In the Court of Appeal of Alberta

Citation: Johnson v Goyette, 2018 ABCA 353

Date: 20181030
Docket: 1701-0223-AC
Registry: Calgary

Between:

Sandra Johnson

Appellant

- and -

Danielle Goyette

Respondent

The Court:

The Honourable Mr. Justice J.D. Bruce McDonald
The Honourable Mr. Justice Thomas W. Wakeling
The Honourable Madam Justice Michelle Crighton

Memorandum of Judgment

Appeal from the Order by
The Honourable Madam Justice C. Dario
Dated the 22nd day of June, 2017
Filed on the 31st day of August, 2017
(Docket: FL01-12743)

Memorandum of Judgment

The Court:

Introduction

[1] The appellant, Sandra Johnson, appeals the trial decision regarding unjust enrichment, joint family venture and division of property.

Background Facts

[2] The parties were in a 13-year common law relationship that commenced in 1997 and ended in 2010. During their relationship, the respondent, Danielle Goyette, was a professional women's hockey player and competed in three Olympic Games. While the appellant had somewhat greater financial means at the outset of their relationship, the respondent came to earn more than the appellant because of prize money, grants and gifts she received as a result of her hockey successes. These funds were used to pay out the mortgage on the parties' primary residence, pay for renovations to the primary residence, and to acquire a rental condominium and interests in other ventures. The only joint asset of the parties was their primary residence, which was initially bought by the appellant and after the respondent paid off the mortgage, she was added to the title. All other assets acquired by the respondent were held in her name alone.

[3] At the end of the relationship, the respondent sued for an equal division of the primary residence. The appellant counterclaimed for a share of the respondent's assets on the basis of unjust enrichment and joint family venture. She alleged that she undertook a majority of the domestic work, prepared lunches for the respondent while she was training for the Olympics, provided assistant coach and administrative assistance to the respondent after she retired from playing and became the head coach for the Dinos women's hockey team, and assisted the respondent with the rental condominium. The respondent denied that the appellant provided the bulk of these services.

[4] The parties never had any children, although they attempted in vitro fertilization. They occasionally vacationed together, but also took separate trips with friends. They kept separate bank accounts and credit cards, and shared most expenses. The appellant accompanied the respondent home for Christmas on one or two occasions despite the respondent going home for the holidays most years. The appellant did not allege that she tailored her work, training or education plans around the respondent's career. The respondent was instrumental in assisting the appellant with finding employment. The appellant also alleged that she was terminated from her employment because of the respondent.

Decision of the Trial Judge

[5] The trial judge heard a five-day trial and witnesses were called for both sides (a number of whom were mutual friends of the appellant and respondent). Overall, the trial judge preferred the evidence of the respondent and her witnesses over that of the appellant and her witnesses. She found that while the appellant provided some of the assistance she claimed, she somewhat overstated her contributions. The trial judge found that unjust enrichment was established, but not a joint family venture.

[6] Under the joint family venture analysis, the trial judge considered four factors: mutual effort, economic integration, actual intent and priority of the family. She found there was some evidence of mutual effort, but the other three indicators of a joint venture were not established. There was no economic integration but clear evidence of independence of the parties' finances. She found there was no actual intention to form a joint family venture. The trial judge found the parties held themselves out as a couple, but the respondent was very exacting in the parties' accounting and allotment of household expenses. She found the respondent intended to keep her wealth separate and communicated that to the appellant through her conduct. This included the designations of single status on the respondent's tax returns. Priority of the family, meaning a party has given priority to the family in their decision made to her detriment, was found by the trial judge not to have been established on the appellant's work history.

[7] Taking into account the relative contributions of the parties, on the basis of *quantum meruit*, the trial judge awarded the appellant $45,000. She also directed that the parties split the value of the primary residence, as of 2016, on an equal basis. She rejected the appellant's claim that she should be entitled to an exemption for the down payment on the primary residence. She also rejected the respondent's claim that the amounts she paid for the renovations or additional contributions to payments on the primary residence should be brought into account.

