COURT OF APPEAL FOR ONTARIO

CITATION: Dembeck v. Wright, 2012 ONCA 852
DATE: 20121204
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Gillese, Rouleau and Epstein JJ.A.

BETWEEN

Ella Dembeck

Applicant (Appellant)

and

Terence William Wright

Respondent
(Respondent in Appeal)

Patrick Kraemer and Daniel W. Veinot, for the appellant

Elliot Berlin, for the respondent

Heard: June 18, 2012

On appeal from the order of Justice Craig Perkins of the Superior Court of Justice, dated July 5, 2011.

Epstein J.A.:

I. OVERVIEW

[1] The issues in this matrimonial case are entirely financial. The trial judge dealt with various aspects of the parties' disagreements over property and support. Before this court, the appellant, Ella Dembeck, appeals the trial judge's

(1) treatment of the respondent Terence Wright's property interests at the date of marriage, (2) determination of the value of her business, and (3) determination of the value of the household items. The appellant also challenges the amount of income the trial judge assigned to each spouse in order to determine the respondent's support obligations, and thus the amount of support the respondent was ordered to pay.

[2] The main question is this: under what circumstances, if any, does a spouse "own" on the date of marriage an entitlement to a severance payment that he or she later receives?

[3] The trial judge concluded that a portion of the amount of severance the respondent was paid before separation when his employment was terminated was property owned by the respondent on the date of marriage.

[4] For the reasons that follow, I disagree with this conclusion and would allow the appeal on this issue. I would dismiss the appeal in respect of all other issues raised by the appellant.

II. BACKGROUND

[5] Given the nature of the issues, only a few background facts are necessary to provide context to the analysis. More facts will be added, where necessary.

[6] The parties were married on December 30, 1998; they separated on April 19, 2007. There are two children in the family. At the time of trial, Tamoril, the

appellant's son from a previous marriage, was 21 years old and a university student. Neona, a child of the marriage, was a seven-year-old elementary school student. Both children lived with the appellant, who was then 49. The respondent was 62.

[7] When the parties married, the appellant was a full-time student and the respondent was working for a company later acquired by Unilever. The appellant then obtained her degree and an early childhood education certificate and started a daycare business, while the respondent rose to a relatively senior position at Unilever.

[8] In April 2007 the respondent's employment was terminated. Upon his departure from the company on April 16, 2007, the respondent accepted a termination package and payout of his pension. The termination package totalled $190,000, before tax. This was the combined amount owing to the respondent arising from Unilever's breach of the employment contract, agreed upon as 18 months' salary in lieu of notice ("common law damages") and eight weeks' pay under the *Employment Standards Act,* R.S.O. 1990, c. E.14 ("*ESA* severance"). The respondent rolled $64,000 of the $190,000 into his RRSP and the remaining $126,000 was taxed as 2007 income, at the rate of 46.1%.

[9] The parties separated three days after the respondent's employment was terminated.

III. THE TRIAL DECISION

[10] The parties agreed on custody – the appellant would have custody of young Neona – and on terms of access. They further agreed to share the cost of the s. 7 expenses of both children. The trial judge was therefore only required to resolve various disputed financial issues. He considered each issue discretely.

The Respondent's Termination Package

[11] In her Net Family Property statement ("NFP") the appellant assigned a valuation day value to the respondent's termination package of $157,841. This was comprised of the $64,000 he rolled into his RRSP plus $93,841, representing the net amount available after tax, using a tax rate of 25.5%.

[12] The respondent's position, supported by an actuarial report, was that the termination package should be valued for the purposes of his NFP at $25,577. This was the portion of the $190,000 that had accumulated during the marriage since, according to the respondent, most of the value of the termination package was property he brought into the marriage.

