Tauber v. Tauber

48 O.R. (3d) 577
[2000] O.J. No. 2133
Docket No. C31593

Court of Appeal for Ontario
Carthy, Rosenberg and O'Connor JJ.A.
June 12, 2000
***Application for leave to appeal to the Supreme Court of Canada was filed October 17, 2000, and submitted to court January 29, 2001.**
***Note: The court agreed to hear further submissions on the issue of costs and their decision is currently under reserve.**

Family law -- Costs -- Very wealthy husband resisting paying child support in Guidelines Table amount and sought to have child support calculated under s. 4(b) of Guidelines -- Father unsuccessful at trial -- Wife unsuccessful at trial in her claim for lifetime spousal support -- Trial judge erring in awarding no costs on basis that success divided -- Wealthy payor spouse who wishes to challenge Guidelines Table child support amount should be required to pay costs -- Husband having no basis for refusing to pay Table amount under law as it stood at time of trial -- Huge disparity existing between parties' ability to pay costs of litigation -- Wife entitled to her costs of trial attributable to child support -- Wife also entitled to costs of appeal.

Family law -- Support -- Child support -- Federal Child Support Guidelines -- Husband's income for purposes of Federal Child Support Guidelines $2.5 million -- Husband ordered to pay child support in Guidelines Table amount of $17,000 per month -- Table amount far exceeding needs of child -- Amount inappropriate -- New hearing ordered on issue of child support -- Federal Child Support Guidelines, SOR/97-175, ss. 3, 4.

Family law -- Support -- Spousal support -- Trial judge refusing to order spousal support on basis that wife had no economic disadvantage from marriage and could quickly become self-sufficient -- Husband ordered to pay child support in Guidelines Table amount of $17,000 per month -- Husband's appeal from award of child support allowed and issue returned to trial court for fresh determination -- Wife's appeal from spousal support order allowed -- Trial judge erring in failing to consider all four factors set out in s. 15.2(6) of *Divorce Act* -- Issue of spousal support also returned to

trial court -- *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.), s. 15.2(6) -- Federal Child Support Guidelines, SOR/97-175.

The parties were married in May 1996 and separated in December 1997. They had one child, who stayed with the wife after the separation. In accordance with a marriage contract signed before the marriage, the husband paid the wife $100,000. Prior to the marriage, the wife worked as a wardrobe and photo stylist, earning between $45,000 and $50,000. Following the marriage, she reduced her work and earned very little. The husband was the sole owner of a very successful business. There was a dispute between the parties as to the income he earned from the company, but it was somewhere between $2.5 and $5 million annually.

Since the husband's income exceeded $150,000, child support was to be determined in accordance with s. 4 of the Federal Child Support Guidelines (the "Guidelines"). The trial judge found that the husband's income for Guidelines purposes was $2.5 million. The amount of child support payable under the Guidelines Table was thus $17,000 per month. The claim for child support was tried after the decision of the Court of Appeal for Ontario, but before the decision of the Supreme Court of Canada in *Francis v. Baker*. The Court of Appeal had held that the term "inappropriate" in s. 4(b) means "inadequate", and that the Table amounts could only be reduced in narrow circumstances, none of which applied in *Francis* or in this case. Although the trial judge felt that $17,000 per month was "inappropriate", he considered that he was bound by the decision of the Court of Appeal in *Francis* and that he was not entitled to reduce the amount of child support below the Table amount. He ordered the husband to pay child support in the amount of $17,000. Subsequently, the Supreme Court of Canada in *Francis* interpreted the relevant provisions as permitting a trial judge to reduce the child support below the Table amount if the income of the paying spouse is over $150,000 and if the Table amount is inappropriate. "Inappropriate" was interpreted as meaning "unsuitable", rather than "inadequate".

The husband sought joint custody of the child; the wife opposed it. The trial judge held that this was not a case for joint custody as joint custody is rarely imposed without consent and the parties were unable to deal with each other in the co-operative manner required of joint custodians. Sole custody was granted to the wife.

The wife sought spousal support for life. The trial judge noted that she had received $100,000 under the marriage contract, that she had received personal property with a value of $100,000 during the brief marriage, and that she had received spousal support from the husband for 15 months after the separation. He concluded that this was not a case for spousal support as the wife had suffered no economic disadvantage as a result of the marriage and could quickly become self-sufficient.

The trial judge reviewed the offers to settle that had been submitted by the parties and concluded that none of them fell within Rule 49. In his view, a trial was inevitable because of the husband's position on child support and the wife's claim for lifetime support. He concluded that success was, at best, divided and that, accordingly, there should be no costs.

The husband appealed with respect to child support and custody. The wife cross-appealed with respect to spousal support and costs.

Held, the husband's appeal with respect to child support should be allowed; the wife's cross-appeal should be allowed.

While it is now clear that "inappropriate" in s. 4 (b) of the Guidelines means "unsuitable" rather than "inadequate", there is still a presumption in favour of the Table amount. In this case, the husband had rebutted that presumption and was entitled to an assessment under s. 4(b)(ii) of the Guidelines. The evidence demonstrated that the Table amount of $17,000 greatly exceeded the needs of the child. Child support can involve some form of wealth transfer to the child and will often produce an indirect benefit to the custodial parent. This will particularly be the case with a wealthy payor spouse because of the standard of living to which the child is entitled even at the home of the custodial parent. However, at some point, the court will find that this transfer and indirect benefit no longer falls within the parameters of an appropriate child support award.

The trial judge made few findings about the means, needs and other circumstances of the child. Accordingly, the appellate court was not in a position to undertake a de novo assessment of the child support issue. A new hearing on that issue was required.

The trial judge erred in not taking all four of the factors set out in s. 15.2(6) of the *Divorce Act* into consideration in determining whether to award spousal support. He was required to consider the financial consequences arising from the care of the child "over and above any obligation for the support of the child of the marriage" and to "relieve any economic hardship of the spouses arising from the breakdown of the marriage". The issue of spousal support should be returned to the trial court for a fresh determination.

