CITATION: Beck v. Beckett, 2011 ONCA 559
DATE: 20110822
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COURT OF APPEAL FOR ONTARIO

Rosenberg, Moldaver and Feldman JJ.A.

BETWEEN

Brenda Yvette Beck

Appellant

and

Daniel Clifford Beckett

Respondent

Erin L. Reid, for the appellant

Charles S. Morison, for the respondent

Heard: March 15 and 16, 2011

On appeal from the judgment of Justice P. Z. Magda of the Superior Court of Justice, dated March 2, 2010 and from the Cost Endorsement of Justice Magda dated May 19, 2010.

Rosenberg J.A.:

[1] Brenda Beck appeals the judgment of Magda J. relating to child and spousal support under the *Family Law Act*, R.S.O. 1990, c. F.3. The claim for support arises out of the breakdown of a twenty-two year relationship between the appellant and the

respondent, Daniel Beckett. The principal issues raised by the appellant concern the amount of income imputed to the respondent and the trial judge's decision to refuse to make an order for lump sum spousal support. The appellant also seeks leave to appeal the costs order made by the trial judge.

[2] For the following reasons, I would allow the appeal in part.

THE FACTS

[3] The appellant and the respondent began living together in 1984. At the time, she was working at Woolco and he was working at General Motors in Scarborough. The appellant stopped working in 1990 with the birth of their first child. A second child was born in 1992. The appellant assumed primary responsibility for the care of the children and left full-time employment. However, she did some part-time work at Costco to supplement the family income.

[4] Although the parties were not married this was in all respects a traditional relationship. The appellant took on primary responsibility for raising the children and keeping the household. The family's principal source of income was the respondent's full-time employment at General Motors, first in Scarborough and later at the plant in Oshawa. He is also a skilled handyman, but did not apparently earn any income from this skill.

[5] The parties separated in September 2006 and the respondent began a relationship with another woman. He now has a young child from this new relationship. When the

parties separated, the respondent had an annual income from General Motors of almost $73,000. He had also accrued a substantial pension. The portion of the pension attributable to the period of the parties' relationship is approximately $400,000. At the time of the separation, the appellant was working part-time at Costco and caring for the children. Her annual income was approximately $36,000. However, due to the stress of the separation, she stopped working for a period of four months.

[6] An important event for the purposes of this appeal is the respondent's decision to take voluntary retirement from General Motors in April 2007 at the age of forty-nine. The respondent received a $70,000 severance package. He did not seek further employment but rather began to live off his pension benefits. He stayed home to take care of his new child. The respondent's new spouse was laid off from General Motors in 2008 and trained as a real estate agent. To the date of trial, she had only earned a nominal income.

[7] On June 6, 2008, Gonsolus J. made an interim order requiring the respondent to pay the mortgage on the parties' home and the minimum amount required on their line of credit. He complied with this order. He did not, however, otherwise pay child or spousal support. In October 2008, the parties sold their house for $480,000. After various deductions, the appellant was paid $125,000. The respondent's share of $126,000 plus interest was held in trust pending the outcome of the trial and is still being held in trust pending the resolution of this appeal. After the house was sold, the respondent stopped paying the home expenses and continued not to pay child or spousal support. The

appellant and the children moved into a new home purchased with the funds from the sale of the parties' home and money from her mother. The appellant also began to work full time at Costco.

[8] The trial of this matter was scheduled to proceed in May 2009, but was adjourned at the respondent's request. A term of the order of Roswell J. granting the adjournment was that the respondent pay child support in the amount of $666.00 per month based on an imputed income of $73,000. The trial proceeded in November 2009 in Oshawa. At that time the children were 19 and 17 years of age and resided with the appellant. The older child was no longer in full-time attendance at school. He worked at a low-paying job and was still supported by the appellant. At one point after the separation the younger child lived with the respondent. The length of time was a matter of dispute at the trial.

[9] The appellant's income in 2009 was $48,118. She has had some health problems, particularly with her eyesight, which have had some impact on her ability to work. The respondent's income, from his pension, was $41,768. He also has health problems.

