COURT OF APPEAL FOR ONTARIO

CITATION: Cronier v. Cusack, 2023 ONCA 178
DATE: 20230317
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Paciocco, Harvison Young and Thorburn JJ.A.

BETWEEN

Claire Cronier

Applicant
(Respondent/Appellant by way of cross-appeal)

and

Patrick Leo Wayne Cusack

Respondent
(Appellant/Respondent by way of cross-appeal)

Patrick Leo Wayne Cusack, acting in person

Claire Cronier, acting in person

Heard: December 7, 2022

On appeal from the orders of Justice James F. Diamond of the Superior Court of Justice, dated March 8, 2021 and April 14, 2021.

Harvison Young J.A.:

A. OVERVIEW

[1] The appellant, Wayne Cusack, and the respondent, Claire Cronier, are former spouses. They are now in their early seventies. They began a relationship in late 2004 or early 2005, began cohabiting in late 2005, and married on

December 6, 2008. By January 31, 2015, they were separated with no reasonable prospect that they would resume cohabitation.

[2] In September 2015, the respondent wife commenced an application seeking, among other relief, the equalization of the parties' net family property ("NFP"). Nearly five years later, the trial of the application took place. Both parties were self-represented at trial although the respondent had some legal assistance from time to time, and the appellant husband is a (non-practicing) lawyer. The trial proceeded over eight days. As the trial judge observed, this was a very contested, high-conflict case for a couple with no children of the marriage. The parties have been and continue to be unable to agree on virtually anything. For example, the date of separation was not agreed upon even though the difference was less than two months and little turned on it. The trial was delayed by motions and disputes over discovery and whether the appellant had produced what he was required to, and, as a result, whether or in what instances the trial judge should have drawn adverse inferences.

[3] In his first order, dated March 8, 2021, the trial judge resolved a number of issues arising from the NFP statements filed by the parties. He requested that the parties submit fresh NFP statements reflecting his determinations with a view to narrowing the issues and finalizing the equalization payment calculation. Against the trial judge's directions, the parties submitted revised NFP statements that did not incorporate the findings contained in the March 8, 2021 order. Instead, the new

NFP statements widened the gap between the appellant's and the respondent's positions. Moreover, the appellant's revised NFP, in which he sought an equalization payment of $42,159.01 from the respondent, introduced the new issue of whether the respondent wife owed him an equalization payment, a claim he had not previously made. In the result, the trial judge ordered the appellant to pay an equalization payment of $59,929.86 to the respondent.

[4] Both parties appeal from the orders, arguing that the trial judge fell into reversible error. The appellant argues that the trial judge erred in valuing the parties' assets, and in failing to indicate which NFP statement he was relying on in his final determination of the equalization payment. He submits that these errors resulted in the order that he pay an equalization payment to the respondent when no equalization payment was owed by either party.

[5] In her cross-appeal, the respondent argues that the trial judge's errors favoured the appellant and that the trial judge should have ordered an equalization payment to her in the amount of $127,953.91. In the last NFP statement she filed before the trial judge made his final endorsement, the respondent sought an equalization payment of $122,353. However, she submitted two subsequent NFP statements to this court, which she prepared for the appeal with the help of a lawyer. In the first of these NFP statements, which does not incorporate the findings of the trial judge she contests in this appeal, the respondent calculates her equalization payment entitlement at $127,953.91. In the second NFP statement,

which is the first and only to incorporate the findings made by the trial judge, the respondent calculates her equalization payment entitlement at $61,016.26, which is a *de minimis* difference from the $59,929.86 figure reached by the trial judge.

[6] For the following reasons, I would conclude that none of the issues raised in either the appeal or the cross-appeal has merit and that, as a result, there is no basis for interfering with the trial judge's orders.

[7] The issues in the appeal and cross-appeal were largely intertwined. For the most part, the issues raised by the respondent on her cross-appeal are duplications of her responses to the main appeal. For that reason, I will only address the cross-appeal issues to the extent that they are not resolved by the consideration of the main appeal.

