

# COURT OF APPEAL FOR ONTARIO

CITATION: Cohen v. Cohen, 2024 ONCA 114

DATE: 20240215

DOCKET: COA-23-CV-0788

Nordheimer, Copeland and Dawe JJ.A.

BETWEEN

Carly Cohen

Applicant (Appellant)

and

Mark Cohen

Respondent (Respondent)

Aaron Franks and Alyssa Weinerman, for the appellant

No one appearing for the respondent

Heard: January 19, 2024

On appeal from the order of Justice Lisa Brownstone of the Superior Court of Justice, dated June 22, 2023.

## REASONS FOR DECISION

[1] The appellant wife appeals the portion of the trial judge's order requiring her to make an equalization payment to the husband.<sup>1</sup> The amount of the payment is

---

<sup>1</sup> This trial was styled in the Superior Court as *A.B. v. C.D.*, court file number FS-22-00028064-000, pursuant to a publication ban ordered by Davies J., on April 5, 2022, made at the request of the appellant.

half of the net proceeds of the sale of the matrimonial home, less certain deductions. The matrimonial home was in the appellant's name only. The appellant argues that the trial judge erred in ordering an equalization payment in favour of the respondent in the uncontested trial, where the respondent made no financial disclosure at any point in the proceedings, and never made a request for equalization.

[2] For the reasons that follow, we allow the appeal and set aside the provisions of the order relating to the equalization payment.

### **Factual background**

[3] The appellant and the respondent married in 2005. They separated on August 17, 2021. They have three children together, who have lived solely with the appellant since the separation. The appellant is a lawyer in private practice. The respondent worked for a rental car agency until he was terminated for cause in June of 2020 for misappropriating funds and other improprieties in connection with the business.<sup>2</sup> In April 2022, the respondent was arrested and charged with two counts of fraud over \$5,000. There is also outstanding civil litigation related to the alleged frauds.

---

The appellant advised through counsel that she was not seeking to continue the publication ban in this court.

<sup>2</sup> The appellant did not learn of the reason for the respondent's termination until later. At the time of his termination, the respondent told the appellant he was let go due to a restructuring at the agency.

[4] The respondent left the matrimonial home on August 23, 2021. After September 2021, the appellant did not see the respondent in person until April 2022, when he was arrested. In the time period prior to his arrest, the respondent occasionally communicated with the appellant via email and text. The appellant did not know where the respondent was residing or how to contact him in person. She described it in her affidavit as being “as if he has disappeared.”

[5] The appellant commenced this proceeding on February 9, 2022. The respondent was served with the application and supporting documents, including the appellant’s financial statement, on April 11, 2022, by email in accordance with the order of Davies J.<sup>3</sup>

[6] Between mid-April and late July 2022, the respondent communicated several times with the appellant’s counsel, either directly or through counsel, requesting additional time to file his responding materials. The appellant repeatedly agreed to extensions of time. The respondent never served an answer or any financial disclosure, and did not advance any claims (including a claim to an equalization payment).

[7] In August 2022, the appellant brought a motion seeking to proceed with an uncontested trial in writing and an order permitting her to sell the matrimonial home

---

<sup>3</sup> The appellant had previously sent the application and supporting documents to the respondent by text and email on February 23, 2022. In light of other text communication by the respondent to the appellant after she sent the court documents by text, it appeared that he was evading service.

without the respondent's consent. After the appellant served her motion by email, new counsel for the respondent contacted the appellant's counsel. The respondent filed materials in response to the appellant's motion and brought a cross-motion for an extension of time to serve an answer to the appellant's claim.

[8] On August 29, 2022, Faieta J. dismissed the respondent's cross-motion and granted the appellant's motion. Faieta J. ordered that the respondent was not entitled to notice of any further steps in the proceeding except for service of an order. He permitted the appellant to proceed with an uncontested trial in writing. Faieta J. also granted the appellant permission to sell the matrimonial home without the respondent's consent or signature. He ordered that the net proceeds of the sale be held in trust pending further direction from the court.

