COURT OF APPEAL FOR ONTARIO

CITATION: Lavie v. Lavie, 2018 ONCA 10
DATE: 20180110
DOCKET: C61548

Sharpe, Rouleau and Fairburn JJ.A.

BETWEEN

Kevin Lavie

Applicant (Appellant)

and

Tanya Lavie

Respondent (Respondent)

Kevin Lavie, acting in person

Christine A. Torry, for the respondent

Heard: November 2, 2017

On appeal from the judgment of Justice Steve A. Coroza of the Superior Court of Justice, dated October 5, 2015 with reasons reported at [2015] W.D.F.L. 6108.

Family law – Divorce – Equalization and post-separation claims for money – Spousal and child support – Underemployment.

Rouleau J.A.:

A. OVERVIEW

[1] The appellant, Kevin Lavie, appeals from the trial judge's decision dealing with division of property, as well as spousal and child support following marriage breakdown. I would grant the appeal in part.

B. FACTS

[2] Kevin and Tanya Lavie began living together in 1998 and married in 2000. They separated in 2009.

[3] The parties have two teenaged children born in 2001 and 2004. Following their separation, the parties agreed on joint custody with the children spending equal time with both parents.

[4] Tanya worked as a teacher from 1998 to 2004. She left teaching after her second child was born. The parties agreed at that point that Tanya would not return to her teaching career so she could be more available to the children. In 2006, Tanya began operating Balls of Fun (BOF), a child play center. Based on the evidence of the expert evaluator, the trial judge determined Tanya's personal income from BOF to be $15,000 per year in 2009. She is the only shareholder of BOF and the evaluator estimated the value of her interest to be approximately $55,000.

[5] Kevin worked as an editor for a television sports show from 1996-2012. He was terminated in 2012 and was given a severance payment in December 2012. He spent most of his career working nights up until September 2008, when he began working days. His income ranged from approximately $64,000 in 2009 to $140,000 in 2012, which sum included a substantial severance payment. The trial judge determined that Kevin's appropriate income for 2012 was $77,923, excluding non-recurring income such as RSP and pension withdrawals.

[6] In his judgment, the trial judge rejected Kevin's position that he was entitled to an equalization payment of $64,915.97 and a post-separation adjustment payment of $52,669.16. Based on his assessment of the evidence, he concluded that Tanya was to make an equalization payment of $5,380.27 and that Kevin was to make a post-separation adjustment payment to Tanya of $1,440.

[7] The trial judge also ordered Kevin to pay retroactive child and spousal support of $714 and $691 per month respectively commencing November 1, 2009. The amounts were adjusted annually based on Kevin's actual income up until his termination at the end of 2012 and thereafter based on an imputed income of $70,000 per year.

[8] With respect to Tanya, the trial judge declined to impute income equal to a teacher's salary. Instead, based on the fact that the parties had agreed that Tanya should not return to teaching, he found that she was not intentionally underemployed. He therefore accepted the evaluator's opinion that her estimated income at the time of separation was $15,000. The trial judge then adjusted that figure to $25,000 in 2011 and to $35,000 in 2012 and thereafter.

[9] The judge ordered the set-off amount of child support and then added to this an amount of spousal support payable to Tanya to achieve equal net disposable incomes between the parties. This was reflected in the amount of support awarded. Given the uncertainty of Kevin's employment prospects, the trial judge also provided that Kevin could seek to have the spousal support issue reconsidered in 2017 without the need to establish a material change in circumstances.

C. ISSUES ON APPEAL

[10] As at trial, Kevin represented himself on appeal. He raises over 20 grounds of appeal challenging virtually every aspect of the trial judge's findings. Several grounds of appeal relate to how the trial judge conducted the hearing. This includes allegations that the trial judge failed to provide adequate assistance to Kevin as a self-represented litigant, made legal errors in several of his rulings, and treated Kevin unfairly in the proceeding.

[11] Many other grounds relate to findings of fact made by the trial judge in determining the value of the parties' assets and debts. Those assets and debts include the value of BOF, the value of Tanya's vehicle, the value of the shareholder loan owing to Tanya from BOF, and the responsibility for various bank and credit card debts.

[12] In oral submissions, however, Kevin focused on three areas as follows:

1. whether he received a fair hearing;
2. the trial judge's treatment of the BOF shareholder loan; and
3. the trial judge's imputation of income to him but not to Tanya.

I will address these issues in turn.