B. THE STANDARD OF REVIEW

[8] The starting point in any appeal is the standard of review which is to be applied by the appeal court. This court recently instructed in *Lesko v. Lesko*, 2021 ONCA 369, 57 R.F.L. (8th) 305, at para. 5, leave to appeal refused, [2021] S.C.C.A. No. 290, that significant deference is owed to orders resolving financial disputes in family law cases. As the Supreme Court stated in *Hickey v. Hickey*, [1999] 2 S.C.R. 518, at para. 12, an appeal court should only intervene "when there is a material error, a serious misapprehension of the evidence, or an error in law".

[9] Several principles from *Hickey* apply to the present appeal. First, and most significantly, an appeal is not a retrial. Second, the findings of fact made by the

trial judge are entitled to deference from this court unless the appellant establishes that the trial judge fell into palpable and overriding error. Third, this is a case that cries out for finality so that these parties can move on with their lives.

C. THE CUSACK APPEAL

[10] The appellant claims that the trial judge erred in ordering him to pay any equalization payment to the respondent. He submits that neither party owed the other an equalization payment.

[11] At the outset, I would note that the evidence of the parties at trial was far from clear. The trial judge observed at para. 9 of his reasons for decision that "the presentation of the evidence, both oral and documentary, was choppy, inconsistent, less than straightforward, and frankly difficult to follow". He noted that "[v]arious iterations of Net Family Property Statements were provided by the parties throughout this proceeding, and indeed during the trial itself" making it "practically impossible for the Court to perform the accounting exercise sought by the parties, as their own entries into their respective Net Family Property Statements were fluid". This has also been true in the appeal.

[12] As already noted, the appellant filed a revised NFP statement, dated March 13, 2021, in response to the trial judge's request in his March 8, 2021 order that the parties submit fresh NFP statements incorporating his determinations. In this NFP statement, which does not incorporate the findings of the trial judge, the appellant indicated for the first time that the respondent owed him an equalization

payment, which he calculated at $42,159.01. While the appellant does not seek an equalization payment from the respondent in this appeal, he still has not produced an NFP statement incorporating the findings of the trial judge.

[13] Similarly, the respondent submitted three NFP statements in response to the March 8, 2021 order, each of which indicates a higher equalization payment than the last. In the last of these statements, filed April 12, 2021, the respondent sought an equalization payment of $122,353. Following the same pattern, the respondent filed an additional NFP statement for the purposes of this appeal in which she seeks an equalization payment of $127,953.91.

[14] The common ground is that both parties are continuing many of the financial disputes that divided them before the trial. They each submit that the trial judge erred in ruling on the various issues that led to his final determination of the equalization payment.

(1) Issues

[15] The appellant husband submits that the trial judge made “erroneous rulings of fact and law as a result of which the Husband was ordered to make an equalization payment to the Wife” and that “[t]he appeal is premised primarily on factual conclusions drawn by the Trial Judge for which there was either no evidence or the evidence ran contrary to his conclusions.” In short, the appellant argues that the trial judge erred in:

a) failing to indicate which NFP statements he was relying upon;

b) assigning a value of $10,000 to the appellant's car at the date of marriage;

c) disallowing the valuation date deduction the appellant sought for his debt to a judgment creditor;

d) finding that the appellant owned the funds found in his legal trust account;

e) his calculation of the amount owing to the appellant from his former employer at the date of marriage; and

f) his treatment of a property ("Parc"), which was owned by the respondent at the date of marriage but sold before the parties separated.

[16] For the reasons that follow, I would not give effect to any of these grounds.

(2) Analysis

[17] In reviewing the record on the appeal and the parties' submissions, I am satisfied that the grounds raised by the appellant and the respondent are comprised entirely of challenges to findings of fact made by the trial judge. Both parties have failed to point to any palpable and overriding errors in these findings that could justify the intervention of this court.

