110).

[23] Neither party called the bookkeeper who had been paying the bills and preparing the payroll. The Respondent presented records suggesting that no HST/GST remittances were ever made and that the Canada Revenue Agency had therefore "estimated" an amount due of \$20,618.49. While the judge accepted that M & L had an outstanding balance due to Workplace NL the only record of this was dated July 30, 2019.

[24] The judge's inability to determine and distribute the net value of M & L is supported by the evidence (or lack thereof) and by the jurisprudence that she cited. Regardless of whether M & L was a matrimonial or a business asset, the judge needed reliable evidence of M & L's assets and liabilities in order to determine its value for purposes of equal division between the parties (*Phillips v. Phillips (No. 2)* (1985), 56 Nfld. & P.E.I.R. 229, 168 A.P.R. 229, at para. 10; *Wong v. Li*, 2018 BCSC 745, at para. 103; and *Wilson v. Wilson*, 2016 BCSC 1315, at para. 81).

CONCLUSION

[25] No error is established in the judge's conclusion that it was "impossible to divide either the assets or debts of this business" (Decision, at para. 110) and I would therefore dismiss the appeal.

COSTS

[26] The judge determined that overall, there had not been a successful party and she declined to order costs. I would not disturb this award. However, on this appeal the Respondent has been successful and costs should follow the cause. I would award the Respondent her costs on a party and party basis on Column 3.

G. D. Butler J.A.

I concur: : _____
B. G. Welsh J.A.

I concur: _____
W. H. Goodridge J.A.