The trial judge erred in his award of costs. The rules with respect to costs in family matters have tended to be somewhat different from those in other civil litigation. Discretionary factors, including the ability to pay, can play a more significant role. Where, as in this case, there is a huge disparity in the abilities of the parties to pay the costs of the litigation, it is reasonable to consider that factor to be of paramount importance. While a child support order will have some spill-over to custodial

spouses, the first objective of the Guidelines is to establish "a fair standard of support for children that ensures that they continue to benefit from the financial means of both spouses after separation". Where, as here, the custodial parent is required to pursue litigation to vindicate that purpose, neither that parent nor the child should be penalized. It will almost always be in the interests of the wealthy non-custodial parent with virtually unlimited resources to litigate, or threaten to litigate, the issue in the hope of rebutting the presumption and substantially reducing the child support below the Guidelines amount. The custodial parent may have very limited ability to successfully defend this claim on her behalf and on behalf of the child. A costs award may be used to discourage litigation. Most importantly, the Table amount is presumptively the amount that the court should order although the paying spouse's income exceeds $150,000. If the paying spouse wishes to challenge that presumptive assessment, ordinarily he or she should be required to pay for that exercise. In this case, there was a huge disparity between the ability of the parties to pay the costs of the litigation. The effect of the costs order was to wipe out the wife's settlement from the marriage contract. It was surely not contemplated by the parties that the $100,000 from the marriage contract was to serve as a fund for litigation for the wife. As the law stood prior to trial, the husband had no legal basis for refusing to pay the Table amount. Nevertheless, he did not seek to adjourn the proceedings pending the decision of the Supreme Court of Canada. Instead, he put the wife to the considerable expense of complex litigation. The wife should have her costs of the trial attributable to child support. Further, in light of her success on appeal on the issues of spousal support and joint custody, she was entitled to her costs attributable to those issues. As to the costs of the appeal, presumptively, the wife was entitled to the costs of the appeal relating to the child support issue. In addition, she had been successful on the issues of spousal support and joint custody. Accordingly, she was entitled to her costs of the appeal and the cross-appeal.

APPEAL by the husband from orders of Jennings J. (1999), 1999 CanLII 14774 (ONSC), 43 O.R. (3d) 42 (Gen. Div.) for custody and child support; CROSS-APPEAL by the wife from orders with respect to spousal support and custody and from an award of costs.

Francis v. Baker, 1999 CanLII 659 (SCC), [1999] 3 S.C.R. 250, 44 O.R. (3d) 736n, 177 D.L.R. (4th) 1, 246 N.R. 45, 50 R.F.L. (4th) 228, affg (1998), 1998 CanLII 4725 (ON CA), 38 O.R. (3d) 481, 157 D.L.R. (4th) 1, 34 R.F.L. (4th) 317 (C.A.); *Moge v. Moge*, 1992 CanLII 25 (SCC), [1992] 3 S.C.R. 813, 81 Man. R. (2d) 161, 99 D.L.R. (4th) 456, 145 N.R. 1, [1993] 1 W.W.R. 481, 43 R.F.L. (3d) 345, apld

Other cases referred to *Andrews v. Andrews* (1980), 1980 CanLII 1913 (ON CA), 32 O.R. (2d) 29, 120 D.L.R. (3d) 252, 20 R.F.L. (2d) 348 (C.A.); *Dergousoff v.*

Dergousoff (1999), 1999 CanLII 12250 (SK CA), 177 Sask. R. 64, 199 W.A.C. 64, [1999] 10 W.W.R. 633, 48 R.F.L. (4th) 1 (C.A.); *Schmuck v. Reynolds-Schmuck* (2000), 2000 CanLII 22323 (ON SC), 46 O.R. (3d) 702 (S.C.J.); *Simon v. Simon* (1999), 1999 CanLII 3818 (ON CA), 46 O.R. (3d) 349, 182 D.L.R. (4th) 670, 1 R.F.L. (5th) 119 (C.A.)

Statutes referred to *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.) (am. 1997, c. 1, s. 2), ss. 15.2(4), (6), 15.3(2)

Rules and regulations referred to Federal Child Support Guidelines, SOR/97-175, ss. 1, 3, 4, 7, 10; Rules of Civil Procedure, R.R.O. 1990, Reg. 194, Rule 49

Gerald P. Sadvari, for appellant.
Rodica David, Q.C., and Michael F. Charles, for respondent.

The judgment of the court was delivered by

[1] ROSENBERG J.A.: -- This is an exceptional case. The principal issue concerns the child support to be paid by a support payor under the Federal Child Support Guidelines, SOR/97-175 (the "Guidelines"). This case was tried following the decision of this court in *Francis v. Baker* (1998), 1998 CanLII 4725 (ONCA), 38 O.R. (3d) 481, 34 R.F.L. (4th) 317, but before the Supreme Court of Canada decision in *Francis v. Baker*, 1999 CanLII 659 (SCC), [1999] 3 S.C.R. 250, 50 R.F.L. (4th) 228. As a result, the trial judge, Jennings J., considered that he was bound to order at least the amount set out in the Table, which he calculated to be $17,000 per month. As the law stood at the time of the trial, the trial judge was not entitled to reduce the amount of child support below the Table amount, although he clearly considered that this amount was excessive. The Supreme Court of Canada has now interpreted the relevant provisions to permit a judge to reduce the child support below the Table amount if the income of the paying spouse is over $150,000 and if the Table amount is inappropriate. This court is now called upon to consider whether, in light of the Supreme Court decision, the child support in this case should be reduced below the Table amount. We are also required to deal with the important question of costs in cases where the wealthy support payor refuses to pay the Table amount and seeks to litigate the issue.

[2] I have said that this case is exceptional because it concerns not simply a payor spouse whose income exceeds $150,000, but a spouse whose income vastly exceeds that amount. Depending on the method of calculation, the husband's annual income falls somewhere between $2.5 and $5 million. Such cases raise their own special

concerns for child support, spousal support and costs. My reasons should be read in that light. They will have limited application to cases where the income of the payor spouse is closer to the $150,000 mark.

[3] The parties have also raised several other issues including spousal support, joint custody and the disposition of a wedding gift.

