

Indexed as:
Sengmueller v. Sengmueller

[1994] O.J. No. 276

Action No. C8706

17 O.R. (3d) 208

Court of Appeal for Ontario,

Morden A.C.J.O., Mckinlay and Carthy JJ.A.

February 16, 1994

Counsel:

C.C. Mark, Q.C., for appellant.

Thomas G. Bastedo, Q.C., for respondent.

The judgment of the court was delivered by

1 MCKINLAY J.A.: -- The appellant, Helga Sengmueller, appeals from that part of the divorce judgment of the Honourable Mr. Justice Fedak which ordered the payment to her of \$368,556.06 as an equalization payment pursuant to s. 5 of the Family Law Act, R.S.O. 1990, c. F.3 (the "Act"). She appeals on the bases that the trial judge should not have deducted from the net family property of the respondent, Frederick Sengmueller, the sum of \$137,697.69 on account of notional costs of disposition and that the rate of pre-judgment interest on the equalization payment should have been 15 per cent rather than 11 per cent.

2 The respondent husband cross-appeals, asking that there be no order as to pre-judgment or post-judgment interest and no order as to costs of the trial. He also moves for the admission on the appeal of evidence of events which have transpired since the time of trial.

3 Valuation date was April 21, 1988, and the trial took place over a five-day period in mid-May of 1990. The date of the judgment is September 13, 1990.

4 The portions of the trial judgment which are relevant to this appeal are: the order that Mr. Sengmueller make an equalization payment to Mrs. Sengmueller in the amount of \$368,556.06; the order that Mr. Sengmueller pay \$600 per month support for each of the two children of the marriage until age 21 (one child was born in September of 1972 and the other in October of 1974); the order to pay support to Mrs. Sengmueller in the amount of \$300 per month until satisfaction of the equali-

zation payment; pre-judgment interest at the rate of 11 per cent per annum from April 21, 1988 on the equalization amount; post-judgment interest on any amounts in default under the judgment at 15 per cent per annum; and costs on a party-and-party scale in favour of Mrs. Sengmueller.

5 As mentioned earlier, the issues on this appeal and cross- appeal are three: first, whether notional costs of disposition of family assets were properly deducted in arriving at the value of net family assets as at valuation date; second, whether pre-judgment interest should be paid on the equalization amount and, if so, at what rate; and third, whether costs at trial should be awarded in favour of Mrs. Sengmueller.

Admission of fresh evidence on appeal

6 It is the position of the respondent that in order to dispose fairly of all issues it is necessary for this court to consider fresh evidence which was not only unavailable at the time of trial, but which did not exist at that time. The evidence in issue is evidence of the dramatic decrease in value of real property owned by the respondent on valuation date and at the time of trial, evidence of a dramatic decrease in the work available to the corporation of which he was and is sole shareholder, and evidence of the forced realization of an R.R.S.P. owned by him to satisfy a portion of the equalization amount assessed at trial.

7 Counsel for the appellant submits that since the trial judge, in arriving at the value of matrimonial property, is charged with valuing assets at a precise date before trial, no court should take into consideration facts subsequent to that date. The difficulties arise, he submits, because of the failure of Mr. Sengmueller to sell his real property assets at an appropriate time, when he was aware that the market was on a downswing.

8 Section 134(4)(b) of the Courts of Justice Act, R.S.O. 1990, c. C.43, gives a court to which an appeal is taken discretion "in a proper case" to "receive further evidence by affidavit, transcript of oral examination, oral examination before the court or in such other manner as the court directs". What concerns the court is not whether it can admit new evidence, but whether the appeal before it is "a proper case" in which to do so.

9 The normal basis on which an appeal court in this jurisdiction will exercise its discretion in favour of admitting fresh evidence is clear and well-established. It will do so when (1) the tendered evidence is credible, (2) it could not have been obtained, by the exercise of reasonable diligence, prior to trial, and (3) the evidence, if admitted, will likely be conclusive of an issue in the appeal: see *Cook v. Mounce* (1979), 26 O.R. (2d) 129, 104 D.L.R. (3d) 635 (S.C.).

10 Most of the cases dealing with the admission of fresh evidence on appeal involve evidence which, though in existence prior to trial, for some reason other than lack of diligence, was not tendered at trial. This case involves evidence which did not exist prior to trial. One obvious problem with admitting on appeal evidence which did not exist at the time of trial is that such evidence could not possibly have influenced the result at trial. It is argued for the appellant that admitting such evidence on appeal would result in there being no finality to the trial process, that it would tend to turn appeal courts into trial courts, and that it would unacceptably protract legal proceedings. All of these objections are valid and compelling. However, in a case where the evidence is necessary to deal fairly with the issues on appeal, and where to decline to admit the evidence could lead to a substantial injustice in result, it appears to me that the evidence must be admitted. In my view in the particular and unusual circumstances of this case, this is such a case. This court admitted evidence

not in existence at the time of trial in *Mercer v. Sijan* (1976), 14 O.R. (2d) 12 at p. 17, 72 D.L.R. (3d) 464 (C.A.), stating:

The competing considerations, on the one hand, are the public interest in finality to litigation, and, on the other hand, the affront to common sense involved in a Court shutting its eyes to a fact which falsifies the assessment.

