COURT OF APPEAL FOR ONTARIO

CITATION: Townshend v. Townshend, 2012 ONCA 868
DATE: 20121211
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Simmons, Cronk and Rouleau JJ.A.

BETWEEN

John Charles Townshend

Applicant (Appellant)

and

Barbara Elizabeth Townshend

Respondent (Respondent in appeal)

Robert N. Kostyniuk, Q.C., for the appellant

Robert B. Lawson, for the respondent

Heard: November 15, 2012

On appeal from the order of Justice Emile R. Kruzick of the Superior Court of Justice, dated December 2, 2010.

Simmons J.A.:

[1] The issues on appeal arise out of a family law proceeding. The parties were married on June 17, 1972 and separated on May 26, 2005. The contested issues at trial related to the division and calculation of their net family properties.

[2] The trial judge rejected the wife's claim for an unequal division of the net family properties. He went on to address various disputed items relating to the calculation of each party's net family property. After dealing with the disputed items, the trial judge calculated the equalization payment using those findings together with the undisputed figures relating to the net family property calculations. He ordered the wife to pay the husband an equalization payment of $31,368.07.

[3] On appeal, the husband submits that the trial judge erred in his findings concerning the disputed items in the net family property calculations. In the event he is successful on appeal, he seeks leave to appeal the costs award of $35,000 made in favour of the wife.

[4] For the reasons that follow, I would allow the appeal.

A. EQUALIZATION ISSUES

[5] I will deal with each disputed item relating to the net family property calculations and leave it to counsel to make the required adjustment to the equalization payment that was ordered. I note at the outset that during oral argument the wife asked that, in the event this court concluded that the trial judge erred in his findings, rather than ordering a new trial, this court make the necessary findings.

(1) Property Brought into the Marriage – the Husband's Claim for an $8,500 credit relating to a one-acre parcel of land

[6] At trial, the husband claimed an $8,500 deduction for the value of a one-acre parcel of land, which he claimed he owned on the date of marriage. The one-acre parcel formed part of a 25-acre parcel of land registered in the husband's parent's names. Both the husband and his sister testified that, at the time the land was acquired, they used their own earnings to purchase one-acre shares in the parcel of land.

[7] The husband's father died in 1971. Both the husband and his mother claimed that: the 25-acre parcel was sold in 1971; the transaction did not close until 1973; following the closing, the husband alone received $8,500 from the proceeds of sale. The husband acknowledged that these monies were eventually invested in the matrimonial home.

[8] The wife disputed the husband's claim that the property was sold in 1971. According to her, the parties received a cheque payable to both of them representing the sale proceeds of the one-acre parcel in 1973 – moreover, that cheque was subsequently deposited into a joint account.

[9] The trial judge rejected the husband's claim for a deduction because the evidence concerning the payment of the proceeds was contradictory and because the husband had no documentary evidence to support his assertion that the sale proceeds were paid to him alone. In my view, he erred in doing so.

[10] Although the evidence concerning payment of the proceeds of sale for the husband's one-acre share was contradictory, on the appeal hearing, the wife's counsel acknowledged that there was no dispute at trial that the husband alone had an equitable interest in the one-acre parcel on the date of marriage. This acknowledgement is consistent with the evidence given by the husband and his sister concerning the acquisition of the property.

[11] Section 4(1) of the *Family Law Act*, R.S.O.1990, c. F.3, defines "net family property" as the value of all property (except excluded property) owned by a spouse on the valuation date (net of debts and liabilities) less the net value of property, other than a matrimonial home, owned by a spouse on the date of marriage.[1]

[12] Accordingly, unlike the case with excluded property, the fact that property owned by a spouse on the date of marriage may have been distributed or invested jointly following the date of marriage is irrelevant. The claiming spouse

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[1] The definition of "net family property" in s. 4(1) of the *Family Law Act* reads as follows:

> "net family property" means the value of all the property, except property described in subsection (2), that a spouse owned on the valuation date, after deducting,
>
> (a) the spouse's debts and other liabilities, and
>
> (b) 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 the matrimonial home, calculated as of the date of marriage.

is entitled to a deduction for the net value of property other than a matrimonial home owned on the date of marriage.

[13] On appeal, the wife argued that the husband's claim for a deduction should fail in any event because the husband did not submit evidence at trial of the value of the land as of the date of the marriage.