[13] In resolving this issue, the trial judge treated the common law damages portion and the *ESA* severance portion of the $190,000 differently. He concluded that the common law damages portion of the $190,000 had accumulated entirely during the marriage since all he had at the date of marriage was an employment contract containing an implied term that he was entitled to damages if his position

were terminated without cause. On this basis, the trial judge concluded that the respondent had no "interest" in the common law damages on the date of marriage as at that time there was no reason to believe that anything would happen that would entitle him to such damages. However, he held, at para. 25, that because the *ESA* severance portion of the $190,000 had fully "accrued" prior to December 30, 1998, when the parties married, the trial judge held that it was a property interest the respondent owned as of that date.

[14] The trial judge therefore ordered that the equalization payment be calculated on the basis that the respondent had brought the portion of the termination package made up of the *ESA* severance – namely, $35,241.26 – into the marriage.

Business Valuation Issue

[15] When the parties separated, the appellant was the co-owner and operator of a daycare centre, an interest she included in her NFP as having a valuation date value of $1,000.

[16] The only support for this value was the appellant's evidence: (1) that the business produced income that allowed her to obtain untaxed benefits but did not generate any profit, (2) that she took out a $15,000 loan and invested the money in the business, (3) that in 2007 the business spent almost $9,500 in advertising and (4) that it suffered when the other partner left.

[17] The respondent, who admitted that he had no involvement with the daycare center and had no information about its financial performance, took the position that the business had a valuation date value of $10,000.

[18] The trial judge, with the little evidence he had, assigned a valuation date value to the business of $5,000.

Value of Household Goods and the Vehicle that the Respondent brought into the marriage

[19] The appellant and respondent gave evidence of what items they brought into the marriage and the value that should be assigned to them. The appellant's position was that each brought about the same amount into the marriage; the respondent valued his contribution at $9,500 more than the appellant's.

[20] The trial judge accepted the respondent's position as he found his evidence was more specific.

Respondent's Income

[21] The evidence showed the respondent's reported income as follows:

(a) $114,132.63 in 2005;

(b) $126,866.04 in 2006;

(c) $680,534.42 in 2007, which included an unsheltered pension payout of $627,620, leaving earned income of $52,914;

(d) $6,357.50 in 2008;

(e) $93,725.54 in 2009, of which $93,123 was withdrawn from his RRSP.

[22] The respondent testified that since separation he had neither been employed nor formally applying for any position.

[23] The appellant sought to have the trial judge attribute income to the respondent of between $62,000 and $100,000 – the former being his pension at age 65 and the latter his base salary when he left Unilever. The trial judge held the latter would have been the appropriate amount to attribute to the respondent but for the fact that the evidence did not support a finding that he could have found a comparable position.

[24] However, the trial judge did conclude that the respondent was intentionally unemployed and imputed an income of $60,000. This amount was based on the trial judge's view that the respondent, given his skills and experience, could have found some type of employment, even part-time, to produce an income of approximately that amount.

Spousal Support

[25] The appellant's evidence was that her income for the years between separation and trial was:

(a) $3,000 in 2007;

(b) $40,000 in 2008;

(c) $40,000 in 2009;

(d) $40,500 in 2010;

(e) $40,500 in 2011 (estimate).

[26] The trial judge drew a negative inference from the appellant's unsatisfactory efforts to establish her income and attributed to her the following amounts: $40,000 for 2007, $45,000 for 2008-2010 and $50,000 for 2011.

Motion to Adduce Fresh Evidence

[27] At the outset of this appeal, the appellant applied to have fresh evidence admitted with respect to her 2007 income consisting of her income tax return and notice of assessment for the 2007 fiscal year, showing earnings of $3,000.

[28] In my view the proposed fresh evidence does not meet the test established in *R. v. Palmer*, [1980] 1 S.C.R. 759:

> 1. The evidence should generally not be admitted, if by due diligence, it could have been adduced at trial;
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> 2. The evidence, to be admitted, must be relevant, bearing upon a decisive or potentially decisive issue, at trial;
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> 3. The evidence, to be admitted must be credible, meaning reasonably capable of belief; and
>
> 4. The evidence must be such that, if believed, could reasonably, when taken together with all of the other trial evidence, be expected to have affected the result.

While the proposed evidence is relevant and credible, I do not see how the appellant satisfies the first and fourth branches of the test.