THE REASONS OF THE TRIAL JUDGE

Imputed Income

[10] The trial judge found that the respondent was justifiably concerned about the economic future of General Motors in Oshawa and was at risk of being laid off for a substantial period of time. If he was laid off, his income would drop below what he

would be entitled to from his pension if he took the retirement package that was being offered. The trial judge accepted the respondent's evidence about these risks and the advice he had received, and found that he retired to "salvage as much as he could from his 30 years of employment with General Motors". The trial judge rejected the allegation that the respondent retired to reduce or avoid his support obligations.

[11] The trial judge went on to find that the respondent was intentionally unemployed in the sense that his unemployment was a voluntary act. Since the respondent had made no effort to find any kind of employment to supplement his pension income, the trial judge held that some income must be imputed to him. The trial judge accepted that there is no chance that the respondent could again be employed at General Motors or in a similar manufacturing job, since such jobs are simply not available. It was therefore not realistic to impute to the respondent the $73,000 he was making at General Motors. Bearing in mind that he was 53 years of age with a Grade 10 education, the most that could be imputed to him was $19,760 per year for minimum wage work. Together with his pension income, this would bring his income up to $61,528.

Child and Spousal Support

[12] The appellant sought spousal support and an order for lump sum support. The trial judge found that while she was entitled to spousal support, this was not a case for lump sum support. In reaching this conclusion, the trial judge considered a number of factors

previously identified as relevant in determining whether a lump sum support order is appropriate in the circumstances:

> (1) Difficulties in enforcing periodic payments—this was not a concern since the respondent had complied with orders to pay.
>
> (2) The possibility that the respondent's livelihood will become precarious—at least for the time being the pension is "solid".
>
> (3) Sufficient assets from which to make the lump sum—the only sum available is the respondent's share of proceeds of the sale of the house, which would not be sufficient to meet the award sought by the appellant.
>
> (4) Risk the respondent would leave the jurisdiction—there is no evidence he would leave Ontario and he has substantial ties in the area.
>
> (5) Termination of personal contact is desirable—the parties have two sons and so will always have some kind of contact and there have been no threats or violence or abuse between the parties.
>
> (6) Disparity in income—in fact, the appellant's financial situation appears to be healthier than the respondent's.
>
> (7) Compensation for the appellant's lost pension benefits—to make an award on this basis would amount to a redistribution of property under the guise of spousal support contrary to the holding in *Mannarino v. Mannarino* (1992), 43 R.F.L. (3d) 309 (Ont. C.A.).
>
> (8) To provide for the appellant's immediate needs—the evidence did not show any such need.
>
> (9) To compensate for lost career opportunities—the appellant did not lose career opportunities; she has worked part-time and now full-time at Costco and is "probably fully up to her potential"; the respondent's career did not advance during his time at General Motors.

> (10) The relationship was of short duration—this was a lengthy common-law relationship of over 22 years.
>
> (11) The dependent spouse has established a new relationship—here it was the payor who had established a new relationship.
>
> (12) To effect a retroactive award of spousal support—the trial judge did not order retroactive support to the appellant.
>
> (13) To enable the dependent spouse to discharge a debt—there was no evidence that the appellant had any large debts due.
>
> (14) There is little chance of future variation—a lump sum award might deprive the respondent of the opportunity to apply to vary support in the event of a material change in circumstances; there was a real potential for the pension income to change in 2015.

[13] As to support, the trial judge found that the respondent should pay child support for the younger child in the amount of $570.00 per month. As a result, the appellant would have 54.7 percent of the parties' net disposable income. Accordingly, an additional amount for spousal support would be inappropriate. This issue could, however, be revisited once the younger child was no longer dependent.

Child Support Credit for the Youngest Child

[14] As I have indicated, there was some evidence that the younger child had lived with the respondent for some of the time after separation. The trial judge found that he lived with the respondent for 21 months from May 2007 to March 18, 2009. As a result, the respondent was entitled to be credited for child support he should have received from the appellant in the amount of $7,438.00. The trial judge deducted $1,140 from that amount

for child support for the months of April and May 2009, which the respondent did not pay. This left a net amount of $6,208.

Unjust Enrichment

[15] In her notice of application, the appellant sought a 50 percent constructive trust in the respondent's pension plan and related benefits accumulated during the course of the relationship, or a monetary award, on the basis of unjust enrichment. However, she abandoned this claim during the trial.