[14] I would reject this argument. Even assuming the trial judge rejected the evidence that the sale of the 25-acre parcel was negotiated in 1971, denying the husband's claim entirely because he failed to obtain a valuation date appraisal would be unreasonable. The value of the lands at issue is relatively nominal. There was undisputed evidence of their value close to the date of marriage.

[15] Had the wife advanced a reasonable basis for a discount of the value of the one-acre parcel as of the date of marriage, I would have considered it. However, disallowing the deduction entirely because the husband failed to obtain a valuation date appraisal would mean increasing the cost of resolving family law disputes unnecessarily.

[16] In all the circumstances, I would allow the $8500 deduction claimed by the husband.

(2) *Inter-vivos* gift received during marriage – The Husband's Claim for a $25,000 exclusion

[17] At trial, the husband claimed an exclusion for a $25,000 *inter-vivos* gift, which he said he received from his mother in June 2001. He claimed that the wife deposited these funds into a joint bank account contrary to his instructions.

[18] The trial judge accepted that the funds were paid to the husband alone. However, he found that the gift lost its exclusionary character when the funds were deposited, initially, into a TD Bank joint account in July 2001 and, subsequently, into a Scotia McLeod joint account in September 2004. Accordingly, the trial judge denied the husband’s claim for a deduction for the amount of this gift.

[19] I take it as implicit in the trial judge's reasons that he rejected the husband's evidence that the wife deposited the funds into a joint account contrary to the husband's instructions. On the appeal hearing, the husband acknowledged that there had been some activity in these accounts, creating an available inference that the husband was aware of the nature of the accounts. In the circumstances, I see no basis on which to interfere with the trial judge's implicit finding.

[20] Nonetheless, in my view, the trial judge erred in failing to grant the husband an exclusion for one-half of the amount of the gift.

[21] On the appeal hearing, the wife relied on *Belgiorgio v. Belgiorgio* (2001), 10 RFL (5th) 239 (Ont. S.C.), aff'd 23 R.F.L. (5th) 74 (Ont. C.A.), as support for the proposition that a gift loses its exclusionary character completely when deposited into a joint account.

[22] In *Belgiorgio*, the husband sought to exclude inherited money that he claimed had initially been kept segregated in GIC's, but later was deposited into a joint account and used to purchase specific items. The trial judge appears to have accepted the wife's evidence that the inherited funds were deposited directly into the joint account and used, along with other funds, as part of leading "an executive lifestyle" following the inheritance. In the circumstances, the trial judge concluded that the husband could not meet his onus to trace the inherited money into the property he sought to exclude. This alone was enough to deny the husband the exclusion. Nonetheless, at para. 33 of his reasons, the trial judge went on to state that the inheritance "lost its exclusionary nature when deposited into the joint bank account".

[23] The trial decision in *Belgiorgio* was upheld on appeal. However, in upholding the result, this court referred only to the trial judge's finding that the husband's evidence was unreliable and did not refer to the trial judge's conclusion about the effect of depositing funds into a joint account.

[24] This court's decision in *Colletta v. Colletta*, [1993] O.J. No. 2537, at para. 1, is also of limited assistance.

[25] In that case, the trial judge allowed the husband a deduction for $23,518.71, being the amount on deposit in a joint account at the date of separation. The monies had been a gift from the husband's mother. On appeal, this court concluded that both parties had an equal interest in the funds. As the husband had subsequently used the funds to purchase a house, this court held that the wife should receive a credit for one-half of the amount on deposit as of the date of separation against the equalization payment she owed to the husband.

[26] This court went on, however, to allow the wife to simply reduce her equalization payment to the husband by the value of her half-interest in the property deposited into the joint account - money that the husband now owed her. However, by allowing this direct offset and failing to also reassess the wife's net family property, which was now increased by her ownership interest in the joint properties, the effect of the court's decision was actually to deprive the husband of the value of his exclusion.

[27] Since the reasons in *Colletta* suggest that the intention was to correct the trial judge only in so far as he failed to take the presumption of joint ownership

into account, the decision does not provide clear guidance on the treatment of excluded property deposited into a joint account.

[28] Interestingly, *Colletta*, for the most part, has been interpreted as standing for the proposition that excluded property deposited into a joint account loses its exclusionary character to the extent of the one-half interest that is presumed to be gifted to the spouse: see *Goodyer v. Goodyer*, [1999] O.J. No. 29 (Gen. Div.), at para. 76; *Cartier v. Cartier*, [2007] O.J. No. 4732 (S.C.), at footnote 4; and Ilana I. Zylberman & Brian J. Burke, "Tracing Exclusions in Family Law" (2006) 25 Canadian Family Law Quarterly, 67.

