COURT OF APPEAL FOR ONTARIO

CITATION: Frick v. Frick, 2016 ONCA 799
DATE: 20161031
DOCKET: C61863

Hoy A.C.J.O, Lauwers and Benotto JJ.A.

BETWEEN

Tammy Frick

Applicant (Appellant)

and

Bruce Frick

Respondent (Respondent)

Harold Niman, Sarah Strathopolous and Chloe van Wirdum, for the appellant

Oren Weinberg, for the respondent

Heard: September 12, 2016

On appeal from the order of Justice M. Gregory Ellies of the Superior Court of Justice, dated February 18, 2016, with reasons reported at 2016 ONSC 359.

Benotto J.A.:

Overview

[1] The parties to this appeal are involved in matrimonial litigation. For ease of reference, I will refer to the appellant as the wife and the respondent as the husband.

[2] The wife commenced divorce proceedings that included a claim for equalization of net family properties. She then sought to amend her application to claim an unequal division of net family properties in her favour pursuant to s. 5(6) of the *Family Law Act*, R.S.O. 1990, c. F.3 on the

basis that the husband had recklessly depleted his net family property. She alleged that he had spent money on extra-marital activities. The husband brought a motion to strike the amendment pursuant to r. 1(8.2) of the *Family Law Rules*, O. Reg. 114/99. The motion judge struck the claim for unequal division, without leave to amend, under r. 16(12)(b) of the *Family Law Rules*.

[3] While I agree that portions of the amendment should be struck, I do not agree with the motion judge's analysis of the *Family Law Rules*, which relies heavily on jurisprudence under the *Rules of Civil Procedure*. Nor do I agree with the result of his order, preventing the wife from claiming an unequal division at trial. I would therefore allow the appeal, in part.

Background

[4] The parties were married in 1993 and have two children. They separated in 2013 and the wife commenced an application for divorce claiming custody, spousal and child support and an equalization of net family properties. The wife alleges that she subsequently learned that the husband had been involved in an affair, used male and female escort services and belonged to an adult fetish website. Consequently, she amended her application to allege a reckless depletion of net family property by the husband, entitling her to a variation in the usual share of net family property.

[5] The amendments to the application are in para. 19, p. 5, under the heading "Claim by Applicant", and paras. 18 and 30, pp. 8-10, under the heading "Important Facts Supporting my Other Claim(s)". Paragraph 19, p. 5 requests:

> In the alternative, an Order for an unequal division of the parties' net family property in favour of the Applicant pursuant to section 5(6)of the *Family Law Act* as a result of the Respondent's reckless depletion of his net family property.

[6] Paragraph 18, p. 8 is amended to allege that the husband had "a ten year affair". The significant paragraph is 30, pp. 9-10, which reads as follows:

> [The husband] has had an ongoing affair since 2003. [The wife] has recently discovered that during the marriage not only did [he] have a mistress but he also hired various escort services (male and female) and had memberships to various adult websites. [The wife] requires a full accounting of all money spent by [him], directly or indirectly, on his mistress, the escort services and website memberships. [She] is also

> seeking an unequal division of net family property as a result of [his] reckless depletion of his net family property.

[7] The husband moved to strike the amendments pursuant to r. 1(8.2) of the *Family Law Rules* ("the family rules") as being "without merit, inflammatory, a waste of the court's time and designed solely to personally attack the [husband]."

[8] The motion judge determined that the wife's amended pleadings were defective in that she failed to plead the material facts supporting the claim for an unequal division. In particular, she failed to plead facts showing that the husband's spending had any effect on his financial position. As the family rules do not require an applicant to plead material facts, the motion judge took recourse to the *Rules of Civil Procedure* ("the civil rules") to impose such a requirement.

[9] However, the motion judge determined that r. 1(8.2) of the family rules was not the proper way to address this defect in the amended pleadings. Interpreting r. 1(8.2) of the family rules along the lines of r. 2.1 of the civil rules, he held that the family rule did not apply and declined to strike the amendment under it. Instead, the motion judge moved on his own initiative to the summary judgment provision under the family rules. He concluded that the claim for an unequal division set out no reasonable claim in law and struck it pursuant to r. 16(12)(b) without leave to amend.

Issues

[10] This appeal engages fundamental principles of a family law proceeding. It raises the following issues:

(1) Was the wife's pleading defective for failure to plead material facts?

(2) Was the motion properly brought under r. 1(8.2)?

(3) Should the claim for unequal division of net family properties have been struck pursuant to r. 16(12)?

(4) Should portions of the wife's application be struck under r. 1(8.2)?

Analysis

(1) Was the wife's pleading defective for failure to plead material facts?