[4] For the reasons that follow, I would allow the husband's appeal and order a new trial on the issue of child support. I would allow the wife's cross-appeal with respect to spousal support and order a new trial on that issue. I would dismiss the husband's appeal with respect to custody and the wedding gift. I would grant the wife leave to appeal the costs order, allow the wife's cross-appeal and order that the husband pay 80 per cent of the wife's costs of the trial.

THE FACTS

[5] The wife and husband are 37 and 46 years of age respectively. They began living together in April 1996 and married in May 1996. This was the wife's first marriage and the husband's second marriage. They had no other dependants. Prior to the marriage, they entered into a marriage contract. Their only child, a son, was born in August 1997 and is therefore not quite three years of age. The parents separated in December 1997, when the child was less than five months old. The mother and child moved out of the matrimonial home in May 1998 and, in accordance with the marriage contract, the husband paid the wife $100,000. During the marriage, the husband gave the wife a motor vehicle, works of art and jewellery, which were worth about $100,000 at the time and $60,000 at the time of the trial. The husband's parents also gave the couple a $36,000 cheque as a wedding gift. Unbeknownst to the wife, the husband never cashed the cheque.

[6] The husband is the sole owner of the shares of Ever-Reddy Duplicating Service Inc. The company is very successful, grossing $10 million in 1998. The husband has worked very hard at establishing his business and he has become wealthy through his ownership of the company. While there was a dispute between the parties as to the income he earned from the company, it was somewhere between $2.5 and $5 million annually.

[7] Prior to the marriage, the wife worked as a wardrobe and photo stylist. In her best year, which was just prior to the marriage, she earned somewhere between $45,000 and $50,000 from her employment. It had taken her many years to reach this level of income. This occupation is said to be highly competitive. She is required to be available on short notice and to work long and erratic hours. It is a difficult occupation for a single parent with custody of a small child, even with child care assistance.

Following the marriage, the wife reduced her work due to the demands of the relationship. This seems to have been in accordance with both their wishes. After she became pregnant, the mother took time off from work and only returned to part-time work after the birth of her son. While the record is not entirely clear on this issue, the wife seems to have earned very little from her occupation after the marriage. She had hoped to return to school to upgrade her training to become an interior designer, but was unable to do so following the separation.

[8] The husband presently lives alone in a home valued at approximately $2.4 million, he owns several luxury cars and has an art collection worth about $1.4 million. At the time of trial, he had money on deposit in the bank of approximately $2.5 million. The wife lives in much more modest, albeit comfortable, accommodations. The child resides with her and the husband has generous access. Both parties employ nannies to assist in the care of the child. The wife also has access to babysitting services.

[9] The wife instituted her petition for divorce and collateral relief in January 1998. The trial took place over five days in February 1999. The trial judge reserved his judgment and released his reasons (now reported at 1999 CanLII 14774 (ONSC), 43 O.R. (3d) 42) on February 17, 1999, with supplementary reasons on costs released on March 10, 1999.

[10] On March 8, 1999, the husband applied to Laskin J.A. for a partial stay pending appeal of the order for child support. In reasons reported at 1999 CanLII 2192 (ONCA), 43 O.R. (3d) 53, 49 R.F.L. (4th) 429, Laskin J.A. ordered that the husband continue to make monthly payments of $11,000 to the wife for child support and that the balance of $6,000 be paid monthly into an interest-bearing trust account. Laskin J.A. reserved the costs of the motion to the panel hearing the appeal.

THE TRIAL JUDGE'S REASONS

Child Support

[11] The husband conceded that the child should continue to reside with his wife. She sought an order for child support against her husband. Since his income exceeds $150,000, child support was to be determined in accordance with s. 4 of the Guidelines. That section provides as follows:

> 4. Where the income of the spouse against whom a child support order is sought is over $150,000, the amount of a child support order is
>
> (a) the amount determined under section 3; or

(b) if the court considers that amount to be inappropriate,

(i) in respect of the first $150,000 of the spouse's income, the amount set out in the applicable table for the number of children under the age of majority to whom the order relates;

(ii) in respect of the balance of the spouse's income, the amount that the court considers appropriate, having regard to the condition, means, needs and other circumstances of the children who are entitled to support and the financial ability of each spouse to contribute to the support of the children; and

(iii) the amount, if any, determined under section 7.

[12] The husband argued that the amount determined under s. 3 (the Table amount) was "inappropriate" and that the judge should therefore determine the amount of child support in accordance with s. 4(b). The trial judge found that the husband's income was $2.5 million for the purposes of s. 3 and that, accordingly, the Table amount would be $17,000.

[13] This case was tried in February 1999. As I have indicated, at the time the law in this province concerning the interpretation of s. 4(b) was set out in this court's decision in *Francis v. Baker*. In that decision, the court held that the Table amounts could only be reduced in narrow circumstances, none of which applied in the *Francis* case nor in this case. [See Note 1 at of document] The term "inappropriate" in s. 4(b) was interpreted as meaning "inadequate" and thus permitting an increase beyond the amounts dictated by s. 3, but not a decrease.

[14] The trial judge rightly held that he was bound by this decision although he considered that it produced a "startling" result. Based on the evidence presented, he found that the wife's household would be entirely supported by the child support payments. The trial judge did not consider this a sensible result, but, as I said, he was bound by this court's decision and he ordered the husband to pay child support in the amount of $17,000. In view of this order, there were no s. 7 requirements to be met. [See Note 2 at end of document]

Custody and Access

[15] While the husband agreed that the child should principally reside with his mother, he sought joint custody. The wife opposed joint custody. The trial judge held that this was not a case for joint custody, giving these reasons:

> Joint custody, which is rarely imposed without consent, requires a mutual commitment between parents to cooperate fully on all matters pertaining to the nurturing of their child, and an ability for the parents to put their own interests behind those of the child. It of necessity requires that each parent trust the other and be able to communicate fully, freely, and easily with the other. Sadly, I have no confidence that at the present time these parents can deal with each other in the manner required of joint custodians.

[16] The appellant submits that the trial judge took an unduly conservative approach to joint custody. He pointed out that courts have begun to impose joint custody on the parties in the absence of consent. He submits that much of the acrimony and lack of communication was a product of the litigation. He points out that both parties are intelligent and should be able to properly reach decisions in the best interests of the child. At the conclusion of oral argument the court indicated to counsel for the wife that we did not need to hear submissions from her on this aspect of the appeal.