[29] With respect to the first branch, the appellant admits that the proposed evidence was available. In fact, it was actually in hand at the time of trial. In her affidavit in support of the motion, she attempted to explain why she did not put the tax documentation into evidence on the basis that it was not necessary - she believed her viva voce evidence that she earned $3,000 in 2007 was not being challenged.

[30] The problem with this argument is that an examination of the record as a whole establishes that her view that her 2007 income was not contested was not reasonably held. The appellant was examined and cross-examined in some detail on this issue.

[31] Moreover, the *FLA* and the *Family Law Rules,* O.Reg. 114/99 specifically require a party applying for or responding to support orders to provide detailed and fully supported information concerning their income. Support was in issue here. The appellant, like the respondent, was obliged to prove her income over the period of time relevant to the relief she sought. The appellant failed to comply with this obligation at her peril.

[32] Finally, with respect to the fourth part of the *Palmer* test, I am not persuaded that it is reasonable to expect that the evidence could have affected the trial judge's decision. I say this as, in the circumstances here, the income tax documentation, while credible evidence concerning the income the appellant

reported to Revenue Canada for 2007, does not provide a complete picture of her income. This is apparent from the appellant's admissions under cross-examination that she received other income that year as well as benefits from her business. She declared neither this other income nor the value of these benefits in her tax return.

[33] I would therefore dismiss the application to admit this proposed evidence.

IV. ISSUES

[34] The appellant raises the following issues on appeal:

> (a) the trial judge erred in allowing the respondent a date of marriage deduction for the uncrystallized *ESA* severance portion of the termination package;
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> (b) the trial judge erred in his determination of the valuation date value of the appellant's business;
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> (c) the trial judge erred in his determination of the date of marriage value of the parties' household items and vehicles;
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> (d) the trial judge erred in the amount of income he imputed to the appellant; and
>
> (e) the trial judge erred in the amount of income he imputed to the respondent.

V. ANALYSIS

(a) The *ESA* Severance Portion of the Termination Package.

[35] The appellant challenges only the trial judge's identification of $35,241.26, the *ESA* severance part of the $190,000 termination package, as property owned

by the respondent as of the date of marriage. She submits that, like the common law damages portion, the respondent's right to *ESA* severance was not property owned by him until his employment was terminated without cause, just prior to the date of separation.

The Legal Framework

[36] Section 57 of the *ESA* provides for entitlement to *ESA* severance as follows:

> 57(1) No employer shall terminate the employment of an employee who has been employed for three months or more unless the employer gives,
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> …
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> (h) eight weeks' notice in writing to the employee if his or her period of employment is eight years or more,
>
> and such notice has expired.

[37] As can be seen from these provisions, an employee does not have an absolute right to be paid *ESA* severance. An employee is only entitled to severance if his or her employment is terminated without notice. The employer has no obligation to pay severance if the employee quits or retires. Further, s. 57(10) provides that an employee is not entitled to *ESA* severance if he or she "has been guilty of wilful misconduct or disobedience or wilful neglect of duty that has not been condoned by the employer".

[38] Property and net family property are defined in s. 4(1) of the *Family Law Act,* R.S.O. 1990, c. F.3 ("*FLA"*):

> "Net family property" means the value of all the property, except property described in subsection (2), that a spouse owns on the valuation date, after deducting,
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> the spouse's debts and other liabilities, and
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> the value of property, other than a matrimonial home, that the spouse owned on the date of the marriage, after deducting the spouse's debts and other liabilities, other than debts or liabilities related directly to the acquisition or significant improvement of a matrimonial home, calculated as of the date of the marriage;
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> …
>
> "[P]roperty" means any interest, present or future, vested or contingent, in real or personal property and includes,
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> (a) property over which a spouse has, alone or in conjunction with another person, a power of appointment exercisable in favour of himself or herself,
>
> (b) property disposed of by a spouse but over which the spouse has, alone or in conjunction with another person, a power to revoke the disposition or a power to consume or dispose of the property, and
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> (c) in the case of a spouse's rights under a pension plan, the imputed value, for family law purposes, of the spouse's interest in the plan, as determined in accordance with section 10.1, for the period beginning with the date of the marriage and ending on the valuation date.

