NOVA SCOTIA COURT OF APPEAL
Citation: *Wagstaff v. Wagstaff*, 2003 NSCA143

Date: 20031216
Docket: CA 191715
Registry: Halifax

Between:

Margaret June Wagstaff

Appellant

v.

Douglas Ian Wagstaff

Respondent

Judges:	Saunders, Oland & Hamilton, JJ.A.
Appeal Heard:	December 11, 2003, in Halifax, Nova Scotia
Held:	Appeal dismissed with costs of $2,000 plus disbursements, payable to the respondent, as per reasons of Saunders, J.A.; Oland & Hamilton, JJ.A. concurring
Counsel:	Michael K. Power, for the appellant Karen Kilawee, for the respondent

Reasons for judgment:

[1] After hearing the appellant's and respondent's submissions concerning Mrs. Wagstaff's application for leave to adduce fresh evidence, as well as the appellant's submissions on the merits, we recessed and then returned to court to announce our unanimous opinion that the appeal was dismissed with reasons to follow. These are our reasons.

[2] At the outset the appellant applied for leave to adduce fresh evidence said to relate to the respondent's testimony at trial describing how he allocated interest income on their children's tax returns. It was suggested by the appellant that this "new evidence" contradicted the respondent's testimony at trial which, she says, "played a key role" in the trial judge's decision. The application was opposed by the respondent. We reserved on this point after permitting counsel for the appellant to file as exhibits documentation he had obtained from Revenue Canada, for our perusal.

[3] The application is denied. It fails to satisfy at least two of the conditions governing the admission of fresh evidence on appeal. In our opinion there is no reason why it could not have been adduced at trial through the exercise of due diligence. Further, if it had been produced and found to be credible, we are not persuaded that it could reasonably be expected to have affected the final result. See for example **Palmer & Palmer v. The Queen**, [1980] 1 S.C.R. 759; **Edwards v. Edwards** (1994), 133 N.S.R. (2nd) 8 (N.S.C.A.); and **MacKenzie v. MacKenzie**, [2003] N.S.C.A. 120.

[4] The appellant's Notice of Appeal is a plethora of complaints listing some 48 alleged errors and grounds of appeal. In our view there is, with respect, no merit to any of them. Close scrutiny reveals that while cast as errors of law or mixed law and fact, they appear to us to be little more than expressions of dissatisfaction with the trial judge's findings. We agree with the following statement made by counsel for the respondent in her thorough and persuasive factum:

> . . . while the Appellant has framed her appeal . . . as an error of law, in actual fact, she is asking this court to find that the judge erred in his findings of fact and credibility, and on that basis, overturn the decision . . .

[5] This case was based in large part on the findings of fact of Justice Scanlan which, by their nature, ought to be treated with considerable deference by this court.

[6] In his book *The Conduct of An Appeal*, (2nd ed. Butterworths, 2000), the late John Sopinka observed:

> It has long been the rule in English and Canadian appellate courts that a finding of fact based upon the credibility of witnesses who have testified before the trier of fact ought not to be overturned unless it is determined to be manifestly wrong. (underlining mine)

[7] The standard of review was succinctly described by McLachlin, J., (as she then was) in **Toneguzzo-Norvell (Guardian ad litem of) v. Burnaby Hospital**, [1994] 1 S.C.R. 112 at p. 121:

> It is by now well established that a Court of Appeal must not interfere with a trial judge's conclusions on matters of fact unless there is palpable or overriding error. In principle, a Court of Appeal will only intervene if the judge has made a manifest error, has ignored conclusive or relevant evidence, has misunderstood the evidence, or has drawn erroneous conclusions from it. ... (Authorities omitted). A Court of Appeal is clearly not entitled to interfere merely because it takes a different view of the evidence. The finding of facts and the drawing of evidentiary conclusions from facts is the province of the trial judge, not the Court of Appeal.

[8] This high degree of deference is especially true in matrimonial cases. This point was made by Chipman, J. A., in **Edwards**, supra, at ¶ 53:

> The degree of deference accorded to the trial judge with respect to factual findings is probably no higher anywhere than it is in matters relating to family law. Hart, J.A. put it well when he said on behalf of this court in Corkum v. Corkum (1989), 20 R.F.L. (3d) 197 at 198:
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> > "In domestic matters the trial judge always has a great advantage over an appellate court. He sees and hears the witnesses and can assess the emotional aspects of their testimony in a way that is denied to us. Unless there has been a glaring misconception of the facts before him or some manifest error in the application of the law, we would be unwise to interfere."

[9] Appeals to this court are not a re-trial. Our role is to review for error and only interfere where mistakes are so serious as to warrant our intervention. We are not persuaded that Justice Scanlan erred in law. In particular we see no error in his determination of a fair and reasonable income for the respondent upon the record before him. Neither are we persuaded that he committed any palpable or overriding error in his findings of fact or inferences drawn from such facts.

[10] He was exceedingly critical of the appellant's credibility. He rejected her evidence and the positions she advanced in practically every respect. He found that she misled the court, the respondent, their children and the judge before whom she first appeared in family court on matters involving spousal and child support. Using remarkably blunt language, Justice Scanlan found that the appellant had deliberately withheld evidence and effectively poisoned her children's relationship with their father. I need only cite a brief extract to capture the tenor that permeates the decision and explains how the trial judge chose to characterize the appellant and the positions she had taken at trial:

> . . . unequivocally, after having heard all of the evidence . . . I accept completely the credibility of Mr. Wagstaff's evidence without any reservation.
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> . . . where there was a divergence as between what his version of the facts was and that of Mrs. Wagstaff, I have no hesitation in saying I accept Mr. Wagstaff's evidence.
>
> . . . She is just not believable in just about every instance where it counts. . . . I am satisfied, based on the materials that I have before me, that Mrs. Wagstaff was completely untruthful to the Family Court in disclosing her true situation when she referenced her needs and her savings.
>
> . . . stop interfering in the relationship that Lindsay had, has and will have with her father. You have interfered with it, you have interfered with it in a very substantial and meaningful way. This includes your intentional hiding away with Lindsay for an entire summer while Mr. Wagstaff was trying to have summer access.
>
> [and when dealing with costs]
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> . . . The final result should have been achievable in a much simpler form had there been proper disclosure. This case would likely have been unnecessary had there not be the trickery and connivance and the attempt to deceive the Court by saying

> I have no assets, I am impoverished, I just handed close to a quarter of a million dollars over to my brother and I do not have anything left anymore. . . . Mrs. Wagstaff was totally unreasonable in her position. Her position is almost totally unsupported in the law.

[11] Such findings were pivotal to a determination of the competing claims and were entirely within the purview of the trial judge. After carefully considering the entire record we are not persuaded that he erred in his disposition of the issues placed before him for determination.

[12] The respondent sought solicitor/client costs in the court below, and makes the same claim here. Scanlan, J. declined the request holding that this was not the rare type of case where such costs would be justified. We agree. The appeal is dismissed with costs of $2,000 plus disbursements, payable to the respondent.

Saunders, J. A.

Concurred in:

Oland, J. A.

Hamilton, J. A.