D. ANALYSIS

(1) The trial judge's treatment of Kevin

[13] From my review of the trial proceedings, I see no basis for concluding that Kevin was not afforded a fair hearing. The trial judge gave him considerable assistance as a self-represented party. At the outset of the hearing, the trial judge provided him with the Superior Court of Justice memorandum on trial procedures. The trial judge also provided regular assistance throughout the trial.

[14] Kevin was given wide latitude in his presentation of evidence, his submissions, and in his cross-examinations of Tanya and her witnesses. He was not prevented from presenting any relevant evidence. And in my view, the trial judge applied the same standards in assessing the evidence of both parties.

(2) The value of the shareholder loan

[15] Kevin also raised in oral submissions the trial judge's failure to attribute any value to the outstanding $93,097 shareholder loan owed to Tanya by BOF. Kevin had listed this in his Net Family Property Statement. In his view, because the expert valued BOF at $55,000 using an earnings-based approach, it should logically follow that the shareholder loan qualifies as an asset of Tanya's over and above the earnings-based valuation.

[16] I would dismiss this ground of appeal. The expert evidence at trial was that BOF's value to Tanya was $55,000 in total, which included the value of the shareholder loan. The expert explained that, given the amount of bank debt and the payment obligations of BOF for rent, employees, and the like, $55,000 was all that could be salvaged by Tanya if she sought to dispose of BOF. I would not interfere with the trial judge's acceptance of this expert evidence.

(3) Child and spousal support

[17] Kevin also challenges both the child and spousal support orders. In his submission, the trial judge erred in imputing income to him when he was in fact unemployed, while imputing no additional income to Tanya. He argues that the trial judge ought to have found that Tanya was intentionally underemployed. Following that, he should have imputed income to her equal to a teacher's salary in the range of $72,000 to $86,000 per year. Tanya held that position up until 2004 and remained qualified for it.

[18] For her part, Tanya maintains that imputing $70,000 in income to Kevin was not only reasonable, but inevitable given that he consented to imputing income to him in that amount. For her income, she supports the trial judge's finding that no additional income should be imputed to her.

[19] The trial judge rejected Kevin's submission that income should be imputed to Tanya. He found that because Tanya was not intentionally underemployed, there was no basis to impute income to her. The trial judge explained that:

(1) the opening of BOF in 2006 was a joint decision by the parties "for the purpose of improving their family life"; and
(2) the advantage to the parties of having Tanya operate BOF was that it allowed Tanya to be more flexible with the kids.

This, in the trial judge's view, supported his conclusion that Tanya was not intentionally underemployed.

[20] The trial judge also found that Kevin agreed to the setting up of BOF. He relied on Kevin's evidence explaining that setting up BOF was worth the sacrifices the family would endure. Those sacrifices would allow them to build a business that would be good for the future of the family and provide opportunities for them to work together as BOF developed. In his testimony, Kevin explained that one reason to create BOF was because of concerns about the job prospects in his field. The couple thought of BOF as a business that both he and Tanya would work in together.

[21] The trial judge then used the joint nature of the decision to establish BOF as support for the conclusion that no additional income should now be imputed to Tanya following marriage breakdown.

[22] For the reasons that follow, I agree with Kevin that the trial judge erred in coming to this conclusion

(a) Tanya was intentionally under-employed

[23] Section 19(1)(a) of the *Federal Child Support Guidelines*, SOR/97-175, permits the court to impute additional income where a spouse is intentionally underemployed:

> **19 (1)** The court may impute such amount of income to a spouse as it considers appropriate in the circumstances, which circumstances include the following:
>
> > **(a)** the spouse is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by the needs of a child of the marriage or any child under the age of majority or by the reasonable educational or health needs of the spouse;

[24] This section was discussed by the Court of Appeal in *Drygala v. Pauli* (2002), 2002 CanLII 41868 (ON CA), 61 O.R. (3d) 711 (Ont. C.A.). The trial judge referred to *Drygala v. Pauli* and correctly observed that in order to find intentional underemployment and impute income to a parent, there is no need to find a specific intent to evade child support obligations. He also noted that in order for parents to meet the legal obligation to support their children, they must earn what they are capable of earning.

[25] Where the trial judge erred, in my view, was in concluding that Tanya was not intentionally underemployed. He based this conclusion the fact that opening BOF was a joint decision and "was really for the purpose of improving their family life."

[26] There is no requirement of bad faith or intention to evade support obligations inherent in intentional underemployment: *Drygala v. Pauli*, at paras. 24-37. The reasons for underemployment are irrelevant. If a parent is earning less than she or he could be, he or she is intentionally underemployed. From the time she chose to start BOF and to earn $15,000 per year rather than the over $70,000 per year, Tanya would have earned returning to teaching, she was intentionally underemployed. There was also no basis on the record to find that Tanya could not resume her teaching career at the time of separation or at the time of trial. In fact, the trial judge found that her teaching career had not been compromised by her marriage or assumption of household responsibilities.