[17] The experienced trial judge was in the best position to make the determination about joint custody. He had heard both parties testify. He recognized that in a proper case he could impose joint custody although the wife was opposed to such an order. We have not been persuaded that the trial judge made any error.

[18] At the time of trial, the husband enjoyed generous access. There was a dispute about access at trial, concerned primarily with when overnight access should commence. The trial judge resolved that matter somewhat more in favour of the husband. Access is not an issue on the appeal.

Spousal Support

[19] In her petition, the wife sought spousal support for life. At trial, she modified that claim and requested spousal support until her child reached the age of six years. The trial judge found that she was an intelligent, articulate person and, on the evidence, a person of considerable talent. He found that prior to the marriage she had earned approximately $50,000. Under the marriage contract she received $100,000 and during the marriage received personal property of a value of $100,000. She had received spousal support from the husband for 15 months after the separation. The trial judge concluded that this was not a case for spousal support [at p. 51]:

> I have no doubt that should she choose to do so she can move smoothly and quickly back into her chosen profession, from which she has been separated for only a very little while, on a full-time basis.
>
> I can find no economic disadvantage suffered by her as a result of this very brief marriage. On the evidence, her capital position improved significantly because of it and her standard of living is clearly superior now, a year and a half post separation, than to what it was prior to marriage.

[20] On appeal, the wife cross-appeals from this part of the judgment only if the husband is successful in his appeal to reduce the amount of child support.

The Wedding Gift

[21] The parties received a wedding gift from the husband's parents in the form of a cheque for $36,000 payable to their joint order. The husband put the cheque away for safekeeping and forgot about it. The wife assumed it had been cashed and that the proceeds had been used to purchase a particular work of art. The cheque could no longer be negotiated at the time of the trial. The trial judge held that all of the requirements for a valid gift had been fulfilled and the wife was therefore entitled to her half of the proceeds.

[22] On the appeal, the husband repeated the arguments made to the trial judge. The wife was not called upon to respond to this part of the appeal. We agree with the reasons of the trial judge.

Costs

[23] After the trial, Jennings J. invited the parties to make submissions on costs. He reviewed the offers to settle that had been submitted by the parties and concluded that none of them fell within Rule 49. In his view, a trial was inevitable because of the husband's position on child support and the wife's claim for lifetime support. He then considered the relative degree of success and the amounts of trial time taken on the issues in dispute. He concluded that success was, at best, divided and that, accordingly, there be no costs.

[24] The wife cross-appeals against the order of costs. She submitted that the husband should be ordered to pay her costs of the trial on a solicitor and client basis. The husband supports the trial judge's order and also indicated that he was not seeking costs even if he should be successful in upsetting the trial judgment on child support.

THE ISSUES

[25] The remaining issues for determination on appeal are the following:

Child Support

(i) Is the Table amount of child support "inappropriate" within the meaning of s. 4(b) of the Guidelines?

(ii) If so, should this court set the appropriate amount or order a new hearing in the trial court?

(iii) If a new hearing is required, should the court order a new trial or remit the matter to Jennings J.?

Spousal Support

(i) Did the trial judge err in failing to order spousal support?

(ii) If so, should this court or the trial court determine the amount of spousal support?

Costs

(i) Did the trial judge err in failing to order that the husband pay the wife's costs of the trial?

THE POSITIONS OF THE PARTIES

Child Support

[26] The husband submitted that the trial judge clearly considered that the Table amount was "inappropriate" as that term has been interpreted by the Supreme Court of Canada and, had he been free to do so, the trial judge would have set an amount well below $17,000. He submitted that this court should therefore allow the appeal and remit the matter of child support to Jennings J.

[27] The wife submitted that the husband has not rebutted the presumption that the Table amount is appropriate and the appeal should be dismissed. Alternatively, she submitted that this court should set the amount of child support or the matter should be sent for a new hearing before a different judge.

Spousal Support

[28] As indicated, if this court allows the husband's appeal on child support, the wife asked that this court make an award for spousal support. She submitted that the trial judge refused to order spousal support because he already considered the award for child support to be inordinately high. She argued that, in any event, the trial judge misapprehended the evidence concerning spousal support and erred in only considering one of the statutory factors set out in s. 15.2(6). She submitted that the combination of spousal and child support should total $18,000.

[29] The husband supported the trial judge's decision that there should be no award for spousal support. He pointed out that had the trial judge reduced the amount of spousal support because of the child support order he was required to give reasons for that decision in accordance with s. 15.3(2) of the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.). [See Note 3 at end of document]

Costs

[30] The wife submitted that the trial judge erred in failing to require that the husband pay her costs. She argued that even if the offers to settle did not fall within Rule 49, her offer was more realistic. She also submitted that, contrary to the finding of the trial judge, she achieved substantial success at the trial and that the actions of the husband, particularly his insistence on litigating the *Francis v. Baker* issue, prolonged the litigation. Finally, she relied on the fact that the husband clearly has the ability to pay the costs of the litigation and she does not, short of using the lump sum provided for in the marriage contract.

[31] The husband supported the trial judge's decision on costs. He submitted that the trial judge properly found that the offers did not fall within Rule 49 and that success at trial was divided. As to ability to pay, he argued that the $100,000 lump sum from the marriage contract was his wife's to use as she pleased, including litigating.

ANALYSIS

Child Support

(i) Was the Table amount inappropriate?

[32] It is apparent from his reasons that the trial judge was of the view that the Table amount of child support was inappropriate. However, I agree with the respondent that this is not conclusive of the issue before this court. The trial judge did not have the benefit of the Supreme Court of Canada decision in *Francis v. Baker*, nor this court's

decision in *Simon v. Simon* (1999), 1999 CanLII 3818 (ONCA), 46 O.R. (3d) 349, 1 R.F.L. (5th) 119.