[29] In my view, this is, in fact, the correct approach. That this is so is best understood by recalling that, in addressing property issues under Part I of the *Family Law Act*, the court first determines issues of ownership before turning to questions involving calculation of the parties' net family properties: for example, see *McNamee v. McNamee*, 2011 ONCA 533, at paras. 56-63.

[30] While s. 14 of the *Family Law Act* creates certain presumptions with respect to the ownership of property, it does not address how each party's net family property is to be calculated. Rather, it is s. 4(2) that stipulates the exclusions from net family property.

[31] In relation to gifts, s. 4(2) states that, "[p]roperty, other than a matrimonial home, that was acquired by gift or inheritance from a third person after the date

of marriage" is to be excluded. Similarly, "[p]roperty other than a matrimonial home, into which [a gift] can be traced" is excluded.

[32] Given that the legislature made clear its intention that gifts used to purchase a matrimonial home lose their excluded character, but did not do the same in relation to monies deposited into a joint account, I discern no legislative intent that the entire amount of the gift should lose its excluded character when deposited into a joint bank account. See also: *Brubacher v. Brubacher*, [1996] O.J. No. 2730 (Gen. Div.), at para. 34; *LeCouteur v. LeCouteur* (2005), 18 R.F.L. (6th) 386 (Ont. S.C.), at paras. 50-51; *Cartier*, at paras. 2, 33-36.

[33] In my view, therefore, the trial judge in this case erred in concluding that all of the gift monies lost their excluded character when deposited into a joint account.

[34] On the appeal hearing, counsel for the wife acknowledged that the $25,000 was included in the September 2004 deposit into the Scotia McLeod account. However, he argued that the husband had failed to produce documents to show whether the $25,000 gift could be traced into the funds that remained in that account as of the date of separation. Moreover, counsel noted that the husband had breached an undertaking to produce such documents.

[35] I would reject this argument. In my view, assuming, without deciding, that monetary gifts must be traced, the wife's position reflects an overly formalistic

approach. It was undisputed that there was approximately $31,000 in the Scotia McLeod account on the date of separation, approximately 9 months after the September 2004 deposit. In these circumstances, a compelling inference arises that the $25,000 *inter-vivos* gift could be traced into those monies. While I do not condone the failure to comply with undertakings, I note that the account was a joint account and that the wife would have had equal access to the relevant documents. In all the circumstances, I would allow the husband an exclusion for an *inter-vivos* gift in the amount of $12,500.

(3) The 1967 Buick

[36] The husband claimed that the value of a 1967 Buick Wildcat automobile registered in his name on the date of separation should be excluded from his net family property, either because he acquired it by gift during the marriage or because he had transferred the equitable ownership of the vehicle to the parties' son prior to the date of separation.

[37] The car was originally owned by the husband's father. As of the date of trial, it was registered in the name of the parties' son.

[38] The husband's mother testified that, following her husband's death she drove the car for a few years and then gave it to her son, Paul, to encourage him to go back to school. The husband claimed that, during the marriage, Paul "gave"

him the car for $400, being the amount Paul had recently paid for new tires for the car.

[39] The husband and his son both testified and claimed that the husband gifted the car to his son prior to the date of separation.

[40] The trial judge concluded that, “technically”, the husband did not acquire the car by way of gift; rather, he purchased it, albeit for nominal consideration. Further, the trial judge rejected the evidence that the husband gifted the car to his son prior to the date of separation. The trial judge accordingly included the sum of $5,750 in the husband’s net family property, representing the value of the car on the date of separation.

[41] I acknowledge that it was open to the trial judge to reject the evidence that the husband gifted the car to his son prior to the date of separation. Nonetheless, in my view, the trial judge erred in including the entire value of the car in the husband’s net family property.

[42] It is implicit in the trial judge’s reasons that he accepted the husband’s evidence that he acquired the car from his brother by effectively reimbursing his brother for the cost of new tires the brother put on the car.

[43] In these circumstances, in my view, it was unreasonable to conclude that the husband had not acquired the car by way of gift. To the extent that the value of the car exceeded the value of the new tires, this additional value was acquired

by gift and should be excluded from the calculation of the husband's net family property. The husband paid for the tires and it was only their value -- $400 – that should have been included in the husband's net family property.

[44] Accordingly, I would reduce the amount included in the husband's net family property for this item by $5,350.

