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COURT OF APPEAL FOR ONTARIO

DOHERTY, LASKIN and JURIANSZ JJ.A.

B E T W E E N :	)	
	)	
LOUISE HELEN HOCKEY-SWEENEY	)	**Donald F. Bur for the appellant**
	)	
Petitioner (Appellant)	)	
	)	
- and -	)	
	)	
LAWRENCE PERCIVAL SWEENEY	)	**Harold Niman and Deborah F. Zemans for the respondent**
	)	
(Respondent)	)	
	)	
	)	**Heard: August 27, 2004**

On appeal from the judgment of Justice Peter B. Hambly of the Superior Court of Justice dated July 8, 2002 reported at [2002] O.J. No. 3165.

LASKIN J.A.:

I. Introduction

[1] The appellant, Mrs. Hockey-Sweeney, and the respondent, Mr. Sweeney, separated in 1999 after a sixteen-year marriage. They have three children, now 19, 18 and 14 years old.

[2] The parties litigated their differences over the children, the amount of the equalization payment and spousal support in an acrimonious five-week trial before Hambly J. Mrs. Hockey-Sweeney chose to represent herself. The two principal issues at trial were whether Mr. Sweeney had disclosed all his assets and whether he ought to have included in his net family property statement the shares of several companies owned

beneficially by a trust – the LILAC Trust – which he established in 1997 for the benefit of his children. The trial judge accepted Mr. Sweeney's evidence, and rejected Mrs. Hockey-Sweeney's allegation that her husband had not disclosed or accounted for all his assets.

[3] After granting the parties their divorce, the trial judge made the following corollary orders:

A. The Children: Mrs. Hockey-Sweeney and Mr. Sweeney were given joint custody, but the children were to live primarily with Mr. Sweeney. Mr. Sweeney was also given the sole power to make decisions affecting the children. The two older children could decide how much time they wished to spend with their mother. Mrs. Hockey-Sweeney was given specified access to the youngest child.

B. Equalization Payment: Mrs. Hockey-Sweeney was ordered to pay Mr. Sweeney $553,390.45. This equalization payment largely reflected Mrs. Hockey-Sweeney's ownership of the two main items of family property: the matrimonial home valued at $1,000,000 and a thirty-four foot yacht valued at $511,000.

C. Spousal Support: Mr. Sweeney was ordered to pay Mrs. Hockey-Sweeney $3,500 per month.

D. Costs: Mrs. Hockey-Sweeney was ordered to pay Mr. Sweeney his costs of the action, fixed at $200,000.

[4] Mrs. Hockey-Sweeney is now under a disability. On this appeal she was represented by the Public Guardian and Trustee. In her factum she advanced numerous grounds of appeal. In her oral argument she focused on three submissions:

1. The trial judge failed to advise her that she could read in evidence from the transcript of Mr. Sweeney's discovery and that she could use the transcript to cross-examine him.

2. The trial judge erred by failing to order Mr. Sweeney to produce documentation relating to the LILAC Trust and by proceeding with the trial in the absence of this documentation.

3. The trial judge erred by failing to hold that Mr. Sweeney had a property interest in the LILAC Trust.

[5] In addition to these submissions Mrs. Hockey-Sweeney brought a motion to introduce fresh evidence on the appeal. We dismissed this motion. We also did not find it necessary to hear from Mr. Sweeney on the three submissions Mrs. Hockey-Sweeney advanced orally. We did, however, call on Mr. Sweeney to respond to the submission

raised in Mrs. Hockey-Sweeney's factum that the spousal support award was inadequate. In my view, it was inadequate. I would increase the amount of monthly support from $3,500 to $5,000.

II. Background Facts

(a) Marriage

[6] The parties met in England where they married in 1983. After living in England for a while, they moved to the Bahamas and then, in 1997, to Burlington, Ontario.

(b) Employment

[7] Mrs. Hockey-Sweeney is a talented writer. She has not, however, worked outside the home since shortly after the marriage. At present she is unemployable.

[8] Mr. Sweeney began his career as a banker. Since then he has worked in a variety of businesses. He earns over $200,000 annually.

(c) The LILAC Trust

[9] At trial, Mr. Sweeney testified that he preferred not to hold shares in his business interests. In 1997, he set up the LILAC Trust – the name is comprised of the initials of the family members – to hold the shares of the holding companies that owned shares in his businesses. His brother Mark Sweeney, who lives in New Zealand, is the trustee. The three children are the beneficiaries of the trust.