[11] The *Family Law Rules* were enacted to reflect the fact that litigation in family law matters is different from civil litigation. The family rules provide for active judicial case management, early, complete and ongoing

financial disclosure, and an emphasis on resolution, mediation and ways to save time and expense in proportion to the complexity of the issues. They embody a philosophy peculiar to a lawsuit that involves a family.

[12] In the rare instance when a matter is not adequately covered by the family rules, the court may decide the issue with reference to the civil rules. This is contained in r. 1(7) of the family rules, which provides:

> If these rules do not cover a matter adequately, the court may give directions, and the practice shall be decided by analogy to these rules, by reference to the *Courts of Justice Act* and the Act governing the case and, if the court considers it appropriate, by reference to the *Rules of Civil Procedure*.

[13] Here, the motion judge determined that the family rules did not adequately cover the contents of a pleading because, unlike the civil rules, there was no requirement of a concise statement of material facts relied upon. He considered that, pursuant to r. 1(7) of the family rules, this issue was not adequately covered and he could apply r. 25.06(1) of the civil rules, which requires pleadings to contain a statement of material facts relied on. In the result, he concluded that the wife had not pleaded the material facts necessary to support her claim for a variation of the normal share of net family property.

[14] The motion judge's analysis reflects a misunderstanding of the family rules.

[15] This case, like all cases in family law, was started with an "Application" in the prescribed Form 8. In accordance with this form, a party is required to set out the details of the order sought and the important facts supporting the claim.

[16] Rule 1(7) does not apply to redirect the court to the civil rules, because the family rules adequately cover the contents of an application. The family rules do not require all the material facts relied on to be set out at the time the case is started because a party will often not know all the facts supporting a claim. That is why the family rules provide stringent financial disclosure obligations. The emphasis on financial disclosure reflects the fact that parties might not know – and are entitled to find out – the details of the other's circumstances. To require a party to plead "material facts" before financial disclosure would run contrary to the way family litigation is conducted, contrary to the family rules and contrary to basic fairness.

[17] The wife's pleading claiming an unequal division of net family properties was not defective for failure to plead material facts.

(2) Was the motion properly brought under r. 1(8.2)?

[18] The husband brought his motion to strike portions of the application pursuant to r. 1(8.2). This rule provides: "The court may strike out all or part of any document that may delay or make it difficult to have a fair trial or that is inflammatory, a waste of time, a nuisance or an abuse of the court process."

[19] Again the motion judge moved to the civil rules. He analogized family rule 1(8.2) to r. 2.1.01 of the civil rules, which provides that the court may stay or dismiss a proceeding that on its face appears to be "frivolous or vexatious or otherwise an abuse of the process of the court." The motion judge interpreted family rule 1(8.2) in line with the jurisprudence under civil rule 2.1.01. Since the civil rule would not apply here – the amendments were not on their face frivolous, vexatious or abusive – the motion judge inferred that the family rule did not apply either.

[20] I do not agree that the civil rules can be parachuted into the family rules to determine this issue. Rule 1(8.2) adequately sets out when a portion of a document may be struck in a family law proceeding: namely, if it "may delay or make it difficult to have a fair trial or [it] is inflammatory, a waste of time, a nuisance or an abuse of the court process."

[21] The words of r. 1(8.2) are clear. There was no basis to apply jurisprudence under civil rule 2.1.01 and it was an error to do so. The motion was properly brought under r. 1(8.2) and should have been disposed of pursuant to that rule.

[22] Having declined to strike the amendment under family rule 1(8.2), the motion judge moved on his own initiative to r. 16 of the family rules for authority to strike it.

(3) Should the wife's claim for unequal division of net family properties have been struck pursuant to r. 16 (12)?

[23] Rule 16 is the summary judgment rule for family law proceedings. The motion judge found that he had the authority to move, on his own initiative, to the summary judgment rule because the motion "engages the provisions of subrule 16(12) of the *Family Law Rules*, even if the notice of motion fails to mention that subrule." He stated that neither party "would be prejudiced if I deal with the respondent's motion under" r. 16(12).

[24] This rule provides:

MOTION FOR SUMMARY DECISION ON LEGAL ISSUE

(12) The court may, on motion,

(a) decide a question of law before trial, if the decision may dispose of all or part of the case, substantially shorten the trial or save substantial costs;

(b) strike out an application, answer or reply because it sets out no reasonable claim or defence in law; or

(c) dismiss or suspend a case because,

(i) the court has no jurisdiction over it,

(ii) a party has no legal capacity to carry on the case,

(iii) there is another case going on between the same parties

(iv) the case is a waste of time, a nuisance or an abuse of the court process.