Costs

[16] The trial judge found that the respondent was successful on the two most contentious issues in the case: the appellant's claim for lump sum spousal support and his claim for retroactive child support for the younger child. The trial judge was also of the view that the appellant's claim for lump sum support bordered on the unreasonable and her claim to impute income to the respondent in the amount of $73,000 per year was "patently unrealistic" and "inappropriate". In his view, the respondent had acted more reasonably "throughout". There was no reason not to apply the presumption that costs should follow the event and he awarded the respondent costs in the amount of $15,000 inclusive of disbursements and GST.

ANALYSIS

Unjust Enrichment

[17] As I have said, at the trial, the appellant abandoned her claim for a constructive trust over a share of the respondent's pension on the basis of unjust enrichment. She did not raise the issue in her original Notice of Appeal nor in the two Amended Notices of Appeal. In her factum, dated October 5, 2010, counsel for the appellant wrote as follows:

> It should be noted that while, for reasons unexplained, the Appellant's counsel did not pursue a constructive trust claim against the Respondent in Appeal's pension at trial, the Appellant did plead in her Application for a monetary award arising from her contributions to the pension based upon the principles of a constructive trust. The Appellant did not amend her Application and it was still open to Justice Magda to award this relief. It is settled law that pension benefits accrued during periods of cohabitation may be awarded to common law partners either through money judgments or constructive trust remedies.

[18] At the oral argument of the appeal, the appellant filed the decision of the Supreme Court of Canada in *Kerr v. Baranow*, 2011 SCC 10 released February 18, 2011. It was suggested that *Kerr* supports expanded entitlement for a common law spouse to share in the assets accumulated during the course of a "joint family venture" on the basis of unjust enrichment. The appellant did not seek leave to amend her Notice of Appeal after the *Kerr* decision was released. She also did not apply to adduce fresh evidence to explain why she had abandoned her unjust enrichment claim. Aside from the reference in her factum, counsel for the appellant only addressed the question of constructive trust and the

impact of the *Kerr* decision in response to questions from the court during the oral argument.

[19] In my view, it would not be appropriate to consider the issue of unjust enrichment at this stage of the proceedings. The appellant had ample opportunity to directly raise the issue at the hearing of the application and by seeking leave to amend her Notice of Appeal. In addition, it would be difficult to deal with an unjust enrichment claim at this juncture. Such a claim would have to take into account the package of relief granted to the parties, including the even division of the proceeds of the sale of their residence, award of child support, and the respondent's circumstances. Further, because the unjust enrichment claim was abandoned at trial, the trial judge did not make the factual findings necessary to support that claim. Given that the claim was abandoned at trial, the absence of factual findings in relation to the question of unjust enrichment, and the fact that the issue was never raised in the Notice of Appeal, we must leave the issue of unjust enrichment to the side.

Lump Sum Support

[20] I have summarized the trial judge's reasons for refusing to make a lump sum support award. In *Davis v. Crawford*, 2011 ONCA 294, a five-person panel of this court revisited the question of lump sum spousal support and, in particular, reconsidered the court's earlier decision in *Mannarino*, upon which the trial judge relied in part. In *Davis*, the court clarified that lump sum spousal support is not reserved only for cases where

there is a real risk that periodic payments would not be made or other very unusual circumstances. Rather, s. 34 of the *Family Law Act* confers a broad discretion on judges to make an award of periodic or lump sum spousal support as appropriate under the circumstances. That said, at para. 60, the court reaffirmed that a lump sum award should not be made in the guise of support for the purpose of redistributing assets. This is the issue for which the trial judge made reference to *Mannarino*.

[21] The court discussed at paras. 60 – 76 of *Davis* a number of considerations as relevant to the question of the propriety of a lump sum spousal support award. One important consideration is whether the payor has the ability to make a lump sum payment without undermining the payor's future self-sufficiency. The court explains that there is a need to weigh the perceived advantages of making a lump sum award in the particular case against any presenting disadvantages, and that the advantages and disadvantages of making such an award will be highly variable and case specific. The court identified a number of these advantages and disadvantages at paras. 67 and 68, most of which were referred to by the trial judge. The court noted that as a practical matter, most spousal support orders will be in the form of periodic payments. But, a lump sum award will not necessarily take the place of periodic support and can be made to supplement an award of periodic support.