(a) The trial judge did not err in failing to indicate which NFP statement he was relying upon.

[18] Running throughout the appellant's submissions is his complaint about the trial judge's treatment of the NFP statements filed by the parties. In particular, he

complains (as does the respondent wife) that the trial judge failed to indicate which NFP statements he was relying upon in his April 14, 2021 endorsement.

[19] The problem with the appellant's submission is that it is clear from the trial judge's final endorsement that he could not rely on any of the NFP statements filed by the parties because neither had followed his direction to accept his rulings for the purpose of preparing revised NFP statements. In these circumstances, the trial judge's failure to indicate which NFP statement he was relying on was not an error. Instead, the trial judge properly considered all the evidence before him to arrive at his own conclusions, which he was entitled to do on the record before him.

[20] While the parties' NFP statements must be considered by the trial judge, as with any evidence presented to the court, the trier of fact can accept none, some, or all of it: *Sagl v. Sagl*, 31 R.F.L. (4th) 405 (Ont. S.C.), at para. 30; *Qaraan v. Qaraan*, 2012 ONSC 6017, at para. 35. In this case, there were numerous NFP statements prepared before, during and after the trial, along with oral and documentary evidence from both parties. As the evidence was adduced during the trial, updated NFP statements were produced. This is not unusual, and indeed, may helpfully respond to the court's resolution of certain key factual disputes, such as the separation date, and so assist the parties and the court in focussing on the outstanding issues.

[21] In this case, the parties did not follow the trial judge's directions, rending their updated NFP statements unhelpful. The trial judge issued reasons for decision

after the trial, asking the parties to prepare new NFP statements reflecting his determinations of various asset values. This is a common and sensible approach, which reflects the fact that it is not the responsibility of the court to prepare such statements. It is up to the parties to prepare and submit their NFP statements: *Cong v. Cong*, 2007 CanLII 7994 (Ont. S.C.), at para. 38. However, where, as here, the parties fail to accept the trial judge's determinations, the revised NFPs do not assist.

(b) The trial judge did not err in assigning a value of $10,000 to the appellant's car at the date of marriage.

[22] The appellant submits that the trial judge erred in assigning a value of $10,000 to his car at the date of marriage. The appellant claims that there was no evidence to support this amount because he claimed that it was worth $16,000 and the respondent wife claimed it was worth $12,000 as of the date of marriage. The trial judge noted that while the parties had agreed that some value should be attributed to the car, neither party had produced "blue book" or "black book" values as evidence, and their respective values appeared to be arbitrary.

[23] Rules 2(2)-(4) of the *Family Law Rules*, O.Reg., 114/99 require the court to deal with cases justly by ensuring that the process is fair, saving time and expense, dealing with the case in a way that is appropriate to its importance and complexity, and giving appropriate court resources to the case while taking account of the need to give resources to other cases. The trial judge did exactly that here.

(c) The trial judge did not err in disallowing the valuation date deduction the appellant sought for his debt to a judgment creditor.

[24] The appellant also submits that the trial judge erred in disallowing the valuation date deduction of $4,800, which he claims was owing as of the valuation date. This amount was a cost order made against the appellant in relation to pre-marriage litigation. In her NFP statements, the respondent treated it as a debt owing at the date of marriage.

[25] The trial judge considered this issue and found that while the litigation pre-dated the parties' marriage, the cost order was made after the date of marriage, in November 2011. While the trial judge did not address the question of whether this amount remained owing as of the valuation date as the appellant claims, there is no clear evidence on the issue and the appellant has not identified any palpable and overriding error that could justify interfering with the trial judge's finding.

(d) The trial judge did not err in finding that the appellant owned the funds found in his legal trust account.