[39] For the purposes of calculating net family property, property owned on the valuation date is defined in the same way as property owned on the date of marriage.

[40] This somewhat circular definition is meant to address three issues: what is property, what property is subject to deferred sharing, and the date upon which property is to be valued. Here, the focus is on the first issue. The question is under what circumstances, if any, a spouse's potential entitlement to *ESA* severance that has accumulated before marriage should be categorized as property he or she owned on the date of marriage.

[41] In answering this question, it is important to start with the foundational position that the meaning of property under the *FLA* must be guided by general property principles: *Caratun v. Caratun* (1992), 96 D.L.R. (4th) 404 (Ont. C.A.), leave to appeal to S.C.C. refused, [1992] S.C.C.A. No. 531.

[42] But, what are those principles? There is much debate as to what constitutes property: it is a juridical subject that eludes easy characterization. It has been said that in attempting to arrive at a sense of what property is, it is useful to think of it as less a thing, "but rather a right, or better, a collection of rights (over things) enforceable against others." Bruce Ziff, Principles of Property Law, 5th ed. (Toronto: Carswell, 2010), at p. 2.

[43] An understanding of property in its abstract form is an important footing for any determination of whether an interest should be classified as property, but within a statutory setting the principles of statutory interpretation are also relevant.

[44] In *Lowe v. Lowe* (2006), 78 O.R. (3d) 760 (C.A.), Sharpe J.A. shed light on the specific issue of identifying property within proceedings governed by the *FLA* at para. 14, where he said:

> In keeping with the 'modern' approach to statutory interpretation, s. 4 should not be read as including any and every interest, even those bearing no relationship to the marriage partnership, simply because that interest is not specifically excluded. While the scheme of the *FLA* is to give a broad definition to property and then exclude certain specific types of property … the definition of property itself must be given meaningful content and that meaningful content imposes limits on the definition of property limits apart from the specific exclusions. [Emphasis added.]

[45] Despite the importance of defining property broadly within the context of *FLA* proceedings, with one exception Ontario courts have consistently held that entitlement to severance pay is only property once it has crystallized.[1]

[46] In *Gasparetto v. Gasparetto* (1988), 15 R.F.L. (3d) 401 (Ont. H. Ct. J.), an early retirement incentive plan was held not to be property because there was no present or future right to any payment. In *Blais v. Blais* (1992), 38 R.F.L. (3d) 256 (Ont. Gen. Div.), a retirement incentive payment was held not to be family property for similar reasons. In *Montreuil v. Montreuil*, [1999] O.J. No. 4450 (Sup. Ct. J.), the wife's severance pay was not included in family property, again due to the fact that she had no property right to it at the time of separation. In *Vitagliano*

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[1] The one exception to which I refer is the decision of J. Wright J. in *Arvelin v. Arvelin,* [1996] O.J. No. 412 (Gen. Div.), decided before this court's decision in *Leckie v. Leckie* (2004), 238 D.L.R. (4th) 571, that effectively overturned *Arvelin*, as described below.

v. Di Stavolo (2001), 17 R.F.L. (5th) 194) (Ont. Sup. Ct. J.), the husband's post-separation severance payment was not included as property due to the fact the husband had no property right to it at the time of separation. And after a comprehensive analysis in *Slack v. Slack*, [2001] O.T.C. 941 (Sup. Ct.), the husband's severance payment was held not to be property due to the fact that it crystallized post-separation and had not come into existence during the marriage.

[47] This court has, on two occasions, ruled on this issue.

[48] In *Leckie v. Leckie* (2004), 238 D.L.R. (4th) 571, the trial judge included the value of severance packages received by both parties after the date of separation as property they owned as of valuation day. This court allowed the appeal on that issue, noting at para. 4 of a brief endorsement that "[t]he severance packages did not exist at the date of separation. Neither party had any entitlement to such a package as at the date of valuation. They are not property as of separation."