Grounds of Appeal

[8] On appeal the appellant submits:

a. the trial judge misunderstood the law of unjust enrichment as it relates to common-law partners, and consequently committed a palpable and overriding error;

b. the trial judge ignored, forgot, or misapprehended material evidence in finding the parties were not engaged in a joint family venture during their 13-year relationship; and

c. in making the above errors, the trial judge failed to remedy the disproportionate retention of the wealth accumulated during the relationship by the respondent.

Standard of Review

[9] A trial judge's findings of fact or inferences of fact are reviewed for palpable and overriding error; findings of mixed fact and law involving the application of a legal standard to a set of facts, and the interpretation of evidence as a whole are reviewed for palpable and overriding error: *Buchner v Long*, 2017 ABCA 382 at paras 11 and 12, quoting *Housen v Nikolaisen*, 2002 SCC 33, [2002] 2 SCR 235 at paras 10, 25, 36 and 37.

[10] "Whether there was a joint family venture is a question of fact and may be assessed by having regard to all of the relevant circumstances, including factors relating to (a) mutual effort, (b) economic integration, (c) actual intent and (d) priority of the family": *Kerr v Baranow*, 2011 SCC 10 at para 100, [2011] 1 SCR 269.

Analysis

Unjust Enrichment

[11] The trial judge correctly identified the elements for unjust enrichment: the claimant must show that the defendant has been enriched, the claimant suffered a corresponding detriment, and there is no "juristic reason" for the enrichment. She considered each element but before coming to a conclusion on unjust enrichment, she proceeded to consider whether there was a joint family venture. Ultimately, she found unjust enrichment, but did not find that a joint family venture existed.

[12] In our view, the trial judge did not make a palpable and overriding error in her finding that the appellant had established that unjust enrichment applied in this case.

Joint Family Venture

[13] The appellant's main ground of appeal is the trial judge's failure to find a joint family venture. As stated in *Kerr*, this determination is a question of fact. In order for this court to intervene, the appellant must show an overriding and palpable error.

[14] The Supreme Court of Canada decision in *Kerr* addressed five issues. The discussion of joint family venture arose in the analysis of the nature of the money remedy for an unjust enrichment claim. The Supreme Court concluded that always restricting the monetary award to a "value received" or "fee-for-services" approach was inappropriate because it failed to reflect the reality that many domestic relationships are essentially joint ventures to which both partners contribute. Further, the dichotomy between *quantum meruit* and constructive trusts situations was a false one as it was inconsistent with the inherent flexibility of the concept of unjust enrichment

and ignored the historical basis of *quantum meruit* claims. Finally, the Supreme Court's decision in *Peter v Beblow*, [1993] 1 SCR 980, did not mandate fee-for-services as some courts had held.

[15] The Supreme Court pointed out that many domestic relationships should be realistically viewed as joint family ventures in which both parties have contributed over time to an accumulation of wealth. In such situations, "the unjust enrichment should be thought of as leaving one party with a disproportionate share of the jointly earned assets": *Kerr* at para 60.

[16] In a joint family venture situation and where "there is a clear link between the claimant's contributions to the joint venture and the accumulation of wealth", the "wealth created during the period of cohabitation will be treated as the fruit of their domestic and financial relationship, though not necessarily by the parties in equal measure" (para 81).

[17] In determining whether a joint family venture exists, Cromwell J stated at para 88:

> It is critical to note that cohabiting couples are not a homogeneous group. It follows that the analysis must take into account the particular circumstances of each particular relationship. Furthermore, as previously stated, there can be no presumption of a joint family venture. The goal is for the law of unjust enrichment to attach just consequences to the way the parties have lived their lives, not to treat them as if they ought to have lived some other way or conducted their relationship on some different basis. A joint family venture can only be identified by the court when its existence, in fact, is well grounded in the evidence. The emphasis should be on how the parties actually lived their lives, not on their *ex post facto* assertions or the court's view of how they ought to have done so.