[25] The motion judge determined that r. 16(12)(b) gave him authority to strike the claim for an unequal division of net family property on the ground that the claim disclosed no reasonable cause of action. In coming to this determination the motion judge performed an in-depth analysis of the law relating to a claim for unequal division of net family property. He then reviewed the jurisprudence where such a claim was based on extra-marital misconduct, finding that the focus of s. 5(6) of the *Family Law Act* was not on immoral conduct but on financial consequences. He concluded that the claim for unequal division could not succeed because there was no evidence that the husband's affairs had any significant effect on his net family property.

[26] The motion judge also denied leave to amend, "[b]ecause it is obvious from the amended application itself that the [wife] cannot identify the effect, if any, of the [husband]'s alleged spending on his net family property". In the result, the wife was precluded from raising s. 5(6) at trial.

[27] I disagree with the approach and with this conclusion for two reasons.

[28] First, while the court has jurisdiction to move on its own initiative to summary judgment, the requirement of notice still must apply: *Stulberg v. Batler*, 2010 ONSC 5299, 94 R.F.L. (6th) 375, at para. 15. Here, the wife knew that the motion was to strike portions of her document. She could not have known that her claim for an unequal division would be judged according to the summary judgment rules. Nor could she have known that her claim would be barred forever since she was denied leave to amend.

[29] The wife could not have known that she was required to respond to the test for summary judgment. It was an error for the motion judge to

apply r. 16(12)(b) without notice to the wife. As Doherty J.A. observed in *Rodaro v. Royal Bank of Canada* (2002), 2002 CanLII 41834 (ON CA), 59 O.R. (3d) 74 (C.A.), at para. 61, parties have "the right to know the case they had to meet and the right to a fair opportunity to meet that case." See also *Labatt Brewing Company Limited v. NHL Enterprises Canada, L.P.*, 2011 ONCA 511, 106 O.R. (3d) 677, at paras. 5-9.

[30] Second, the motion judge was incorrect to eliminate the wife's s. 5(6) claim at the pleadings stage.

[31] The legislative structure for equalization is set out in s. 5 of the *Family Law Act*, which provides:

> (1) When a divorce is granted or a marriage is declared a nullity, or when the spouses are separated and there is no reasonable prospect that they will resume cohabitation, the spouse whose net family property is the lesser of the two net family properties is entitled to one-half the difference between them.
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> …
>
> Variation of share
>
> (6) The court may award a spouse an amount that is more or less than half the difference between the net family properties if the court is of the opinion that equalizing the net family properties would be unconscionable, having regard to,
>
> (a) a spouse's failure to disclose to the other spouse debts or other liabilities existing at the date of the marriage;
>
> (b) the fact that debts or other liabilities claimed in reduction of a spouse's net family property were incurred recklessly or in bad faith;
>
> (c) the part of a spouse's net family property that consists of gifts made by the other spouse;
>
> (d) a spouse's intentional or reckless depletion of his or her net family property;
>
> (e) the fact that the amount a spouse would otherwise receive under subsection (1), (2) or (3) is disproportionately large in relation to a period of cohabitation that is less than five years;

> (f) the fact that one spouse has incurred a disproportionately larger amount of debts or other liabilities than the other spouse for the support of the family;
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> (g) a written agreement between the spouses that is not a domestic contract; or
>
> (h) any other circumstance relating to the acquisition, disposition, preservation, maintenance or improvement of property.

[32] There is a high hurdle to overcome for a claim to succeed under s. 5(6) on the basis of marital infidelity. I concur with the view of Perkins J. in *Cosentino v. Cosentino*, 2015 ONSC 271, 55 R.F.L. (7th) 117, at paras. 46 and 49:

> All of the provisions of section 5(6) are directly linked to the impact on one or both spouses' debts, liabilities, or property. A general sense of outrage, absent a clear connection to the parties' debts, liabilities, or property, is not sufficient. … It is the financial result, the result of the usual NFP equalization, that must be unconscionable, after taking into account only the eight enumerated considerations, nothing else.
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> …
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> However morally objectionable or emotionally harmful the husband's conduct may have been in this case, it is only open to the court to respond to it under section 5(6) if it falls within one of the eight clauses of that provision. … Indeed, section 5(6) was very tightly drawn specifically so as to exclude consideration of matrimonial misconduct such as this.

[33] Therefore, while the threshold is high, two matters are clear. First, the determination can only be made after the usual equalization payment is calculated. It is that calculation that must result in unconscionability. By definition, therefore, this determination cannot be made on a pleadings motion; it can only be made once the equalization payment is known. This explains why the cases relied upon by the motions judge to strike the claim were trial judgments.

[34] Second, and perhaps most important, in my view the wife did not even need to plead s. 5(6) in her application. Section 5(6) is not a separate cause of action. The cause of action is under s. 5(1).