[26] The appellant takes issue with the trial judge's finding that the $18,547.06 that was in his legal trust account was an asset owned by the appellant as of the valuation date. Again, I find no palpable and overriding error in this finding.

[27] The backdrop to this conclusion was, in part, the respondent wife's insistence that the appellant had accounts that he had failed to disclose. She obtained a court

order that the appellant provide a Work-In-Progress (“WIP”), but none was ever provided. At trial, he admitted that he had never provided a statement, but stated that this was because his legal business had “zero value” as of the date of separation. As the trial judge noted, however, that “unilateral assessment of the value of the WIP [was] not his to make”. Rather, “it is a finding to be made by the Court, and the [appellant] simply did not live up to his court-ordered obligations.” There was evidence at trial “that there were eight client files opened as of the date of separation, although with no value described [sic] to those files by the [appellant].” The respondent wife alleged that there were additional files that the appellant had not disclosed, and asked the court to impute a value of $69,443.43 as of the date of separation. The trial judge considered photographs that the respondent wife had taken of documents that were scattered around the house. The appellant objected to the admission of this evidence on the basis that the documents had been illegally obtained, and that they were protected by solicitor-client privilege. The trial judge rejected the first argument, finding that the admission of the documents would not prejudice the administration of justice. He went on to say that while there may have been an argument that the documents were privileged, the appellant husband was given many chances to produce a WIP statement, which he could have redacted to protect the identities of his clients, but failed to do so. I need make no comment on whether the photographs of the documents should have been admitted. It was the respondent’s onus to prove that

no WIP was indeed owing – a fact of which he was well aware since an interim disclosure order was made seeking that information. Since he had not met that onus, it was appropriate to draw an adverse inference against him on this point and impute $50,000 as WIP owing.

[28] The appellant does not challenge this finding on appeal, but does challenge a related finding with respect to the amount of $18,547.06 which was in his legal trust account.

[29] Again, I see no error of law or principle or palpable or overriding error in the trial judge's conclusion on this point. The appellant admits that he had deposited $24,000 from the parties' joint line of credit into this account. The account contained $18,547.06 at the date of separation. The trial judge noted that he was not concerned with the two other accounts that the respondent wife alleged were not contained in the appellant's disclosure, but that there was evidence that the appellant's "own money was commingled with other money likely belonging to clients/third parties." On that basis, and in the context of the husband's failure to make WIP disclosure, the trial judge was prepared to attribute the $18,547.06 found in the legal trust account to the appellant. To entertain the appellant's submission on appeal on this issue would effectively reward him for failing to make full and timely disclosure. Since disclosure is "the linchpin of a just and effective family law system": *Colucci v. Colucci*, 2021 SCC 24, at para. 4, I would not interfere with the trial judge's conclusion.

(e) The trial judge did not err in his calculation of the amount owing to the appellant from his former employer at the date of marriage.

[30] The husband sold his Ottawa practice to his firm before the date of marriage. He takes issue with the amount that the trial judge attributed to the portion still owing to him at the date of marriage. He claims that the problem arose because he forgot to include $44,000 of this amount and accordingly, his July 12, 2018 NFP statement contained an amount that was erroneously $75,000 rather than $119,000, which he corrected in his March 29, 2019 NFP statement, and testified to in his oral evidence. He claims that the trial judge "got the amounts backwards". The respondent wife, in her cross-appeal, also claims that the trial judge erred on this point, submitting that the trial judge erred in finding that there was any pre-marriage debt owing to the appellant.

[31] I disagree with both parties on this point. The trial judge addressed this issue expressly and was not prepared to accept the appellant's evidence as to the higher amount. In the end, he accepted the evidence that his employer owed the appellant the lower amount of $75,000 at the date of marriage. Neither party has pointed to any error on the part of the trial judge. His finding was grounded in the record.

(f) The trial judge did not err in his treatment of the Parc property.