[22] The standard of review of a support order is set out in *Davis* at para. 77. This court should not overturn a support order unless the reasons disclose an error in principle, a significant misapprehension of the evidence, or unless the award is clearly wrong. In

my view, there is no basis for interfering with the trial judge's decision refusing to award lump sum support. The trial judge did not approach the issue on the basis that such an award is reserved for exceptional cases. He considered almost all of the factors identified by this court in paras. 67 and 68 of *Davis* and found that the overwhelming number of those factors told against a lump sum award.

[23] The appellant's principal submission on this issue was that there was a real risk that the respondent would not comply with an award of periodic support payment. She points to two factors to support this submission. First, the respondent did not pay a costs order made by Roswell J. and second, that he did not made the child support payments ordered by the trial judge. I do not accept this submission. The costs order was relatively small and pending trial, the respondent had otherwise complied with court orders. The fresh evidence tendered by the appellant does show that the respondent was not making the child support payments ordered by the trial judge. Counsel for the respondent explained that the respondent did not have sufficient funds to pay child support because his share of the proceeds from the sale of the house remain in trust, and his only income is from his pension. Given the history prior to trial, once the respondent has access to the funds that have been sitting in trust since 2008, it is reasonable to believe it will not be difficult to enforce a periodic support order.

[24] Admittedly, the trial judge might have weighed some of those factors differently. I would not have attached much significance to the fact that the appellant was seeking an award that would exceed the amount available from the respondent's share of the

proceeds from the sale of the house. As indicated, a lump sum award will not necessarily take the place of periodic support and can be made to supplement an award of periodic support. However, this was but one of the factors considered by the trial judge and on the evidence, it was open to the trial judge to refuse to make the lump sum award.

Spousal Support

[25] While the trial judge held that the appellant was entitled to spousal support, he refused to make such an order having regard to the order for child support and the relative incomes of the parties. Again, I cannot say that this decision was unreasonable or reflects an error in principle. The factors the court is to take into account in deciding whether to award spousal support are set out in s. 33(9) of the *Family Law Act*. A review of those factors supports the trial judge's decision, including the parties' current assets and means, the assets and means they will have in the future, the appellant's capacity to contribute to her own support and the respondent's capacity to provide support.

[26] On his findings of fact, it was open to the trial judge to conclude that this was not a case for spousal support on the basis of the compensation principle. As indicated, the trial judge found that the appellant's earning capacity was not affected by the nature of the relationship and the parties' decision that she would leave full-time employment. This finding was open to the trial judge. The only opportunity that the appellant may have lost as a result of her part-time rather than full-time employment was an

employment pension. The trial judge, however, made no findings in support of this conclusion.

[27] The appellant submits that the order for spousal support should take into account the fact that she is not entitled to a share of the respondent's General Motors pension. However, this overlooks the context of this case. As I will explain, I would make an order for spousal support retroactive to November 2010. As a practical matter, this spousal support will likely be paid out of the respondent's pension.

[28] The trial judge expressly left open the possibility that the appellant could apply for spousal support once the respondent was no longer obligated to pay child support for the youngest child. We were informed at the hearing of the appeal that the youngest child is no longer a dependant as of November 2010. Rather than require the parties to return to the Superior Court to vary the judgment, I would vary the judgment to eliminate the order for child support and replace it with an order for spousal support as of December 2010 at the rate of $433 per month; this amount stands at the mid-range of the *Spousal Support Advisory Guidelines* (Ottawa, Department of Justice, 2008): *Fisher v. Fisher* (2008), 88 O.R. (3d) 241 (C.A.).