[9] The respondent did not appeal the order of Faieta J. The appellant filed her materials for the uncontested trial on December 22, 2022.

[10] The appellant sold the matrimonial home in 2023, with a closing date of August 15, 2023. The proceeds were held in trust pending the order on the uncontested trial. A portion remains in trust as a result of the order under appeal.

### **The Decision under appeal**

[11] We summarize only the portions of the decision under appeal – namely, the reasons for decision in relation to the equalization order and payment of the proceeds of the sale of the matrimonial home.

[12] The trial judge acknowledged that the matrimonial home was solely in the appellant's name, and that she was solely responsible for expenses related to the home since the date of separation. She noted that a significant amount of debt was secured against the matrimonial home, at least some of which was related to debts incurred as a result of the respondent's gambling addiction. However, she found that the quantum of debts related to the respondent's gambling could not be determined on the evidence on the uncontested trial.

[13] The appellant sought the release to her of all of the net proceeds from the sale of the matrimonial home. She required the full proceeds to secure new accommodation for her and the children. Her position was that it was impossible for the court to determine if the respondent was owed an equalization payment, given that he provided no financial disclosure. Further, he was not entitled to an equalization payment because he did not advance a claim for such payment. In the alternative, the appellant submitted that in the circumstances, she was entitled to an unequal division of the net family property.

[14] Notwithstanding the lack of financial disclosure by the respondent, the trial judge held that he was entitled to an equalization payment, stating:

While the father has not made disclosure and his financial information is not before the court, the evidence demonstrates that he is indebted and likely living with his parents. I therefore find that the father is owed an equalization payment with respect to his half of the net proceeds of the matrimonial home.

[15] Notably, although the trial judge found – despite the absence of financial disclosure – that the respondent was indebted, she also found that “it is impossible to draw any conclusions on whether this would be a case that would be appropriate for unequal division of family property.” She explained this conclusion as based on both the lack of disclosure by the respondent and the lack of quantification of the gambling and other debts that led to an increase in mortgages on the matrimonial home.

[16] The trial judge acknowledged the concern that the appellant would be unable to collect the child support payments and contributions to s. 7 expenses under the *Federal Child Support Guidelines*, SOR/97-175, provided for in the order. She also acknowledged that the respondent owed the appellant outstanding costs awards and arrears of child support and s. 7 expenses. As a result, the trial judge ordered that the net proceeds of the sale of the matrimonial home be distributed as follows:

- One half of the net proceeds of the sale of the matrimonial home, plus \$26,000 in satisfaction of outstanding costs awards and \$81,840 in satisfaction of arrears of child support and s. 7 expenses to be released immediately to the appellant;
- The remaining proceeds (e.g., the remainder of the respondent’s equalization share) to be held in trust by “the real estate solicitor”, who was directed to release funds to the appellant on a monthly basis in the amount of child support and s. 7 expenses owing and not paid by the respondent each month.

## **Analysis**

[17] The appellant argues that the trial judge erred in considering the issue of equalization in the uncontested trial given the absence of any claim for equalization from the respondent. She relies primarily on s. 7 of the *Family Law Act*, R.S.O. 1990, c. F.3 ("*FLA*"), which provides that the court may determine equalization entitlement "on the application" of a spouse.

[18] We do not accept the appellant's argument that the trial judge erred by considering the issue of equalization.

[19] The appellant herself had claimed equalization in her initial application to the court. By the time of the uncontested trial, the appellant had abandoned her request for an equalization payment in her favour. However, she requested an order that there be no equalization payment owing by either party because of the impossibility of assessing the amount of equalization payment owing due to the respondent's failure to make financial disclosure and his secrecy about his financial circumstances during the marriage. In the alternative, the appellant argued that she was entitled to an unequal division of the value of net family property in her favour, pursuant to s. 5(6) of the *FLA*.

[20] As the issue of equalization was engaged by the appellant's pleadings, including in her affidavit in the uncontested trial, the trial judge did not err in considering the issue of equalization.