[33] The scheme under s. 4, which applies where the income of the payor spouse exceeds $150,000, is to give the court two ways of calculating child support. Under s. 4(a), the judge can order the Table amount in accordance with s. 3. In Ontario, for one child, the monthly award is $1,108 plus 0.67 per cent of the income of the payor spouse that exceeds $150,000. Assuming the husband's income in this case to be $2.5 million annually, this formula produces the monthly amount of approximately $17,000, which is about 8 per cent of the husband's income.

[34] If the judge considers the Table amount to be inappropriate, the judge must make an award that is the total of:

(i) at least the Table amount for the first $150,000, i.e., $1,108 (s. 4(b)(i));

(ii) in respect of the balance of the spouse's income the amount the court considers appropriate (s. 4(b)(ii)); and

(iii) the amount determined under s. 7 (s. 4(b)(iii)).

[35] While it is now clear from the Supreme Court of Canada decision in *Francis v. Baker* that "inappropriate" in s. 4(b) means "unsuitable", rather than "inadequate", there is still a presumption in favour of the Table amount. Bastarache J. explained this presumption as follows at pp. 272-74:

> For that portion of the paying parent's income over $150,000, the strict Guidelines amount is immediately open to review; under s. 4(b)(ii) any amount attributable to income above the $150,000 threshold can be reduced or increased by a court if it is of the opinion that the amount is inappropriate having regard to the condition, means, needs and other circumstances of the children, and the financial abilities of the spouses. Nevertheless, based on the ordinary meaning of the provision, its context in the overall child support scheme, and the purposes of the Guidelines, I find that in all cases Parliament intended that there be a presumption in favour of the Table amounts. I agree with Abella J.A. that the words "Presumptive Rule" found in the marginal note beside s. 3 of the Guidelines are relevant in this regard. Accordingly, the Guideline figures can only be increased or reduced under s. 4 if the party seeking such a deviation has rebutted the presumption that the applicable Table amount is appropriate. Counsel for the appellant conceded this point in oral argument.

> The recognition of a presumption in favour of the Guideline figures does not compel a party seeking a deviation from this amount to testify or call evidence. No unfavourable conclusions should be drawn from this decision. Indeed, in some cases, such a party may not be able to provide relevant evidence. Parties seeking deviations from the Table amounts may simply choose to question the evidence of the opposing party. Whatever tactics are used, the evidence in its entirety must be sufficient to raise a concern that the applicable Table amount is inappropriate. To this end, I agree with Lysyk J. of the British Columbia Supreme Court in *Shiels v. Shiels*, 1997 CanLII 767 (BCSC), [1997] B.C.J. No. 1924 (QL), at para. 27, that there must be "clear and compelling evidence" for departing from the Guideline figures.
>
> While there must be an "articulable reason" for displacing the Guideline figures (see, for example, *Plester v. Plester* (1998), 1998 CanLII 6657 (BCSC), 56 B.C.L.R. (3d) 352 (S.C.), at para. 153), relevant factors will, of course, differ from case to case. I note, however, my agreement with MacKenzie J. in *Plester*, supra, as well as Cameron J.A. in *Dergousoff, supra*, that the factors relevant to determining appropriateness which Parliament expressly listed in s. 4(b)(ii), that is, the condition, means, needs and other circumstances of the children, and the financial abilities of both spouses, are likewise relevant to the initial determination of inappropriateness. Only after examining all of the circumstances of the case, including the factors expressly listed in s. 4(b)(ii), should courts find Table amounts to be inappropriate and craft more suitable child support awards.

(Emphasis added)

[36] Thus, in *Francis v. Baker*, although the Supreme Court held that the court can reduce the award below the Table amount where the income of the paying spouse exceeds $150,000, it nevertheless held that the Table amount was appropriate. The Table amount for the two children of the marriage in *Francis v. Baker* was $10,034. Similarly, in *Simon v. Simon*, this court held that the husband had not rebutted the presumption, although the Table amount for support of the single young child was $9,215. In these cases dealing with a wealthy paying spouse, each case will turn on its facts and particularly whether the paying spouse has been able to rebut the presumption.

[37] In my view, the husband has rebutted the presumption that the Table amount was appropriate and he is entitled to an assessment under s. 4(b)(ii). The husband called a forensic accountant to testify about a child expense budget. That budget of approximately $5,000 monthly was subject to a number of shortcomings. It was based upon limited information and on certain assumptions about the attribution of some of the common expenses, such as accommodation. The accountant was subjected to a

vigorous cross-examination that led him to concede that, based on fuller information and different assumptions, somewhat more could be allocated for a child care budget. In argument, counsel for the wife suggested that on the evidence of the husband's own accountant, $6,000 to $10,000 could be justified. I have some reservations about those figures. Even taking the $10,000 figure, this is far less than the Table amount of $17,000. That testimony provided clear and compelling evidence that the Table amount was in appropriate. The evidence demonstrated that the Table amount exceeded the needs of this healthy young child, even accepting the imprecision of child expense budgets, that the mother had only a limited financial ability to meet those needs and that she was entitled to include a large element of discretionary spending in view of the income of the husband.

[38] In *Francis v. Baker*, Bastarache J. recognized that child support can involve some form of wealth transfer to the child and will often produce an indirect benefit to the custodial parent. It seems to me that this will particularly be the case with a wealthy payor spouse because of the standard of living to which the child is entitled even at the home of the custodial parent. However, at some point, the court will find that this transfer and indirect benefit no longer falls within the parameters of an appropriate child support award. As he said at pp. 271-72:

> . . . even though the Guidelines have their own stated objectives, they have not displaced the *Divorce Act*, which clearly dictates that maintenance of the children, rather than household equalization or spousal support, is the objective of child support payments. Section 26.1(2) of the Act states that "[t]he guidelines shall be based on the principle that spouses have a joint financial obligation to maintain the children of the marriage in accordance with their relative abilities to contribute to the performance of that obligation" (emphasis added [by Bastarache J.]). While standard of living may be a consideration in assessing need, at a certain point, support payments will meet even a wealthy child's reasonable needs. In some cases, courts may conclude that the applicable Guideline figure is so in excess of the children's reasonable needs that it must be considered to be a functional wealth transfer to a parent or de facto spousal support. I wholly agree with the sentiment of Abella J.A. that courts should not be too quick to find that the Guideline figures enter the realm of wealth transfers or spousal support. But courts cannot ignore the reasonable needs of the children in the particular context of the case as this is a factor Parliament chose to expressly include in s. 4(b)(ii) of the Guidelines. Need, therefore, is but one of the factors courts must consider in assessing whether Table amounts are inappropriate under s. 4. In order to recognize that the objective of child support is the maintenance of children, as well as to implement the fairness and flexibility components of the Guidelines' objectives, courts must therefore have the discretion to remedy situations where

> Table amounts are so in excess of the children's reasonable needs so as no longer to qualify as child support. This is only possible if the word "inappropriate" in s. 4 is interpreted to mean "unsuitable" rather than merely "inadequate".