(4) The GMAC Loan

[45] The trial judge rejected the husband's claim that he owed $12,790 to GMAC for a car loan on the date of separation because the husband failed to provide documentation to prove the existence of the loan on the date of separation.

[46] The husband has filed fresh evidence on appeal, which demonstrates that the amount owing on the loan as of the date of separation was $12,483.36. Moreover, contrary to the trial judge's conclusion, the husband in fact did file evidence at the trial that supported his claim about the existence of this debt on the date of separation.

[47] Prior to trial, counsel for the husband obtained a copy of GMAC's file relating to the debt. Although GMAC had sold the particular indebtedness, its file revealed that the indebtedness was not paid off until 2006. Further, the copy of the conditional sales contract in the file indicated that the original amount

financed was $30,696.62 and that this amount was repayable in 48 monthly installments of $639.92 commencing November 25, 2002 at 0% interest.

[48] Assuming that the husband paid the 31 monthly payments that fell due between November 25, 2002 and the date of separation, the amount outstanding as of the date of separation would have been approximately $10,871.84. In my view, the trial judge erred in failing to take this documentary evidence into account.

[49] Although the fresh evidence indicates that a somewhat larger amount was owing, it is evident that the husband obtained that evidence only because the trial judge disallowed his claim altogether. In the circumstances, I would allow the husband a deduction in the amount of $10,871.84.

(5) The Wife's Claim for a Deduction for a $12,000 Debt Owing to her Parents

[50] The trial judge allowed the wife a $12,000 deduction for a debt owing to her parents relating to monies borrowed for renovations to the matrimonial home because the wife filed a promissory note as an exhibit at trial to support the existence of the debt. The trial judge rejected the husband's assertion that no monies were owing to the wife's parents because the husband had nothing in writing to support his claim.

[51] However, the trial judge overlooked the fact that during the trial, the wife withdrew her claim based on the promissory note. Instead, she chose to advance this claim solely as a claim for a debt owing to her parents relating to renovations to the matrimonial home.

[52] The trial judge also overlooked the fact that a document signed by the wife's parents was filed, without objection, as an exhibit at trial in which the wife's parents denied that the wife owed them any money.

[53] As the trial judge erred in allowing this deduction on the basis of the promissory note and in failing to squarely address the alternative basis for the wife's claim, I see no alternative but to set aside the trial judge's finding and to deny the wife's claim for this deduction. Not only did she not have any documentary evidence to support this claim, the documentary evidence that did exist undermined it.

(6) The Husband's Claim relating to the Hallstand

[54] During oral argument on the appeal, the husband abandoned his claim in relation to this issue.

B. THE TRIAL JUDGE'S COSTS AWARD

[55] Both parties claimed costs at trial. The husband claimed costs in the range of $53,000 to $73,000; the wife claimed costs of $60,000. The trial judge awarded $35,000 to the wife as partial indemnity costs of the trial.

[56] Although the wife was unsuccessful in her claim for an unequal division of net family properties and the husband was successful in his claim for an equalization payment, the trial judge found that the husband had acted unreasonably in advancing a claim for nominal support and in disputing the date of separation until the eve of trial. Further, the trial judge noted that, albeit on the eve of trial, the wife had offered to settle for an amount almost double the amount awarded to the husband at trial.

[57] Given the adjustments I would make to the net family property calculations, the husband's net family property will decrease by approximately $37,222 and the wife's net family property will increase by $12,000. This will result in a net increase of approximately $24,611 in the equalization payment owing to the husband. In the light of this fact and the other factors identified by the trial judge, the husband's proposal that there be no costs of the trial is reasonable. Like the trial judge, I think that this case should have been settled.

C. DISPOSITION

[58] Based on the foregoing reasons, I would allow the appeal and set aside paragraphs 2 and 9 of the trial judge's amended order dated December 2, 2010. I would substitute an order for an equalization payment to the husband in an amount to be agreed upon by counsel, taking account of these reasons, for paragraph 2 of the December 2, 2010 amended order. And I would substitute an

order that there be no order as to the costs of the trial for paragraph 9 of the December 2, 2010 amended order.

[59] I would award costs of the appeal to the husband on a partial indemnity scale, fixed in the amount of $4500, inclusive of disbursements and applicable taxes.

Released: “JS” December 11, 2012

“Janet Simmons J.A.”
“I agree E.A. Cronk J.A.”
“I agree Paul S. Rouleau J.A.”