[21] However, we agree with the appellant that the trial judge erred in finding that the respondent was entitled to an equalization payment. On the record before the trial judge, that finding was a palpable and overriding error. There was a wholly inadequate factual basis to assess the net family property of the respondent. Absent that information, there was no basis on which to order an equalization payment.

[22] None of the information about the respondent's assets and liabilities that would have been necessary to calculate his net family property was disclosed by the respondent or in the trial record: *Hamilton v. Hamilton* (1996), 92 O.A.C. 103 (C.A.), at paras. 23-26. There was no evidence of the respondent's assets or debts and liabilities at the date of the marriage or on the valuation date, and no evidence of any of the other financial information required to be disclosed under s. 8 of the *FLA*.

[23] The respondent made no financial disclosure at any stage of the proceedings. This court has repeatedly stressed that the duty to disclose financial information is the most basic obligation in family law proceedings: *Roberts v. Roberts*, 2015 ONCA 450, 65 R.F.L. (7th) 6, at paras. 11-12; *FLA*, s. 8; *Family Law Rules*, O. Reg. 114/99, r. 13 ("*FLRs*").

[24] In the absence of any disclosure from the respondent, the trial judge did not have a record before her on which equalization could be assessed. Depending on



the record, in the absence of disclosure, it may be open to the court to make an adverse inference. However, in this case, the trial judge accepted that the respondent was in debt (i.e., he had a net family property of zero, pursuant to s.4(5) of the *FLA*), which was a finding in his favour.

[25] Further, ordering an equalization payment in favour of the respondent in the face of such non-disclosure creates incentives that are contrary to the objectives of both the *FLA* and the *FLRs*. It gives the non-disclosing spouse the benefit of a finding in their favour while denying the other spouse and the court any evidence to assess the assets of the non-disclosing spouse.

[26] In our view, it was also unfair to the appellant to order her to make an equalization payment to the respondent in circumstances where he failed to make disclosure and where the evidence from the appellant was that she was in the dark about his financial situation during the marriage. The appellant explained in her affidavit in the uncontested trial that she knew very little about the true nature of the respondent's finances. He had a gambling problem throughout the marriage. He recklessly ran up debts during the marriage due to his gambling, compulsive shopping, and perhaps, given what the appellant learned after the date of separation, other illicit activities of which she was unaware. In early 2020, the appellant found out that the respondent had forged her signature to secure more debt against the matrimonial home.

[27] As noted above, the appellant does not seek an equalization payment in her favour. In the circumstances of this appeal, given the total failure of financial disclosure by the respondent and the evidence that, because of the respondent's secrecy about his finances during the marriage, the appellant was not in a position to know anything about his finances, we find it appropriate to make an order that no equalization payment is owing.

[28] The appellant also raised concerns about the form of the order made by the trial judge. Specifically, she points to the fact that the order would foreseeably have resulted in the real estate solicitor being responsible for holding part of the net proceeds of the sale of the matrimonial home in trust for many years. In light of our conclusion that no equalization payment is owing and that the appellant is entitled to the entire proceeds of the sale of the matrimonial home, we do not reach this issue. We would however note that, absent a request from the parties, a lawyer should not ordinarily be ordered to administer funds over a period of many years.

### **Disposition**

[29] The appeal is allowed. Paragraphs 9 and 12 of the order of the trial judge are set aside. In their place the following paragraphs are substituted:

9. There shall be no equalization payment owing by either party to the other.

12. The remaining net proceeds of the sale of the matrimonial home shall be immediately released to the Mother [the appellant].

[30] The appellant also filed a motion to adduce fresh evidence. We have reviewed the proposed fresh evidence. However, in light of our disposition of the appeal, the fresh evidence is unnecessary. The motion to adduce fresh evidence is dismissed.

[31] The appellant is entitled to costs of the appeal in the amount of \$5,000, inclusive of disbursements and HST.

“I.V.B. Nordheimer J.A.”

“J. Copeland J.A.”

“J. Dawe J.A.”