(Emphasis added)

[39] In my view, the husband made out a prima facie case that the Guidelines amount was inappropriate and exceeded the purpose of child support. This was sufficient to rebut the presumption.

[40] I should say that this does not mean that something approaching the Table amount may not in the end be awarded. It does mean, however, that the court will have to make that determination based on the factors set out in s. 4(b)(ii). Those factors are "the condition, means, needs and other circumstances of the children who are entitled to support and the financial ability of each spouse to contribute to the support of the children". Moreover, in a case such as this, involving a very wealthy support payor, the basic needs of the child are not the sole or even dominant consideration. Child support in such cases will include reasonable discretionary expenses. In *Francis v. Baker*, Bastarache J. summarized the conclusion at the trial level by Benotto J. as follows at p. 257:

> According to Benotto J., the assessment of children's "needs" is influenced by the financial position of their parents. The lifestyle the children enjoy with the wealthier parent and the lifestyle the children would have enjoyed with both parents had there been no separation are also relevant to the concept of need. What may be an extraordinary expense in a family of modest means may be a typical expense in a wealthier family. Accordingly, the higher the level of wealth enjoyed by the parents, the more inappropriate the consideration of basic need becomes. The reasonableness of discretionary expenses replaces the concept of need.

(Emphasis added)

[41] Bastarache J. later approved of this approach at pp. 279-80 in rejecting the argument of the husband that the trial judge had erred in awarding the wife discretionary expenses above the amounts listed in her budget:

> The appellant disputes the existence of a proper evidentiary foundation for such an award. I disagree. The trial judge noted that the respondent's budgets were prepared without the benefit of the appellant's financial information, and that they did not include the level of discretionary expenses that might be appropriate for children whose father is in the financial category of the appellant. Also referred to in the trial judgment is the fact that the appellant himself leads a lavish lifestyle

> and spares no expense on the children when they are with him. In my opinion, the trial judge properly considered all of the circumstances of the case in awarding the respondent additional discretionary expenses. Accordingly, the appellant has failed to show that the trial judge's decision to increase discretionary expenses was an abuse of her discretion.

(Emphasis added)

(ii) Should this court make the order for child support?

[42] The wife submits that if this court were to find that the Table amount was inappropriate, it should make the order that it considers appropriate under s. 4(b). I disagree. Because he was bound by this court's decision in *Francis v. Baker*, the trial judge made few findings of fact about the means, needs and other circumstances of the child. In effect, we are being asked to make a de novo assessment without having seen the parties testify nor having up-to-date financial information. In *Francis v. Baker*, at p. 277, Bastarache J. discouraged such an exercise by an appellate court:

> Having clarified the principles which should inform assessments of the appropriateness of child support awards under s. 4 of the Guidelines, this Court must still determine whether the appellant has met his burden of showing that the trial judge in the present case improperly exercised her discretion in holding that the Table amount was appropriate. This should not be confused with a de novo review of the fitness of the child support amount awarded by the trial judge, a review this Court will not undertake on its own initiative.

[43] In my view, this court is not in a position to undertake the kind of de novo review required to do justice to the parties and to the child. Accordingly, there must be a new hearing.

Spousal Support

(i) Did the trial judge err in failing to order spousal support?

[44] Section 15.2(4) of the *Divorce Act* sets out the factors to be taken into account in making an order for spousal support and s. 15.2(6) sets out the objectives of such an order:

> 15.2(4) In making an order under subsection (1) or an interim order under subsection (2), the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including

(a) the length of time the spouses cohabited;

(b) the functions performed by each spouse during cohabitation; and

(c) any order, agreement or arrangement relating to support of either spouse.

. . . . .

(6) An order made under subsection (1) or an interim order under subsection (2) that provides for the support of a spouse should

(a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;

(b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;

(c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and

(d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

[45] I have set out above the trial judge's reasons for not making an award of spousal support. In summary, he found that the wife suffered no economic disadvantage from the marriage and could quickly become self-sufficient. However, in *Moge v. Moge*, 1992 CanLII 25 (SCC), [1992] 3 S.C.R. 813 at p. 852, 43 R.F.L. (3d) 345 at p. 376, L'Heureux-Dubé J. held that all four of the objectives must be taken into account when spousal support is claimed. This required that the trial judge consider the financial consequences arising from the care of the child "over and above any obligation for the support of any child of the marriage" (s. 15.2(6)(b)) and "relieve any economic hardship of the spouses arising from the breakdown of the marriage" (s. 15.2(6) (c)). I can understand the trial judge's failure to refer to the financial consequences arising from the care of the child given his view that the amount of child support was already inappropriately high. However, given my conclusion with respect to child support, it will now be necessary for the judge on the new trial to consider all the objectives of spousal support. In doing so, the trial judge will have to consider whether the wife's responsibilities for the child prevent her from continuing her career at the same level as prior to the marriage and the birth of the child. Because

of those responsibilities, she may be no longer free to take every job offered on short notice nor work the kinds of hours that some of the engagements require.

[46] In view of the relationship between spousal support and child support in this case, both matters must be returned to the trial court for a fresh determination. In those circumstances, I need not consider whether the trial judge erred in his appreciation of the evidence and whether as alleged by the wife, she has been uniquely disadvantaged in reestablishing her career, notwithstanding the short duration of the marriage. All of these issues will be for the trial judge at the new trial.

(ii) Should this court determine the amount of spousal support?