While this case does not involve a reassessment of damages, as *Mercer v. Sijan* did, the potential for substantial injustice makes it important for the court to exercise its discretion in favour of admitting the fresh evidence, but only for the very limited purposes described below.

Nature of the fresh evidence

11 At the time of trial Mr. Sengmueller had approximately \$26,000 of non-taxable assets with which to satisfy the equalization payment of \$368,556.06. The balance of his assets at that time consisted primarily of an R.R.S.P., two parcels of real estate (one of which included the matrimonial home), and Film Sound Services Ltd., the business from which he earned his livelihood. Their value as at valuation date, April 21, 1988, was found to be \$85,272, \$250,000, \$375,000 and \$161,854 respectively, less the trial judge's finding as to the tax cost of realization in amounts of \$38,789, \$36,911, \$35,862, and \$26,134 respectively.

12 A valuation report of Norman Height, A.A.C.I., accepted by both parties at trial, indicated that as of January 16, 1990 one parcel of real property had a value of \$550,000 and the other a value of \$775,000. It was Mr. Height's opinion that as at May of that same year there had been a reduction in real property values generally of from 15 to 20 per cent. As of the end of March 1991, Mr. Wright, a real estate broker who had had the properties listed for sale for some time, informed Mr. Sengmueller that he would be fortunate to receive \$250,000 for either of the two parcels. Mr. Sengmueller says that he had been attempting to sell the real property ever since the release of the reasons for judgment, but without success. Counsel for Mrs. Sengmueller takes the position that the reason the property was not sold is that Mr. Sengmueller was asking too high a price for it. That may have been the case shortly after the trial, but the fresh evidence indicates that more recently the asking price for the properties was not out of line. In any event, no offers, not even very low ones, have been received.

13 The sound engineering business operated by Mr. Sengmueller is dependent upon his personal involvement. He is 66 years of age, has had cataract problems with both eyes, and will probably not be able to operate the business profitably for many more years. His other income consists of Canada Pension and Old Age Security payments. The real property is not income-producing.

14 By order of a judge of this court dated February 6, 1991, the automatic stay pending appeal was lifted to the extent of \$250,000. Mr. Sengmueller had already paid \$50,000 of the equalization payment, and following the lifting of the stay, counsel for Mrs. Sengmueller instructed the sheriff to seize the R.R.S.P., which at that time had a value of approximately \$125,000. After income tax holdback, Mrs. Sengmueller received approximately \$89,000 from the realization of the R.R.S.P.

15 The issues in this appeal should be assessed in the light of the above facts.

Notional costs of disposition

16 The trial judge, in valuing net family property, deducted as a debt or other liability under s. 4(1) of the Act amounts estimated as taxes (but not other types of costs of disposition, such as real

estate commissions), which would be exigible if the assets involved were realized upon. Counsel for Mrs. Sengmueller argues that he was in error in so doing, relying on the decisions of this court in *McPherson v. McPherson* (1988), 63 O.R. (2d) 641, 13 R.F.L. (3d) 1, and in *Starkman v. Starkman* (1990), 75 O.R. (2d) 19, 28 R.F.L. (3d) 208. In deducting tax costs, the trial judge relied on *Heon v. Heon* (1989), 69 O.R. (2d) 758, 22 R.F.L. (3d) 273 (H.C.J.).

17 The *McPherson* case, decided under the Family Law Reform Act, R.S.O. 1980, c. 152, involved shares held by the husband in a private company. The husband and wife acted as true partners in the company, although their shareholdings did not reflect that fact. Evidence was adduced before the trial judge to show the tax implications to the husband of satisfying the award out of earnings and/or assets of the company. The trial judge, in arriving at the amount payable to the wife, ignored the tax consequences. On appeal to this court, a deduction for taxes was allowed.

18 In my view, it is equally appropriate to take such costs into account in determining net family property under the Family Law Act if there is satisfactory evidence of a likely disposition date and if it is clear that such costs will be inevitable when the owner disposes of the assets or is deemed to have disposed of them. In my view, for the purposes of determining net family property, any asset is worth (in money terms) only the amount which can be obtained on its realization, regardless of whether the accounting is done as a reduction in the value of the asset, or as deduction of a liability: the result is the same. While these costs are not liabilities in the balance sheet sense of the word, they are amounts which the owner will be obliged to satisfy at the time of disposition, and hence, are ultimate liabilities inextricably attached to the assets themselves. This is consistent with *McPherson* but goes beyond it.