[18] He then set out some hallmarks which he grouped under four main headings: mutual effort, economic integration, actual intent and priority of the family. But noted at para 89:

> There is, of course, overlap among factors that may be relevant under these headings and there is no closed list of relevant factors. What follows is not a checklist of conditions for finding (or not finding) that the parties were engaged in a joint family venture. These headings, and the factors grouped under them, simply provide a useful way to approach a global analysis of the evidence and some examples of the relevant factors that may be taken into account in deciding whether or not the parties were engaged in a joint family venture. The absence of the factors I have set out, and many other relevant considerations, may well negate that conclusion.

[19] In this case, the appellant urged the panel to carefully review the evidence. Having done so, some problems may be noted in the trial decision.

[20] In considering mutual effort, the trial judge acknowledged that there was mutual effort towards the respondent's career and success, but that they did not use their funds for "family purposes". She appeared to give little weight to the joint efforts towards the family home because as she noted, "all costs relating to the sole joint asset, the home, were allocated on a 50:50 bases".

[21] There were some difficulties with the trial judge's earlier conclusion that the appellant overstated her contributions to the respondent's career. With respect to the respondent's athletic career, the trial judge pointed out that according to the respondent's witness, leg massage "flushing" was not effective. The trial judge did not recognize the effort made by appellant, and gave little, if any, weight to the testimony of Ms. Miller and Ms. Wickenheiser about the importance of family support for athletic performance, which they both testified was provided by the appellant.

[22] With respect to the respondent's coaching career, the trial judge relied upon an erroneous recollection of the appellant's testimony to conclude she did not provide 20 hours per week assisting with emails, misstated the evidence of the appellant's assistant coach work, and gave little, if any, weight to the testimony of Ms. Millar and Ms. Berg regarding their observations of the assistance provided by the appellant.

[23] However, these errors and omissions do not amount to overriding and palpable errors regarding the appellant's contributions. The trial judge found that the appellant had made contributions towards the respondent's career.

[24] Under economic integration, the trial judge found no economic integration, noting, among other facts, that the parties had split the household expenses. In *Kerr* the court stated at para 92, "The sharing of expenses and the amassing of a common pool of savings may also be relevant considerations (citations omitted)." In this case, there was no amassing of a common pool of savings.

[25] This stands in contrast to the situation in *Thompson v Williams*, 2011 ABQB 311, 87 RFL (6th) 133, where although the parties had kept separate bank accounts and credit cards, the trial judge found that "[t]hey worked together to develop a real estate rental portfolio that would help fund their retirement. On balance I am satisfied that they were engaged in a form of joint family venture, albeit pursuant to an arrangement that was not as financially integrated as would be the case in many marriages" (para 42). In this case, the only "common" asset was the primary residence and the trial judge dealt with that specifically.

[26] Further, at para 93 in *Kerr* the court stated, "The parties' conduct may further indicate a sense of collectivity, mutuality, and prioritization of the overall welfare of the family unit over the individual interests of the individual members (citations omitted)."

[27] The trial judge found this was not established because the respondent sold her car to the appellant. She also pointed out, "Although Ms. Johnson suggested that she left the Home Depot

position to be available to assist Ms. Goyette, the evidence on this is unclear as to whether that was the motivation or if she left because she felt comfortable with the new position at the Olympic Oval, which was a full-time position."

[28] That conclusion appears somewhat inconsistent with the evidence of the appellant, and which the trial judge had earlier noted:

> [T]here is no indication of a specific lost opportunity, such as an inability to pursue training or a different career or even more employment. The one exception was after Ms. Johnson began working at the Olympic Oval and [sic] 2008 and subsequently gave up her part-time work at Home Depot.

