2017 ONCA 558
Ontario Court of Appeal

Barber v. Magee

2017 CarswellOnt 9971, 2017 ONCA 558, [2017] W.D.F.L. 4013, [2017] W.D.F.L. 4018, [2017] W.D.F.L. 4023, [2017] O.J. No. 3409, 139 O.R. (3d) 78, 282 A.C.W.S. (3d) 132

Haley Barber (Applicant / Respondent) and Neil Magee (Respondent / Appellant)

H.S. LaForme J.A., C.W. Hourigan J.A., and David M. Paciocco J.A.

Heard: June 27, 2017
Judgment: June 29, 2017
Docket: C.A. C61647

Proceedings: affirming *Barber v. Magee* (2015), [2015] O.J. No. 6818, 2015 CarswellOnt 19620, 2015 ONSC 8054, Fitzpatrick J. (Ont. S.C.J.)

Counsel: John Bruggeman, for Appellant
Michael Stangarone, Serena Lein, for Respondent

Subject: Civil Practice and Procedure; Estates and Trusts; Family; Property

Headnote

Family law --- Division of family property — Determination of ownership of property — Application of trust principles — Resulting and constructive trusts — Matrimonial homes

Husband's father, K, advanced $90,414 and $67,000 ("disputed monies") to husband throughout parties' marriage, which was invested in matrimonial home, held in husband's name — Husband took position that disputed monies were loans to him for purposes of calculating net family property — After trial, trial judge ordered equal division of net family property — Judge held that disputed monies were gifts, not loans, so they were not liability in calculation of husband's net family property — Judge found that wife rebutted presumption of resulting trust with respect to disputed monies — Evidence established that disputed monies were intended by K as gifts with no clear expectation that these funds would be returned — Judge relied on factors set out in case law dealing with resulting trust, which included no documents evidencing loan, no evidence of demand for repayment before separation, no litigation commenced by K to collect alleged loan, and no repayments made — Judge did not require wife to rebut presumption of resulting trust with affirmative evidence — Husband appealed — Appeal dismissed — Judge correctly stated and applied law of resulting trusts — When judge commented on what was not present by way of indicia of loans, he was not reversing onus of proof — It would have been preferable if judge had not said that he was not persuaded that monies were loans, but in context of accurate statements of law and analysis, it was clear that judge was alive to presumption of resulting trust and assignment of burden — Judge did not err in evaluating evidence — Judge did not err in awarding prejudgment interest from date of separation.

APPEAL by husband from judgment reported at *Barber v. Magee* (2015), 2015 ONSC 8054, 2015 CarswellOnt 19620, [2015] O.J. No. 6818 (Ont. S.C.J.), ordering equal division of family property and characterizing payments from husband's father as gifts.

Per curiam:

1 Neil Magee, the appellant, and Hayley Barber, the respondent, agree that the appellant's father, Ken Magee, advanced $90,414 and then $67,000 to the appellant, all of which was invested in the matrimonial home held in the appellant's name. If these advancements were loans, they are debts owed by the appellant, reducing his net family property. If they were gifts, they

are included in the appellant's net family property. The appellant appeals the decision of the trial judge that these advancements were gifts.

2 The appellant argues that these advancements are presumed not to be gifts, yet the trial judge reversed the onus of proof, expecting him to prove that they were loans. The appellant also contends that the trial judge erred in fact and law in finding that the advancements were gifts on the evidence before him. Finally, the appellant urges that the trial judge erred in awarding prejudgment interest during the period when the respondent occupied the home. None of these alleged errors occurred.

3 The trial judge correctly stated the law of resulting trusts, and he applied the law correctly. The trial judge's task was to weigh all of the evidence in deciding the father's actual intention at the time of the transactions, and that is what he did: *Pecore v. Pecore*, 2007 SCC 17, [2007] 1 S.C.R. 795 (S.C.C.), at para. 44.

4 Generally, there are objective indicators that can assist in determining whether an advancement is a gift or a loan: *Locke v. Locke*, 2000 BCSC 1300, [2000] B.C.T.C. 681 (B.C. S.C.), at para. 21; *Klimm v. Klimm*, 2010 ONSC 1479, [2010] O.J. No. 968 (Ont. S.C.J.), at para. 28-32; *Mora v. Mora*, 2011 ONSC 2965, [2011] O.J. No. 2188 (Ont. S.C.J.), at paras. 38-40. A gift is a transfer in which the absence of an expectation of repayment tends to be reflected in the absence of security, recording, payments or efforts to collect payments. A loan often involves a formal, recorded transfer in which terms are set out and in which repayment is made or sought. In evaluating whether the presumption of resulting trust has been rebutted, a trial judge will naturally look at such indicia.

5 When the trial judge was commenting on what was not present by way of indicia of loans, he was not reversing the onus of proof. He was looking at the presence or absence of objective criteria that could help him characterize the payments. Even though the burden is on the party claiming a gift to prove it, it is quite appropriate for a trial judge to notice the failure of the party who would be in control of documents and records of a loan to produce such documents. The relevant inference is not that the party is hiding the truth by not producing anything; it is that the absence of indicia of a loan that one would reasonably expect to find suggests that the advancement was not a loan but a gift. There was no error in the trial judge reasoning in this way.

6 It would have been preferable if the trial judge had not commented that he was "not persuaded that the monies advanced were loans." However, it is clear in the context of his accurate statements of the law, his close discussion of the burden, and his analysis, that he was alive at all times to the presumption of resulting trust and the proper assignment of the burden. This ground of appeal is denied.

7 Nor did the trial judge make any palpable and overriding errors in evaluating the evidence. He was entitled to accept the respondent's explanation for comments attributed to her, and her testimony, and to reject the evidence of the appellant and his father.

8 Finally, the trial judge did not err in awarding prejudgment interest from the date of separation. Section 128(1) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 (the "*CJA*") provides that prejudgment interest is "calculated from the date the cause of action arose," which in this case was the date of separation. While s. 130(1)(c) of the *CJA* confers discretion to award prejudgment interest for a period other than that provided in s. 128(1), the trial judge was not asked to do so and was entitled not to do so.

9 The appeal is dismissed. The respondent is awarded costs of the appeal in the amount of $10,000 inclusive of disbursements and HST.

Appeal dismissed.

End of Document