[47] This court is in no better position to set the level of spousal support than the level of child support. Moreover, while the two amounts must be separately assessed and involve different considerations, in a case like this the two issues are linked, first through s. 15.2(6)(b) of the *Divorce Act* and second because, as Bastarache J. recognized in *Francis v. Baker*, the child support award inevitably will produce some indirect benefit to the wife.

(iii) Should the matter be remitted to the trial judge?

[48] I have concluded that there must be a new hearing on the questions of spousal and child support. Obviously, those issues must be determined by the same judge. In accordance with the usual practice, there should be a new hearing before a judge other than the original trial judge.

Costs

[49] The objectives of the Guidelines are set out in s. 1 as follows:

1. The objectives of these Guidelines are

> (a) to establish a fair standard of support for children that ensures that they continue to benefit from the financial means of both spouses after separation;
>
> (b) to reduce conflict and tension between spouses by making the calculation of child support orders more objective;

> (c) to improve the efficiency of the legal process by giving courts and spouses guidance in setting the levels of child support orders and encouraging settlement; and
>
> (d) to ensure consistent treatment of spouses and children who are in similar circumstances.

(Emphasis added)

[50] Where the income of the paying spouse is less than $150,000 and, in light of the decision in *Francis v. Baker*, at pp. 270-72, where the income is close to $150,000, the Guidelines can be expected to achieve these objectives. Parents will hopefully not have to waste scarce resources, which should be going to the children, to pursue litigation. However, where the income of the paying spouse vastly exceeds $150,000, the effect of expensive litigation to that spouse may be less important.

[51] One of the issues in this case is who is to pay the costs of litigation to make that determination. For the reasons that follow, subject to Rule 49 of the Rules of Civil Procedure, it is my view that absent unusual conduct, the payor spouse in such cases being in the best position to fund the litigation should be required to pay the costs attributable to the child support issues.

[52] First, the rules with respect to costs in family matters have tended to be somewhat different than in other civil litigation. This court has held that discretionary factors, including the ability to pay, can play a more significant role. In *Andrews v. Andrews* (1980), 1980 CanLII 1913 (ONCA), 32 O.R. (2d) 29 at pp. 35-36, 20 R.F.L. (2d) 348 (C.A.), Houlden J.A. set out a non-exhaustive list of factors the court should consider in awarding costs in family law matters:

> (a) The success of the parties: see *Kalesky v. Kalesky* (1974), 1974 CanLII 792 (ONCA), 5 O.R. (2d) 546, 51 D.L.R. (3d) 30, 17 R.F.L. 321. In matrimonial causes success is frequently divided; hence the success of the parties it not as important as in ordinary civil litigation;
>
> (b) The conduct of the parties prior to the commencement of the litigation. This will not involve an investigation of the "fault" or "blame" for the marriage breakdown; the days for this type of futile investigation, fortunately, are past. It will, however, include such matters as a father who has adamantly refused, without just cause, to support his children, or a mother who has, without just cause, refused access to the children: see, for example, *Sepe v. Sepe* (1978), 1 F.L.R.A.C. 220; *Brock v. Brendon* (1979), 1 F.L.R.A.C. 290;

(c) The conduct of the parties during the litigation. This will include such matters as unreasonable delay in prosecuting or defending the action, the neglect or refusal to admit something that ought to have been admitted (Rule 678), the use of wrong or defective procedures, the furnishing of wrong or misleading information, and the use of delaying or other improper tactics at trial: see *Anderson v. Anderson* (1973), 1973 CanLII 1737 (NB KB), 19 R.F.L. 344, 9 N.B.R. (2d) 457; *Brock v. Brendon*, *supra*, and *Firestone et al. v. Firestone and Boylen (No. 2)* (1979), 1979 CanLII 3595 (ON SC), 11 R.F.L. (2d) 175. If a claim under the *Family Law Reform Act*, *1978*, is joined with a claim for divorce, the making of a reasonable and realistic offer of settlement pursuant to Rule 775i(1) [enacted O. Reg. 216/78, s. 19] will be an important consideration: see *Cameron v. Cameron et al.* (1978), 1978 CanLII 1509 (ONSC), 19 O.R. (2d) 18, 83 D.L.R. (3d) 765, 2 R.F.L. (2d) 184 and 1978 CanLII 3065 (ON SC), 3 R.F.L. (2d) 277; *Weir v. Weir* (1978), 1978 CanLII 1620 (ONSC), 23 O.R. (2d) 765, 96 D.L.R.(3d) 725, 1978 CanLII 1620 (ONSC), 6 R.F.L. (2d) 189;

(d) The income and assets of each party, the relative means of each party to bear his or her own costs, and the effect of the award on the ability of a party to meet the obligations imposed on him or her by the judgment: see *Dill v. Dill* (1972), 1972 CanLII 1909 (ON SC), 9 R.F.L. 119; *Weir v. Weir*, *supra.*

(Emphasis added)

[53] Where, as in this case, there is a huge disparity in the ability of the parties to pay the costs of the litigation, it is reasonable to consider that factor to be of paramount importance.

[54] Second, I agree with the reasons of Himel J. in *Schmuck v. Reynolds-Schmuck* (2000), 2000 CanLII 22323 (ONSC), 46 O.R. (3d) 702 (S.C.J.) at p. 705 where she points out that, "[u]nlike other civil litigation, in family cases, the ability to pay a costs order or the effect of a costs award is taken into account as part of the financial arrangement on judgment".

[55] Third, while a child support order will have some spill- over to custodial spouses, the first objective of the Guidelines is to establish "a fair standard of support for children that ensures that they continue to benefit from the financial means of both spouses after separation". Where, as here, the custodial parent is required to pursue litigation to vindicate that purpose, neither that parent nor the child should be penalized. In light of the Supreme Court of Canada decision, the husband is now

entitled to challenge the Table amount, but, ordinarily, the custodial parent should not bear the cost of litigation that is for the benefit of the child.

[56] Fourth, it will almost always be in the interests of the wealthy non-custodial parent with virtually unlimited resources to litigate, or threaten to litigate, the issue in the hope of rebutting the presumption and substantially reducing the child support below the Guideline amount. The custodial parent may have very limited ability to successfully defend this claim on her behalf and on behalf of her child. A costs award may be used to discourage litigation.