[32] The appellant also submits that the trial judge erred in his treatment of the Parc property, which was sold during the marriage, although his submissions lack precision as to the nature of the alleged errors. The appellant had owned this

property when the parties' relationship began. However, the respondent purchased it from the appellant before they were married, largely because the appellant was in substantial debt at the time. At trial, the appellant argued that he was entitled to claim $28,000 in pre-marriage property for the Parc property. However, by the date of marriage, the respondent had purchased the property from the appellant. The trial judge reviewed the history of the parties' arrangements for this property. He ultimately rejected the appellant's claim. He considered the parties' evidence and gave reasons for his findings. These are clear findings of fact and the appellant's submissions must fail on this issue because he has pointed to no palpable and overriding error.

[33] I would add that the trial judge's approach to this is entirely consistent with the *Family Law Act*, R.S.O. 1990, c. F.3. Parc was not a matrimonial home. It was owned by the respondent at the date of marriage, and she was clearly entitled to the pre-marriage deduction. The appellant, who was asserting a qualification or limitation to the deduction, had the onus of showing that the $28,000 he was claiming was warranted. He did not satisfy the trial judge that it was. Both parties claimed that binding agreements governed their financial and in-kind contributions. Each claimed different terms to these agreements. In the face of these claims, the trial judge reasonably found that while there were discussions and various iterations of draft agreements prepared, there was no binding agreement.

[34] In short, I would dismiss the entirety of the appellant husband's appeal. He has identified neither errors of law or principle, nor any palpable and overriding error that could justify the intervention of this court.

D. THE CRONIER CROSS-APPEAL

[35] The respondent wife submits by way of cross-appeal that the trial judge committed three main errors by:

a) attributing the full amount (instead of half) of a $14,907.55 joint line of credit to her as a debt owing on the date of marriage ("Scotiabank line of credit");
b) declining to treat the appellant's CRA debts as pre-marriage debts; and
c) allowing the $75,000 amount owed by the husband's former law firm as a pre-marriage asset deduction.

[36] The result of this, she argues, was that the appellant husband owed her a significantly higher equalization payment ($127,953.91) than the amount ordered by the trial judge ($59,929.86).

[37] With respect to the Scotiabank Line Credit, the trial judge considered the evidence before him and explained in his reasons why he concluded that the balance as of the date of marriage was hers alone. That finding was open to him on the record before him and there is no basis for interfering with it.

[38] Similarly, the trial judge addressed the respondent's claim that the CRA debt was owing on the date of marriage. He noted that the evidence was ambiguous on this point and concluded that he could not "find sufficient evidence on a balance of

probabilities to attribute this CRA debt to the [appellant] as of the date of marriage." I see no error of law or palpable and overriding error in this assessment.

[39] I have already addressed the $75,000 pre-marriage asset deduction claimed by the appellant.

[40] Accordingly, I would also dismiss the cross-appeal.

E. CONCLUSION

[41] I have concluded that there is no merit to any of the grounds of appeal advanced by either party.

[42] Both parties improperly treated this appeal as an opportunity to retry the facts of the case. The trial judge was faced with disorganized materials, and oral evidence that was frequently conflicting and confusing. Faced with this challenging record, he had to resolve numerous issues ranging from the valuation date, to whether there was a contract governing aspects of the parties' property, to the details of the permissible pre-marriage and valuation date assets and liabilities. He discharged his duty to hear the evidence and decide the case fairly. Some of his findings favoured one party and some favoured the other. Such is the nature of a trial. The grounds raised on this appeal amount to nothing more than disagreements with the trial judge's factual findings, all of which were open to him on the record.

F. DISPOSITION

[43] I would dismiss the appeal and cross-appeal. The parties shall submit their brief submissions (no longer than 3 pages each) as to the costs of the appeal no later than April 24, 2023.

Released: 20230317 “DMP”

“A. Harvison Young J.A.”
“I agree. David M. Paciocco J.A.”
“I agree. J.A. Thorburn J.A.”