[27] In my view, the trial judge erred by rejecting the contention that Tanya was intentionally under-employed.

[28] Section 19(1)(a) also provides that the court must consider if such intentional under-employment is "*required* by the needs of a child of the marriage or any child under the age of majority or by the reasonable educational or health needs of the spouse" [Emphasis added].

[29] The trial judge found that the decision for Tanya to start BOF rather than to return to teaching was "for the purpose of improving their family life", but that does not rise to the level of a "requirement" for the purpose of s. 19(1)(a).

[30] The trial judge ought, therefore, to have concluded that s. 19(1)(a) was engaged in this case.

(b) Income should be imputed to neither or both parties

[31] Where s. 19(1)(a) is engaged, the court retains discretion to decide whether, and if so, how much, income to impute to the under-employed spouse.

[32] Here too, *Drygala v. Pauli* provides guidance. When imputing income based on intentional under- employment or unemployment, a court must consider what is reasonable in the circumstances. The factors to be considered have been stated in a number of cases as age, education, experience, skills and health of the parent: para. 45.

[33] I acknowledge that the record supports the judge's finding that Tanya's decision not to return to her teaching position and to work on building up BOF was made jointly by the parties. That alone, however, does not justify imputing $70,000 in additional income to Kevin and no additional income to Tanya.

[34] When the parties made the decision that Tanya would not return to teaching, Tanya had primary responsibility for the young children and the parties were maintaining a single combined household. Further, as Kevin testified, he was concerned about his ability to maintain his employment in his industry and considered BOF a possible way to provide for the whole family.

[35] By the time of trial, the situation had changed. The parties were now maintaining two separate households with the additional total expenses that this entails. And, as found by the trial judge, the parties were now sharing parenting responsibilities equally such that the children could only directly benefit from Tanya's extra time at home while staying with her. For the other half of the time, they would benefit equally from Kevin's ability to work fewer hours. It is also relevant that while Kevin may have chosen to support building a business from which he too could ultimately benefit, after separation, he could no longer benefit from the business' growth.

[36] Taking all of this into account, in my view it is appropriate to either impute additional income to both parties or to neither of them.

[37] While Kevin was still employed, and given the appropriateness of a period of adjustment to allow Tanya time to reengage in teaching or some other more remunerative form of employment, I would impute no additional income to Tanya. I would, therefore, leave the trial judge's support order for this period intact.

[38] However, once Kevin became *unintentionally* unemployed, it was not appropriate to impute to him his former full salary while at the same time imputing no additional income to Tanya. For the period from January 1, 2013, I would impute income of $70,000 to both parties such that they are deemed to be earning the same amount. In this way, neither party owes the other spousal or child support.

[39] In the result, I would vary the judgment to provide that as of January 1, 2013 there is no spousal or child support owing by either party. I would also modify the provision that Kevin can bring a review of spousal support after October 5, 2017 to provide that either party may bring a review of spousal or child support based on any relevant change in circumstances since trial. The parties need not meet the threshold of a material change in circumstances. A qualifying change would include that either party now has a stronger claim for child or spousal support based on bona fide but unsuccessful efforts to secure employment income beyond that earned at trial.

E. ADDITIONAL GROUNDS OF APPEAL

[40] Kevin raises a number of additional grounds of appeal. These are based on the trial judge's factual findings, are entitled to deference, and I see no reason to intervene. I would therefore dismiss the balance of the grounds of appeal.

F. FRESH EVIDENCE

[41] Both Tanya and Kevin have tendered proposed fresh evidence. In my view, the fresh evidence would not have affected the outcome of the trial. To the extent that it involves changes in circumstances since the trial, the fresh evidence is best considered in a future motion to vary the support obligations. As noted, the trial judge specifically contemplated that a review may be appropriate any time from October 2017 onward.

G. CONCLUSION

[42] In conclusion, I would allow the appeal in part to vary the child and spousal support obligations. I would reduce both spousal and child support to zero as of January 1, 2013 and adjust the amount of the arrears ordered to reflect this decision. I would also amend the review provision in paragraph 14 of the order in the manner I have set out in these reasons. In the circumstances, I would make no award as to costs.

"Paul Rouleau J.A."
"I agree Robert J. Sharpe"
"I agree Fairburn J.A."

Released: January 10, 2018