

COURT OF APPEAL FOR ONTARIO

CITATION: Whalen-Byrne v. Byrne, 2017 ONCA 729

DATE: 20170920

DOCKET: C61858

Laskin, Feldman and Miller JJ.A.

BETWEEN

Kellie Whalen-Byrne

Applicant
(Respondent/Appellant in
Cross-Appeal)

and

Timothy Raphael Byrne

Respondent
(Appellant/Respondent by
Cross-Appeal)

Michael J. Polisuk, for the appellant/respondent by way of cross-appeal

Chelsea Hooper and Christina Doris, for the respondent/appellant by way of cross-appeal

Heard: August 24, 2017

On appeal from the order of Justice Peter A. Douglas of the Superior Court of Justice, dated February 17, 2016, with reasons reported at 2016 ONSC 1172.

REASONS FOR DECISION

[1] Both the appellant Timothy Byrne and the respondent Kellie Whalen-Byrne appeal from the February 17, 2016 order of Douglas J., which dealt with child support and spousal support. Each party raises a single issue.

[2] Mr. Byrne submits that the trial judge erred by failing to characterize a \$75,000 advance he made to Ms. Whalen-Byrne as a payment on account of spousal support.

[3] On her cross-appeal, Ms. Whalen-Byrne submits that in fixing the duration of spousal support, the trial judge erred by finding that the length of the parties' cohabitation was only 13 years instead of 16.5 years. Thus, Ms. Whalen-Byrne contends that the trial judge erred in holding that the duration of spousal support should be 11 years from the date of separation.

[4] We did not call on Ms. Whalen-Byrne on Mr. Byrne's appeal, which we would dismiss. However we agree with Ms. Whalen-Byrne's submission on the cross-appeal. We order Mr. Byrne to pay Ms. Whalen-Byrne spousal support in the amount fixed by the trial judge for a period of 14 years from the date of separation.

(1) The \$75,000 payment

[5] Ms. Whalen-Byrne began this litigation in 2011. On October 23, 2013, Mulligan J. made an order on the consent of the parties that Mr. Byrne pay Ms. Whalen-Byrne interim disbursements of \$75,000. The order resolved Ms. Whalen-Byrne's motion for interim disbursements. Importantly, the order provided: "The aforesaid payment is without prejudice to the issue of whether or not such payment shall be credited against an equalization payment." In April 2015, the parties resolved all net family property issues, and their resolution was incorporated into a final order. This order included provision for a \$399,000 equalization payment from Mr. Byrne to Ms. Whalen-Byrne. The order said nothing about the \$75,000 advance for interim disbursements.

[6] Mr. Byrne argues that the \$75,000 advance should be applied against his support obligation. The trial judge rejected this argument and so do we. The short answer to Mr. Byrne's argument is found in the terms of Mulligan J.'s order, to which Mr. Byrne consented. If Mr. Byrne was to receive any credit for his \$75,000 advance, it was to be a credit against an equalization payment, not against his support obligation. As equalization issues were resolved well before this trial, Mr. Byrne must fail on his appeal.

(2) Length of cohabitation and duration of support

(a) Length of cohabitation

[7] The parties began living together in June 1993. Around this time, they bought a house together. Mr. Byrne had two children from a previous relationship, a boy who was three years old and a girl who was five months old. The children lived mainly with Mr. Byrne and Ms. Whalen-Byrne.

[8] From the end of October 1996 until March 1997 – a period of approximately five months – Ms. Whalen-Byrne moved out of the matrimonial home and stayed with her mother. The parties then got back together, and married in late June 1999.

In 2001, Mr. Byrne and Ms. Whalen-Byrne had a child together, a girl. They separated on April 25, 2010.