[49] *Leckie* was referred to by this court in *Ross v. Ross* (2006), 83 O.R. (3d) 1, where the appellant relied on *Leckie* in arguing that the trial judge erred in treating stock options as property. Rouleau J.A. concluded at para. 21 that:

> … [t]he present case can be distinguished from *Leckie*. Stock options granted as part of a remuneration package are different from severance packages. Severance packages are tied to a specific event, the

> employee's termination. Where the offer of a severance package and the termination of the employee do not occur until after the date of separation, the employee has no right or entitlement to the severance package at the date of separation. Although the size of the severance package is often related to the length of service of the employee, it is the termination of the employment that creates the entitlement, and the length of prior service is used to determine the length of the notice period or pay in lieu of notice appropriate for that employee. In other words, the severance package is directed at compensating for the loss of employment and is not intended as pay for past service.

[50] From these decisions it is clear that for a severance package to be considered property at the date of separation, there must be a right or entitlement to it at that date. As previously indicated, the *FLA*, in defining property does not distinguish between date of marriage and date of separation. It follows that, for a severance package to be considered property as of either of the two dates that form the basis of any equalization calculation, there must be a right or entitlement to it at that date.

Application to Facts of this Case

[51] When the respondent and the appellant married, the respondent had the right to look to his employer for payment in accordance with the provisions of the *ESA*, legislation which, as set out above, restricts the circumstances under which an employer is obliged to pay severance. It follows that, until his employment was terminated in circumstances where, according to the *ESA*, the employer was obliged to pay severance to the respondent, he had no a right or entitlement to

severance. In my view, therefore, the trial judge erred in concluding that the respondent's accumulated *ESA* severance as of the date of marriage, was property owned by him at that point in time.

[52] Moreover, the trial judge's conclusion with respect to this issue runs contrary to the binding decisions of this court in *Leckie* and *Ross*.

[53] Finally, this conclusion, in my view, creates an internal inconsistency in the trial judge's reasons. He reasoned that the common law damages portion of the termination package was not date-of-marriage property on the basis that the respondent's entitlement to damages for wrongful dismissal was uncertain. He would have no right to common law damages unless his employment was terminated without cause. The problem is that, as discussed, the respondent's entitlement to *ESA* severance was similarly limited.

[54] I conclude this portion of my analysis by turning to the respondent's alternative argument advanced in oral submissions that his interest in the *ESA* severance part of the $190,000 retroactively became date-of-marriage property when his entitlement to the amount of *ESA* severance that had fully accumulated prior to marriage, crystallized before the date of separation.

[55] The question this argument raises is whether an interest that is not property when the parties marry can be retroactively reclassified as property after a subsequent event renders it certain.

[56] One need look no further than the wording of the *FLA* to understand why this question must be answered in the negative. First, s. 4(1) of the Act defines property as including "any interest, present or future, vested or contingent, in real or personal property". There is nothing in this wording that gives the court jurisdiction to reclassify an interest as circumstances change.

[57] Second, I note the observation made by Blair J.A. in *Serra v. Serra,* 2009 ONCA 105, 307 D.L.R. (4th) 1, at para. 41, that "[w]hereas other provinces have chosen different mechanisms for giving effect to the policy underlying modern family law legislation – that is, the equal division of family property in recognition of equal contributions to marriage – Ontario deliberately chose a fixed valuation date approach. For most practical purposes, that date is the date of separation. There is no discretion in the court to vary the valuation date." I would add that this fixed date approach is actually dependent on two fixed dates – the date of marriage and the date of separation. In my view, reclassification of an interest that is not property at either of these two dates (even when circumstances change such that the interest can subsequently be identified as property) would be contrary to Ontario's "mechanism for giving effect to the policy underlying modern family law legislation". This would permit on-going adjustments as to what is and what is not property, destroying the "fixed date valuation" identified by Blair J.A. in *Serra.*

[58] Moreover, as previously mentioned, the question of whether *ESA* entitlement meets the definition of property under the *FLA* involves statutory interpretation. In my view, expanding the definition of property in proceedings under the *FLA* to allow for retroactive reclassification would be contrary to the statutory intent. This intent has been expressed in many ways, but for the purposes of making this point I go to the preamble of the Act itself. The preamble identifies the Act's purpose as "to provide in law for the orderly and equitable settlement of the affairs of the spouses upon the breakdown of the partnership".