(d) Separation

[10] The parties' marriage started to deteriorate in 1999. The marriage ended because of Mrs. Hockey-Sweeney's fantasized romantic relationship with her next-door neighbour, even though he was openly gay and told her of his sexual orientation. The parties formally separated in late September 1999.

(e) Custody, Access and Support

[11] In December 1999, Mrs. Hockey-Sweeney was given interim custody of the children. Mr. Sweeney was ordered to pay monthly child support of $3,221 and monthly spousal support of $5,000. In late August 2001, Mrs. Hockey-Sweeney said that she could no longer care for the children. Since then they have been in Mr. Sweeney's care. At trial, Mrs. Hockey-Sweeney did not seek to alter this arrangement, though she sought a role in making decisions about the children, which was rejected by the trial judge. Although Mr. Sweeney no longer paid Mrs. Hockey-Sweeney child support after August 2001, he continued to pay his wife's spousal support of $5,000 per month until the trial.

III. The Trial

[12] Although the trial was lengthy, only the parties testified. Mrs. Hockey-Sweeney produced a long list of witnesses and summonsed many of them, but called none of them.

[13] During the course of the trial she made three main allegations against her husband. First, she alleged that he had physically abused her. The trial judge entirely rejected this allegation. He concluded that he could not accept any of Mrs. Hockey-Sweeney's allegations against her husband unless the allegation was confirmed by credible independent evidence. Where the evidence of Mrs. Hockey-Sweeney differed from that of her husband, the trial judge preferred the evidence of Mr. Sweeney.

[14] Second, Mrs. Hockey-Sweeney alleged that Mr. Sweeney had hidden assets and had breached a series of court orders requiring him to produce financial information. The trial judge also dismissed this allegation and Mrs. Hockey-Sweeney's various motions in support of it. He concluded that Mr. Sweeney had no hidden assets and that Mrs. Hockey-Sweeney knew he did not all along. He also concluded that Mr. Sweeney had tried to comply with Mrs. Hockey-Sweeney's request for financial information, for example, by signing the directions asked of him. Some of these were not honoured by third parties, partly because Mrs. Hockey-Sweeney sent threatening and abusive correspondence to people from whom Mr. Sweeney sought cooperation.

[15] Third, Mrs. Hockey-Sweeney alleged that Mr. Sweeney maintained an interest in the LILAC Trust and in the companies whose shares the Trust held, and that he had told his brother not to produce any Trust documents supporting her contentions. The trial judge rejected this allegation. He accepted Mr. Sweeney's evidence that Mrs. Hockey-Sweeney knew about the Trust, approved of its creation, and knew what was in it. The trial judge noted that the Trust was created in 1997, well before the parties experienced difficulties in their marriage and, therefore, he rejected the suggestion that Mr. Sweeney created the Trust to put assets beyond Mrs. Hockey-Sweeney's reach. Finally, the trial judge concluded that Mr. Sweeney had done all that he could to produce Trust documents, but that neither the trustee (his brother) nor the Trust lawyers would produce the documents because they thought Mr. Sweeney had no interest in the Trust.

[16] Lastly, the trial judge addressed the costs of the trial. He was of the view that Mrs. Hockey-Sweeney was consumed with anger towards her husband and had chosen to engage in unnecessarily protracted and costly litigation to embarrass him and cause him to incur substantial legal fees. He found that instead of honestly trying to resolve their differences Mrs. Hockey-Sweeney had used her energy to seek revenge. After taking account of Mr. Sweeney's more favourable offers to settle, the trial judge awarded him the costs of the trial, which he fixed at $200,000.

IV. Discussion

[17] As she had at trial, Mrs. Hockey-Sweeney directed her main attack on appeal to the issues of whether Mr. Sweeney had fully disclosed his financial interests and whether he maintained control of or an interest in the LILAC Trust.

[18] Before dealing with the specific issues on appeal, I make these general observations. The trial judge extensively reviewed the evidence concerning Mr. Sweeney's disclosure and the LILAC Trust. He made express findings of fact, which turned largely on his findings of credibility. Overall, he accepted Mr. Sweeney's evidence about his finances, his assets and the LILAC Trust. In contrast, he found that Mrs. Hockey-Sweeney's evidence about these matters lacked credibility. An appellate court has a very limited power to overturn credibility findings. We have not been persuaded of any basis to do so in this case. Because we accept the trial judge's credibility findings and the findings of fact that accompany them, Mrs. Hockey-Sweeney's principal attack on the trial judgment must fail.