[9] Under the *Divorce Act*, R.S.C. 1985, c. 3 (2d. Supp.), the length of cohabitation is a relevant factor in determining the duration of spousal support. The trial judge found that for the purpose of Ms. Whalen-Byrne's claim for spousal support, the period of cohabitation was 13 years from March 1997 to April 2010. In other words he did not include the three years and five months the parties had cohabited before their brief separation in October 1996. Instead he held at para. 153 of his reasons:

It appears that following the Applicant moving in with her mother the parties continued to be open to the possibility of continuing a relationship; however, both parties were taking steps to put distance between themselves (ie. cessation of cohabitation and pursuit of relationships with other persons other than the other party). The most reasonable interpretation is that the parties intended to be separate from one another subject, at best, to the possibility of resumption of cohabitation. I find therefore that the period of cohabitation for consideration in respect of the Applicant's claim for spousal support commences March 1997 and concludes with separation on April 10, 2010 for a period of thirteen years.

[10] Ms. Whalen-Byrne submits that the trial judge erred by, in effect, restarting the period of cohabitation in March 1997. He should have instead taken into account the parties' entire period of cohabitation from June 1993, and then deducted from it the five month period of their temporary separation.

[11] We agree with Ms. Whalen-Byrne's submission. We need not decide whether the trial judge erred in law in failing to take into account the previous period of cohabitation. On the evidence before him, his failure to do so was unreasonable and justifies our intervention.

[12] Mr. Byrne and Ms. Whalen-Byrne never formally separated in October 1996. At most what occurred was "interim separation" of brief duration with, as the trial judge found, "the possibility of resumption of cohabitation." The following pieces of evidence show that the period of cohabitation should not have been restarted in March 1997, but should have included the period before the parties briefly separated:

- The period when the parties lived apart was brief, only five months;
- When Ms. Whalen-Byrne left she took only a suitcase of clothes, and did not remove any furniture from the house;
- The parties did not separate their finances;

- Mr. Byrne continued to support Ms. Whalen-Byrne, including allowing her to use a credit card in his name;
- Although Mr. Byrne remained in the house with his two children, Ms. Whalen-Byrne returned to the house regularly to spend time with the children;
- Although Ms. Whalen-Byrne went on a few dates with another man, she was not involved in another relationship;
- In December 1996, Mr. Byrne proposed marriage to Ms. Whalen-Byrne, with a ring and in front of the children, to which she replied “not yet”; and,
- By February 1997 the parties were discussing marriage.

[13] The appropriate period of cohabitation for the purpose of support is 16 years and 10 months (June 1993 to April 2010), less the 5 month period the parties lived apart – a total period of cohabitation of 16 years and 5 months.

(b) The duration of spousal support

[14] In fixing the duration of spousal support of 11 years from the date of separation, the trial judge took into account the relevant considerations under the *Divorce Act*. He also took into account the Spousal Support Advisory Guidelines (Ottawa: Department of Justice Canada, 2008) (“Guidelines”). For a period of cohabitation of 13 years, the Guidelines propose a duration of support between 6.5 years and 13 years from the date of separation. The trial judge’s order of 11 years was towards the upper end of the range.

[15] If instead the period of cohabitation is, as we have concluded, 16 years and 5 months, the Guidelines propose a minimum duration of 8.25 years and a maximum duration of 16.5 years from the date of separation.

[16] Mr. Byrne submits that even though the range is higher for the longer period of cohabitation that we have found, we should nonetheless defer to the trial judge’s order of 11 years of support from the date of separation. Mr. Byrne points out correctly that the duration of support depends on many considerations and that 11 years is still within the range proposed by the Guidelines.

[17] We do not accept Mr. Byrne’s submission. The trial judge’s reasons make it evident that he took into account the range proposed by the Guidelines in fixing the duration of support. Therefore we think it appropriate to take into account the higher range associated with the longer period of cohabitation.

[18] Consistent with the trial judge’s assessment, we fix the duration of spousal support toward the upper end of the applicable range. The duration of support for Ms. Whalen-Byrne should be 14 years from the date of separation.

[19] We therefore allow Ms. Whalen-Byrne’s cross-appeal and vary para. 2 of the order of the trial judge by substituting the date of March 31, 2024 for the date of

March 31, 2021. Ms. Whalen-Byrne is entitled to her costs of the appeal and the cross-appeal fixed in the amount of \$7,500 inclusive of disbursements and HST.

“John Laskin J.A.”

“K. Feldman J.A.”

“B.W. Miller J.A.”