[35] I am aware of some lower courts' decisions to the contrary. *Taylor v. Taylor* (2004), 2004 CanLII 42952 (ON SC), 10 R.F.L. (6th) 202 (S.C.) has been cited as authority for the proposition that a claim for unequal division is separate from a claim for equal division of property. In that case, the trial judge refused to consider a claim for unequal division because it was not expressly pleaded.

[36] I prefer the reasoning in *Holden v. Gagne*, 2013 ONSC 1423, which distinguished *Taylor* because in *Taylor,* the husband did not have notice of the claim. The court stated the following at paras. 105-107:

> I am aware that the court in *Taylor v. Taylor* came to a different result holding that an unequal division per s. 5(6) must be specifically pled and cannot be assumed in a claim for equalization generally under s. 5. I agree with the specific reasoning in that case, namely that it was unfair to the husband that he was not alerted to the claim before trial. Notice of a claim and the opportunity to respond to it is a basic principle of fundamental justice, meriting a rigid adherence to the pleadings in most cases. [Citation omitted.]
>
> However, in this case, Mr. Gagne will not be surprised by the adjustment. …I am of the opinion that … the equal division of the net family properties would simply be unconscionable. In my view a variation of share is required and just in view of the circumstances.

[37] In *Janjua v. Khan*, 2013 ONSC 44, the court again distinguished *Taylor* on the basis that the husband would not be surprised by an unequal division. Although the wife did not specifically plead unequal division of net family property, it had clearly been raised as an issue prior to trial.

[38] In *Baijnauth v. Baijnauth*, 2016 ONSC 4998, the court considered a wife's claim for unequal division, even though it had not been pleaded. The court reasoned, at para. 170, that parties should rarely be denied the opportunity to make their case, and that it was clear from the statements filed by the wife prior to trial that she was seeking an unequal division.

[39] This court has concurred with this approach. In *Khanis v. Noormohamed*, 2011 ONCA 127, 91 R.F.L. (6th) 1, the husband argued on appeal that the trial judge erred in determining the wife's claim for unequal division because it was not pleaded. At para. 8, this court dismissed this ground of appeal because:

> [T]he wife was clear in her answer to the husband's position; she sought an unequal division of assets. In the circumstances, nothing further was required. No one was taken by surprise at trial. The issues in dispute were known to the parties and fully canvassed. No unfairness was occasioned.

[40] Here, the wife's cause of action was for an equalization payment. Form 8 of the family rules requires a party to indicate if there will be a claim for "equalization." A specific reference to s. 5(6) is not required as long as the parties are aware that – when the equalization payment is calculated – the court will be asked to vary the usual share of net family properties. Once an equalization payment is calculated, the court has discretion to apply s. 5(6) if the conditions are met. While notice should be given to the other spouse so that he or she has a fair opportunity to meet the case, s. 5(6) does not need to be specifically pleaded.

[41] The wife's claim under s. 5(6) should not have been struck at the pleading stage.

(4) Should portions of the wife's application be struck under r. 1(8.2)?

[42] I now return to the original motion under r. 1(8.2). As I have explained, this rule was the basis for the husband's motion and should have been applied by the motion judge. In my view, paragraph 30 on pp. 9-10 of the wife's amended application should be struck under r. 1(8.2).

[43] Legislation, jurisprudence and the practice of family law have evolved over the last decades in an attempt to eradicate allegations of marital misconduct unrelated to financial consequences. Fault grounds for divorce are rarely used, having been replaced, in practice, with separation grounds. This approach recognizes that family litigation has the potential to leave families worse at the end of the case than they were at the beginning. It recognizes that resolution is the preferred outcome. Inflammatory allegations impede resolution.

[44] The statements about the husband's conduct are inflammatory. They are – in my view – there to provide a springboard to question the husband about his extra-marital conduct, not about his net family property. As Blair J.A. said in *Serra v. Serra*, 2009 ONCA 105, 93 O.R. (3d) 161, at para. 58, it is the financial consequence of the conduct that is relevant, not the conduct itself. Extended questioning of the husband's conduct (as described in paragraph 30) that is unrelated to financial consequences would be inflammatory, a nuisance and a waste of time.

[45] The claim for unequal division of net family property in para. 19, p. 5, does not offend the rule. Nor does reference to the husband's "ten-year affair" in para. 18, p. 8.

Disposition

[46] I would allow the appeal in part by striking out only paragraph 30 on pp. 9-10 of the amended application. Since success is divided, I anticipate that the parties' agreement with respect to costs no longer stands. I would therefore request brief written submissions as to costs of the appeal.

Released: October 31, 2016

"M.L. Benotto J.A."
"I agree Alexandra Hoy A.C.J.O."
"I agree P. Lauwers J.A."