Imputed Income

[29] The appellant submits that the trial judge erred in only imputing income to the respondent on the basis of minimum wage unskilled employment. She submits that the trial judge should have imputed income to him in an amount comparable to what he was

earning at General Motors as was done in the interim order of Roswell J. when the trial was adjourned. The parties adduced no evidence, aside from their own testimony, about employment prospects in the Oshawa area. In those circumstances, this court must defer to the trial judge's view of what amount was reasonable to impute to the respondent. In fact, the appellant's own evidence tended to support the trial judge's conclusion. The only employment opportunities she was aware of that might suit the respondent were at stores like Canadian Tire and Home Depot, which, while hiring employees, were offering only the minimum wage or "maybe a little bit more".

[30] In *Drygala v. Pauli* (2002), 61 O.R. (3d) 711 (C.A.) at para. 45, Gillese J.A. reviewed the factors to be considered in imputing income to a parent who is intentionally under-employed or unemployed:

> 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. See, for example, *Hanson, supra*, and *Cholodniuk v. Sears* (2001), 14 R.F.L. (5th) 9, 204 Sask. R. 268 (Q.B.). I accept those factors as appropriate and relevant considerations and would add such matters as the availability of job opportunities, the number of hours that could be worked in light of the parent's overall obligations including educational demands and the hourly rate that the parent could reasonably be expected to obtain.

[31] The trial judge considered most of these factors, in particular the respondent's age, education, experience, skills and health and the little evidence there was on the

availability of employment in the area. I have not been persuaded that there is any basis for varying the order imputing income to the respondent.

Retroactive Child Support

[32] The resolution of this issue at trial turned on where the younger son, was living following separation. The appellant claimed that he was living with her throughout the relevant period and therefore she was entitled to retroactive child support. There was conflicting evidence on the issue, which the trial judge resolved against the appellant. Having found that younger son was living with the respondent for a period of 21 months, the trial judge ordered the appellant to pay retroactive child support to the respondent. Unfortunately, the trial judge failed to take into account that the older son was living with the appellant for the entire time post-separation (when he was still a dependant) and that both children were living with the appellant for some periods of time. In fairness to the trial judge, it is not at all clear that this particular issue was raised at the trial as clearly as it should have been.

[33] Counsel for the respondent conceded that if these other issues were taken into account, the appellant would not owe the respondent any retroactive child support.

[34] One final issue is that, as we have noted, the respondent has not made any child support payments in accordance with the trial judge's order. The child support payments that should have been made should therefore be paid out of the funds currently held in

trust before the funds are released to the respondent. The amount of spousal support retroactive to November 2010 will also be paid from the trust funds.

COSTS

[35] The appellant also seeks leave to appeal the costs order made by the trial judge. As indicated, the trial judge found no reason to interfere with the normal rule that costs should follow the event. The principal issues at the trial were lump sum spousal support and imputing income. The appellant was unsuccessful on the lump sum support issue but successful on the issue of whether the respondent was deliberately unemployed, although the amount of income imputed to him was less than was sought by the appellant. She sought to impute income equivalent to the respondent's income at the time he retired from General Motors. The trial judge characterized the appellant's position on this issue as patently unrealistic. In my view, this was an error in principle. Just a few months earlier, Roswell J. had made an order imputing $73,000 in income to the respondent. The appellant, who had a similar background to the respondent, had been able to obtain employment with an income of almost $50,000. The trial judge found as a fact that the income should be imputed to the respondent only at the rate of minimum wage, but the appellant's position could not properly be described as patently unreasonable. This should not have been a factor in fixing costs of the trial. I would grant leave to appeal the costs award, and having regard to the divided success at trial I would order that the parties bear their own costs of the trial.

DISPOSITION

[36] Accordingly, I would allow the appeal in part as follows:

- The order for child support is terminated as of November 30, 2010.
- The respondent shall pay to the appellant spousal support as of December 1, 2010 in the amount of $433 per month.
- Term 4 of the Order requiring the appellant to pay child support arrears is deleted.
- Term 9 of the Order is varied to require that arrears of child support and spousal support payable by the respondent shall be paid out of monies held in trust before the funds are released to the respondent.

[37] I would grant leave to appeal costs, allow the appeal and order that there be no costs of the trial. Similarly, given the divided success on the appeal, I would make no order for costs of the appeal.

RELEASED:

"MR"
"AUG 22 2011"

"Marc Rosenberg J.A."
"I agree M.J. Moldaver J.A."
"I agree K. Feldman J.A."