[29] The conclusion merely reflects the trial judge's reconciliation of the inconsistent evidence. The appellant stated she did not initially give up the Home Depot job when she obtained the Olympic Oval position because she was unsure if she would like working there. We discern no overriding and palpable error in the trial judge's reconciliation of that evidence.

[30] In calculating remedy, the trial judge made numerous references to the money and effort the respondent spent on the house renovations, and the provision of benefits to the appellant such as all expenses paid international trips, but she made no mention of those facts in considering a joint family venture. The trial judge focused mainly on the appellant's contributions or deprivations in the joint family venture analysis, but in *Kerr*, the court pointed out that the actions of the better off partner may also be indicators (para 99).

[31] However, even if the trial judge overlooked or failed to give weight to some of the evidence that shortcoming does negate the facts found by the trial judge that support her conclusion. It cannot be said that her conclusion under this heading was the result of an overriding and palpable error.

[32] Under actual intent, the trial judge noted the facts pointed both ways. The parties were joint tenants, which suggested intent to share wealth, but the trial judge then suggested this may be because the respondent did not understand the distinction with tenants in common. There is no evidence at all from the respondent to support this; she was never asked anything about the title to the house.

[33] The trial judge also found they held themselves out as a couple, which also supports actual intent. But on the other hand, she found they segregated their finances, and the respondent's actions with respect to the investment properties showed no intent to share her wealth.

[34] The trial judge found that the appellant was not designated a beneficiary on any of the respondent's RSPs or life insurance. The evidence on that finding is unclear. The appellant testified that she was told that she had been designated a beneficiary, but the trial judge found the respondent provided evidence of her RRSPs and insurance beneficiaries since 2009 showing the

appellant was not designated a beneficiary. There was no testimony from the respondent to contradict the appellant's evidence. The documentary exhibits at trial were not included in the appeal extracts of evidence. More confusingly, the respondent's counsel in cross-examining the appellant suggested the appellant was designated a beneficiary of a life insurance policy to facilitate the respondent's wish to be buried in Quebec. Other than counsel's questions, there was no evidence on this.

[35] The trial judge also described the respondent's "independent actions with respect to other properties in which she was invested". It is unclear what she is referring to as there was evidence that the appellant assisted with at least the one rental property. However, she also found that the respondent mainly dealt with the investment properties by herself.

[36] The trial judge stated, "[T]here was no intent, at least on [Ms. Goyette's] part, to share her wealth with Ms. Johnson. I find this was communicated clearly to Ms. Johnson through Ms. Goyette's conduct". This appears somewhat inconsistent with her earlier findings that the respondent shared her wealth by providing the funds for the house renovation and paying for other things such as vacations for the appellant.

[37] "The stability of the relationship may be a relevant factor as may the length of cohabitation (citations omitted)": *Kerr* at para 95. In *Vanasse v Seguin*, the appeal considered along with *Kerr*, a joint family venture was found where, among other facts considered, the couple had a 12-year relationship. The trial judge in this case did not refer to the stability of the relationship in her analysis, but she was clearly aware of the fact as she had earlier found the relationship had lasted 13 years.

[38] The trial judge recognized there were facts which indicated actual intent and other facts which did not. While the trial judge may not have noted all possible factors, the appellant cannot point to an overriding and palpable error in the trial judge's conclusion that actual intent had not been established.

[39] Under the heading priority of family, the trial judge stated, "there is little evidence of Ms. Johnson leaving the workforce or being underemployed or forgoing career or education advancement for the sake of the relationship". She noted the one exception was the appellant quitting the part-time Home Depot job.

[40] In this case, the trial judge made no reference to the parties' intentions in her determination of family priority. She referred to the discussions of what might happen if the parties had a child or if the respondent was offered a job in another location, but stated, "these situations did not materialize". Earlier in her reasons, in discussing deprivation as part of the unjust enrichment analysis, she also referred to the possibility of a child or move but noted none of these things happened and stated, "The deprivation cannot be theoretical, it must be actual". She seemed to apply the same reasoning to her joint family venture consideration.