The Fresh Evidence Motion

[19] Mrs. Hockey-Sweeney sought leave to introduce three pieces of fresh evidence:

> (i) an email from the trustee of the LILAC Trust to Mr. Sweeney, which allegedly showed that Mr. Sweeney actively controlled the Trust;
>
> (ii) evidence from a private investigator who, though retained by Mrs. Hockey-Sweeney, did not testify at trial; and
>
> (iii) evidence concerning the sale price of the matrimonial home and the yacht.

[20] We declined to admit the three pieces of evidence. Mrs. Hockey-Sweeney could have obtained the email before trial by exercising reasonable diligence. She could have called the private investigator at trial. Moreover, neither the email nor the investigator's proposed evidence would likely be conclusive of any issue on the appeal.

[21] The evidence concerning the sale price of the home and the yacht was not available at trial as both were sold after the trial ended. The sale price of each asset was apparently less than the separation day value given by Mrs. Hockey-Sweeney and accepted by the trial judge.

[22] Because this proposed new evidence did not exist at trial it could not possibly have influenced the result at trial. The evidence might, nonetheless, be admitted if it were necessary to do so to deal fairly with the issues on appeal and if refusing to admit it might work a substantial injustice. See *Sengmueller v. Sengmueller* (1994), 2 R.F.L. (4th) 232 (Ont. C.A.) at 235. That is not the case here. The sale price of these assets is not

probative of their value on valuation day. The decline in their value may be explained by other factors, for example, Mrs. Hockey-Sweeney's failure to maintain them. The motion for fresh evidence was accordingly dismissed.

First Submission: The trial judge failed to advise Mrs. Hockey-Sweeney that she could read in evidence from the transcript of Mr. Sweeney's discovery and that she could use the transcript to cross-examine him.

[23] This submission has an important context. During the course of these proceedings Mrs. Hockey-Sweeney retained and discharged eight lawyers. She chose to represent herself at trial. Even so, she was assisted by a law firm both in preparing for trial and during the trial itself. A lawyer from this firm attended the trial intermittently.

[24] In this context, we have no reason to doubt that Mrs. Hockey-Sweeney was aware of how she could use the transcript of Mr. Sweeney's discovery. In *Davids v. Davids* (1999), 125 O.A.C. 375 at para. 36, this court set out a trial judge's obligation to an unrepresented litigant:

> The fairness of this trial is not measured by comparing the appellant's conduct of his own case with the conduct of that case by a competent lawyer. If that were the measure of fairness, trial judges could only require persons to proceed to trial without counsel in those rare cases where an unrepresented person could present his or her case as effectively as counsel. Fairness does not demand that the unrepresented litigant be able to present his case as effectively as a competent lawyer. Rather, it demands that he have a fair opportunity to present his case to the best of his ability. Nor does fairness dictate that the unrepresented litigant have a lawyer's familiarity with procedures and forensic tactics. It does require that the trial judge treat the litigant fairly and attempted to accommodate unrepresented litigants' unfamiliarity with the process so as to permit them to present their case. In doing so, the trial judge must, of course, respect the rights of the other party.

[25] We were satisfied that Hambly J. met this obligation. He allowed Mrs. Hockey-Sweeney to present her case, and he treated her fairly. For example, during the trial he offered Mrs. Hockey-Sweeney the opportunity to retain counsel. She rejected the offer. He also invited her to further encumber the matrimonial home to permit her to retain counsel. She rejected this invitation. Overall, on a review of the transcript of evidence, we were satisfied that Mrs. Hockey-Sweeney received a fair trial.

Second Submission: The trial judge erred by failing to order Mr. Sweeney to produce documentation relating to the LILAC Trust and by proceeding with the trial in the absence of this documentation.

[26] As is evident from my review of the trial proceedings, the trial judge concluded that Mr. Sweeney had met his disclosure obligations and had used his best efforts to obtain the financial information sought by his wife. Accordingly, even though Mr. Sweeney did not produce every document Mrs. Hockey-Sweeney asked for, the trial judge did not err in proceeding with the trial.

Third Submission: The trial judge erred by failing to hold that Mr. Sweeney had a property interest in the LILAC Trust.

[27] Mrs. Hockey-Sweeney submitted that Mr. Sweeney had a property interest in the LILAC Trust and that this interest should have been reflected in his net family property statement. She points to the definition of "property" in s. 4(1) of the *Family Law Act*, R.S.O. 1990 c. F-3, which provides in part:

> "property" means any interest, present or future, vested or contingent, in real or personal property and includes...
>
> (b) property disposed of by a spouse but over which the spouse has, alone or in conjunction with another person, a power to revoke the disposition or a power to consume or dispose of the property.