[59] To allow retroactive reclassification of property would be anything but orderly. It would inject a substantial dose of uncertainty into a statutory framework in want of none. It would also increase the consumption of limited resources of time, money and emotional energy that accompany the resolution of matrimonial disputes.

[60] As far as the equities are concerned, the *FLA* already contains a solution. Any legitimate concern over unfairness can be addressed through s. 5(6) of the *FLA,* which allows variation of the equalization payment where an equal division of property would be unconscionable: see, for example, *Serra,* in which Blair J.A. held that market-driven post-valuation date changes in the value of a property interest can be considered in the equalization payment under s. 5(6)(h).

[61] In my view, the respondent's retroactive reclassification proposal should be rejected for many reasons. It not only is dependent on a tortuous definition of property, both generally and within the context of the *FLA,* but also is contrary to a purposive interpretation of the Act.

[62] For these reasons, I conclude that, regardless of how the argument is cast, the trial judge erred in finding that the respondent's entitlement to *ESA* severance was property he owned on the day he married the appellant.

(b) Valuation of Appellant's Business

[63] The appellant submits that the trial judge made an incorrect finding of fact in valuing her business. He arrived at a value that was not supported by the only available evidence – that of the appellant – and instead arrived at a compromise figure.

[64] The trial judge's approach to valuing the business was based on the fact that the business had some assets and provided the appellant with a small income stream as well as certain benefits. The trial judge did his best with the limited evidence he had and I see no basis for appellate intervention.

[65] I would therefore not give effect to this ground of appeal.

(c) Value of Date of Marriage Household Assets

[66] The appellant also takes issue with the trial judge's finding that the respondent brought $9,500 more into the marriage than she did. Again, the trial

judge was put in the position of having to resolve this issue with virtually no assistance from the parties themselves.

[67] The trial judge came to the conclusion he did because, as he stated, he preferred the respondent's evidence for reasons he explained.

[68] The trial judge's conclusion is entitled to deference. I would not give effect to this ground of appeal.

(d) The Appellant's Income

[69] The appellant, once again, challenges the trial judge's finding of fact. She submits the amount imputed to her in 2007 should have been $3,000 and the support order should be adjusted accordingly.

[70] My dismissal of the appellant's application to introduce fresh evidence prevents access to any evidence to support her challenge to the trial judge's findings with respect to her income.

[71] I therefore would not give effect to this ground of appeal.

(e) The Respondent's Income

[72] The appellant contends that the trial judge also erred in failing to include the $190,000 less tax as part of the respondent's 2007 income. She further submits that, given the evidence and related jurisprudence, the imputed income from date of separation forward should be $100,000.

[73] Again, I would not give effect to this ground of appeal.

[74] The trial judge identified the primary issue relating to the respondent's income as being the amount of income that should be attributed to him from the date of separation, forward.

[75] In deciding to treat the $190,000 as an asset rather than income and in arriving at an imputed annual income of $60,000 for the respondent, the trial judge made findings based on a detailed consideration of the available evidence. This evidence included the circumstances relating to the respondent's decision to accept the termination package including the implications of his choice having regard to the specifics of the package, his work history, his age, and ultimately his employability.

[76] In my view, the trial judge's conclusions were supported by the evidence and were well within the exercise of his discretion.

[77] I would not, therefore, give effect to this ground of appeal.

VI. DISPOSITION

[78] For the foregoing reasons, I would allow the appeal in part and vary the judgment so that the equalization payment to be made by the respondent to the appellant would reflect a $35,241.26 increase in his NFP.

[79] Success was divided. I would make no order as to costs.

Released:

"EG" "Gloria Epstein J.A."
"DEC -4 2012" "I agree E.E. Gillese J.A."
"I agree Paul Rouleau"