[41] In *Kerr*, the Supreme Court pointed to the fact that Ms. Vanasse and Mr. Seguin considered marriage although it never happened. The court considered the parties' future plans as facts to be considered in finding a joint family venture.

[42] In considering priority of the family, *Kerr* further explained at para 98, "The focus is on contributions to the domestic and financial partnership, and particularly financial sacrifices made by the parties for the welfare of the collective or family unit." The focus is not only on financial sacrifices. In *Kerr*, in finding a priority of the family in the *Vanasse v Seguin* appeal, Cromwell J included at para 152, "a disproportionate share of the domestic labour" as a fact supporting a joint family venture.

[43] The trial judge in this case made no mention of the domestic contributions in her analysis on priority of the family. However, she made reference to them earlier in her decision. Her failure to repeat the domestic contributions as a factor and her omission of consideration of intentions do not amount to an overriding and palpable error as she also found factors to support her conclusion that priority of the family was not satisfied.

[44] "Cohabiting couples are not a homogenous group": *Kerr* at para 88. The assessment need not fit neatly into a pattern. As stated in *Kerr* at para 89, when undertaking a joint family venture analysis, the factors are not closed, and the four main headings, mutual effort, economic integration, actual intent and priority of family, is not a checklist. The determination is an assessment having regard to all of the relevant circumstances.

[45] The trial judge was aware of the facts that the appellant emphasizes on appeal. As discussed above, there are some problems with some of the fact findings of the trial judge, but none of those were major factors. As well, she failed to explicitly repeat some of the facts in her joint family venture analysis, but that lack of explicit reference does not establish that she did not consider those facts.

[46] The standard of review is one of overriding and palpable error; this court cannot reweigh the evidence. The trial judge found facts supporting her conclusion including the lack of joint bank accounts, lack of joint investments, designating themselves as single on their respective income tax returns, and making major purchases separately. The appellant has not shown the errors or omissions to be sufficient to warrant appellant intervention.

Remedy

[47] As there is no basis to interfere with the trial judge's conclusion on joint family venture, her assessment on the appropriate remedy must be considered on the basis of her conclusion that there was an unjust enrichment.

[48] "Remedies for unjust enrichment are restitutionary in nature; that is, the object of the remedy is to require the defendant to repay or reverse the unjustified enrichment": *Kerr* at para 46.

The first remedy is always a monetary award: *Kerr* at para 47. "[A] monetary remedy must match, as best it can, the extent of the enrichment unjustly retained by the defendant" *Kerr* at para 73.

[49] In this case, the trial judge provided a remedy for unjust enrichment which she stated sought to appropriately recognize the parties' relative contributions. She found that the appellant contributed to the respondent's success but also found that much of the respondent's success and asset accumulation was due to her individual talent and singular efforts. The appellant has not shown an overriding and palpable error in the trial judge's assessment of those contributions.

[50] The appellant specifically submits that the trial judge erred by not exempting the initial $64,000 down payment on their home. This court recently confirmed that the concept of exempt property found in the *Matrimonial Property Act*, RSA 2000, c M-8, at section 7(2) applies only to married parties: *Strigl v Howden*, 2018 ABCA 337 at para 7.

[51] Determining the proportionate contributions of the parties is not an exact science: *Kerr* at para 102. Where the trial judge considered all the evidence and exercised judgment in the remedy granted, the decision is entitled to deference: *Buchner v Long*, 2017 ABCA 382 at para 27.

Conclusion

[52] This appeal is dismissed.

Appeal heard on September 11, 2018

Memorandum filed at Calgary, Alberta
this 30th day of October, 2018

McDonald J.A.

Authorized to sign for: Wakeling J.A.

Crighton J.A.

Appearances:

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