[57] Finally, and most importantly, even after the decision of the Supreme Court of Canada in *Francis v. Baker*, the Table amount is presumptively the amount that the court should order although the paying spouse's income exceeds $150,000. If the paying spouse wishes to challenge that presumptive assessment, ordinarily he or she should be required to pay for that exercise.

[58] I now apply those considerations to this case. There is a huge disparity between the ability of the parties to pay the costs of the litigation. Conservatively speaking the husband had an annual income from his employment of $2.5 million in the course of this litigation. The wife had virtually no employment income during the litigation.

[59] Further, the effect of the costs order by the trial judge is to wipe out the wife's settlement from the marriage contract. Counsel for the husband argued that the $100,000 the mother received as a result of the marriage contract was hers to spend as she liked, including on litigation. This ignores the fact that she was required to pursue the litigation primarily for their son, so that she would be able to offer him a reasonable standard of living as contemplated by the Guidelines. It was surely not contemplated by the parties that the $100,000 from the marriage contract was to serve as a fund for litigation for the wife.

[60] Finally, as the law stood prior to trial, the husband had no legal basis for refusing to pay the Table amount. Nevertheless, he did not seek to adjourn the proceedings pending the decision in the Supreme Court of Canada. Instead, he has put the wife to the considerable expense of complex litigation and now the parties will have to spend further sums on the new trial.

[61] All of these considerations suggest that the husband should be required to fund the child support litigation.

[62] Obviously, there will be unusual cases where the guideline I have suggested here should not apply. Where the conduct of the custodial spouse has unreasonably lengthened the litigation or that spouse has rejected a reasonable offer, the court will

have to consider whether the custodial spouse should bear her own costs. However, there was no such conduct here. To the contrary, it was the husband who exacerbated the dispute by giving contradictory information about his income and subjected the wife's budget to the kind of minute examination that the Supreme Court disapproved in *Francis v. Baker* at p. 276 quoted above.

[63] As for the costs of the trial, since there was more than one issue, the principles I have set out above do not entirely resolve the question of costs. I start with the trial judge's view. He concluded his reasons for costs as follows:

> The petitioner's claim for support was dismissed. The respondent failed to persuade me that I was not bound by *Francis v. Baker*. A subsidiary issue taking much trial time was that of the quality, quantity and conditions of access, resolved more nearly to the respondent's position than that of the petitioner.
>
> Under those circumstances, I am of the opinion that success was, at best, divided. The trial time taken on the Guideline issue was minimal, apart from a lengthy examination and restricted mainly to legal argument. Considering all of the foregoing, I do not think this is a case for costs, and there will be no order in that regard.

[64] In light of what I consider the governing principles, the wife should have her costs of the trial attributable to the child support. Further, in view of her success in this court on those issues, she is entitled to the costs attributable to spousal support, joint custody and the gift. She is not entitled to her costs respecting the access issue. Accordingly, in my view, the wife should have 80 per cent of her costs of the trial.

[65] As to the costs of the appeal, presumptively, the wife is entitled to the costs of the appeal related to the child support issue. In addition, she has been successful on all of the other issues of spousal support, the gift and joint custody. Accordingly, in my view, the wife is entitled to her costs of the appeal and the cross-appeal.

[66] I have considered whether the costs should be on a solicitor and client basis. There is much to be said for the custodial parent receiving more complete compensation for the costs of that part of the litigation attributable to the child support issue. Nevertheless, it is important to attempt to strike the proper balance. While for the reasons that I have set out above it is my view that the paying spouse in these unusual cases should bear the costs of the litigation, the courts must also avoid making rules that would encourage unnecessary litigation. If custodial spouses knew that they could pursue the litigation in these types of cases with virtually no costs to themselves at all, they would have no incentive to attempt a reasonable resolution of the s. 4 issues. Accordingly, I think the better course is to apply the general principle

that an award of solicitor and client costs is exceptional. This case has not involved the kind of misconduct that has led courts to award solicitor and client costs in family matters. Accordingly, I would award the costs on a party-and-party scale.

Disposition

[67] Accordingly, I would allow the husband's appeal and direct a new trial on the issue of child support. In all other respects, I would dismiss his appeal. I would allow the wife's cross-appeal and order a new trial on the issue of spousal support. I would grant leave to appeal the costs order, allow the appeal and order that the wife have 80 per cent of her costs of the trial payable on a party-and-party scale. I would also order that the wife have her costs of the motion before Laskin J.A. and of the appeal and the cross-appeal payable on a party-and-party scale.

[68] I would direct that the wife's costs be paid out of the funds held in trust pursuant to the order of Laskin J.A. The balance should be returned to the husband. Pending the new trial, I would order that the husband continue to pay $11,000 monthly as child support.

Appeal allowed in part; cross-appeal allowed.

* * * * *

Notes

Note 1: For example, where the Table amount would cause undue hardship to the payor spouse (s. 10 of the Guidelines).

Note 2: Section 7 provides that the court may make provision for certain expenses such as child care expenses and so on, so-called "add ons": see *Dergousoff v. Dergousoff* (1999), 1999 CanLII 12250 (SKCA), 48 R.F.L. (4th) 1 at p. 10, [1999] 10 W.W.R. 633 (Sask. C.A.). On consent, the wife was permitted to file fresh evidence concerning certain nursery school expenses. In view of my conclusion that there must be a new trial, it is unnecessary to consider whether the husband should have been required to pay this expense under s. 7.

Note 3: Section 15.3(2) provides as follows:

> 15.3(2) Where, as a result of giving priority to child support, the court is unable to make a spousal support order or the court makes a spousal support order in an amount that is less than it otherwise would have been, the court shall record its reasons for having done so.

I doubt that this subsection applies in the circumstances of this case. The subsection is directed to a case where the paying spouse does not have sufficient means to pay the full amount of child and spousal support. In such a case, s. 15.3(1) directs the court to give priority to the child support. This was not a case where the court was "unable" to make a spousal support order because it had to give priority to the child support. However, in view of my conclusion with respect to child and spousal support in this case, I need not finally decide the issue.