[28] We did not accept this submission. On the findings of the trial judge, once Mr. Sweeney placed assets in the LILAC Trust, he ceased to have any interest in them or control over them. The trustee controlled the Trust. The children were the beneficiaries of the Trust and, therefore, the assets in the Trust.

Spousal Support

[29] The trial judge ordered spousal support of $3,500 monthly. As Mr. Sweeney properly points out, a spousal support award is a discretionary order and is entitled to "significant deference" from a reviewing court. See *Hickey v. Hickey* (1999), 46 R.F.L. (4^{th}) 1 (S.C.C.) at 17. In my view, however, the trial judge committed two errors that justify a review of his order.

[30] The first error is that in determining the amount of support, he seemed to penalize Mrs. Hockey-Sweeney for her "abandonment" of the children. At para. 103 of his reasons he wrote, "Louise's abandonment of the children and Lawrence's acceptance of

full responsibility for the children is a significant factor in assessing the quantum of spousal support".

[31] The trial judge was undoubtedly correct to take account of Mr. Sweeney's assumption of all childcare expenses, including educating the children in private schools. Because he took sole financial responsibility for raising the children he had less disposable income to pay spousal support. But the trial judge was wrong to take into account Mrs. Hockey-Sweeney's conduct. His characterization of her relinquishing the care of the children as an "abandonment" seems unfair, but, even if accurate, it does not warrant penalizing Mrs. Hockey-Sweeney in support. Indeed, even after Mr. Sweeney took on the care of the children in August 2001, he continued to pay spousal support of $5,000 monthly for another ten months until trial.

[32] This last observation points to the second error. The trial judge gave no explanation for why he reduced the interim order, in circumstances where I think an explanation was required.

[33] These two errors justify a review of the order. This was a relatively long-term marriage. Mr. Sweeney's current income is $240,000 a year. The trial judge found "that he has a capacity to produce income greater than his current income when he has his marital difficulties behind him". His assets equal his debts, and he stands to gain a substantial equalization payment because of the divorce judgment.

[34] Mrs. Hockey-Sweeney left the workforce to raise three children. She has not worked since then. Realistically, she presently is unable to work. She must rely on Mr. Sweeney's support. Mr. Sweeney can well afford to pay her monthly support of $5,000, and I would order that he do so.

Costs of the Appeal

[35] Mr. Sweeney asked for the costs of the appeal and that these costs be paid by the Public Guardian and Trustee, Mrs. Hockey-Sweeney's litigation guardian.

[36] Mr. Sweeney succeeded on the main issues in the appeal and, therefore, is entitled to costs. However, having regard to the circumstances of the parties and Mrs. Hockey-Sweeney's success on the issue of spousal support I would fix those costs, not in the amount claimed, but at $15,000 plus disbursements and GST.

[37] This court can order that a litigation guardian for a person under disability pay the costs of an appeal. See s. 131 of the *Courts of Justice Act*, R.S.O. 1990 c. C-43, rule 57.06(2) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, and *Cameron (Public Guardian and Trustee of) v. Louden*, [2002] O.J No. 2184 (Ont. S.C.J.). In *Cameron*, Aitken J. thoroughly canvassed the applicable case law and competing policy concerns in

ordering a statutory litigation guardian to pay the costs of an unsuccessful party under a disability. The court has to ensure that the Public Guardian and Trustee is not unreasonably deterred from carrying out its duties by exposure to a costs order. On the other hand, the court has to ensure that the Public Guardian and Trustee does not pursue frivolous litigation or otherwise act improperly at the expense of the opposing party.

[38] Here, I am not persuaded that I should order the Public Guardian and Trustee to pay the costs order. Although the trial judge's findings of fact and credibility made the main grounds of appeal difficult, I cannot say that the appeal was frivolous. Moreover, the appeal succeeded on one of the grounds raised in the Litigation Guardian's factum. Therefore, I would make no order against the Public Guardian and Trustee.

Conclusion

[39] I would allow the appeal in part by varying para. 14 of the divorce judgment to read "this court orders and adjudges that the Respondent Husband shall pay to the Petitioner Wife spousal support in the amount of $5,000 per month". Otherwise, the appeal is dismissed. Mr. Sweeney is entitled to his costs of the appeal fixed at $15,000 plus disbursements and GST.

RELEASED: November 2, 2004

"D.D."

"John Laskin J.A."
"I agree Doherty J.A."
"I agree R. G. Juriansz J.A."