19 If assets are transferred in specie or are realized upon to satisfy the equalization payment, the amount of tax and other disposition costs is easily proven, assuming the availability of a preliminary calculation of the equalization payment. The real problem arises when the equalization payment is satisfied with liquid assets not subject to disposition costs, and there are other assets to be valued for the purposes of s. 4(1) which will inevitably be subject to disposition costs at some time in the future. Two questions then arise: first, in what circumstances should disposition costs be deducted, and second, how should the amount of the deduction be calculated?

20 Counsel for Mrs. Sengmueller takes the position that both *McPherson* and *Starkman* stand for the following propositions, to quote from his factum: "In valuing an asset, an allowance for taxes should not be made where it is not clear if the asset will ever be disposed of, or where the payor does not have to dispose of an asset that would attract liability in order to make the equalization payment." I agree with the first proposition but not with the second.

21 Support for the first proposition is found in *McPherson*. Finlayson J.A. commenced his analysis with the following comment at p. 645:

It makes little sense, in my view, to visit the entire costs of the disposition on one spouse when dealing with a division of a non-family asset: they, like the benefits, are to be shared equally.

After discussing some of the cases which have grappled with this issue, he stated further at p. 647:

The cases appear to turn on their own facts and if I might hazard a broad distinction, an allowance should be made in the case where there is evidence that the

disposition will involve a sale or transfer of property that attracts tax consequences, and it should not be made in the case where it is not clear when, if ever, a sale or transfer of property will be made and thus the tax consequences of such an occurrence are so speculative that they can safely be ignored.

The result in that appeal (decided, as I have said, under the Family Law Reform Act), was that income tax liability was deducted in calculating the value of the business involved. The reasons give us the following guidance: first, that as a basic principle the entire costs of disposition of assets should not be visited on one spouse, and that those costs, like benefits, should be shared equally; and second, that this principle should be departed from only where the timing of disposition, and thus disposition costs, is "so speculative" that such costs "can safely be ignored". The basic principle is very easy to apply: unfortunately, the exception is not.

22 Counsel for Mrs. Sengmueller relies on both McPherson and Starkman for his second proposition, i.e., that allowance for taxes should only be allowed where the payor must dispose of an asset that would attract tax liability in order to make the equalization payment.

23 The evidence in McPherson indicated the necessity of withdrawing moneys from the company to pay to the wife her entitlement under the old Family Law Reform Act (thus attracting tax). However, in analyzing the principles involved, Finlayson J.A. did not suggest that only when realization of an asset is required to satisfy a payment from one spouse to the other should disposition costs be taken into consideration. Indeed, the portions of his reasons quoted above make it clear that that was not his view.

24 In Heon v. Heon, decided under the Family Law Act, Granger J. distinguished the objectives under the Family Law Reform Act from those under the Family Law Act, and concluded that the appropriate procedure was to value all assets as of valuation day as if there were an actual sale on that day with taxes and other disposition costs deducted. However, Catzman J.A., speaking for the court in Starkman, considered that a fairer method of arriving at the equalization payment than that applied in Heon v. Heon was to require clear evidence of the likely fact of disposition of an asset before allowing deduction of disposition costs.

25 The reasons in the Starkman case indicate that the appeal was argued on the basis that it was necessary to realize on the R.R.S.P. and on the company shares involved in order to meet the equalization payment. It was clear that the evidence adduced did not satisfy that position and there was no evidence of any other likely date of disposition. In my view, the decision went no further than that.

26 In general terms, this court in Starkman approved the application under the Family Law Act of the approach recommended by Finlayson J.A. in McPherson. If the evidence satisfies the trial judge, on a balance of probabilities, that the disposition of any item of family property will take place at a particular time in the future, then the tax consequences (and other properly proven costs of disposition) are not speculative, and should be allowed either as a reduction in value or as a deductible liability.

27 R.R.S.P.s, in particular, are taxable in full, regardless of the time of realization, whether they are cashed in total, or taken by way of annuity.

28 In dealing with a business, one should fairly consider the nature of the business, the possible requirement that the business could only operate if the owner spouse continued to be involved, any

shareholder agreement which required sale of his or her shareholding in specified circumstances, and myriad other possible considerations in the individual case. Different considerations would be relevant in dealing with other types of assets.

29 By requiring evidence of the expected time of the disposition, and by making a present value calculation, courts could avoid inevitable unfair results flowing from the application of the approach used in *Heon v. Heon*, and from the approach suggested by the appellant.

30 A short unsophisticated example will point up the possibility for gross unfairness if paying spouses could only deduct disposition costs when disposition of the assets is necessary to satisfy the equalization payment. On separation, a husband's assets consist solely of liquid non-taxable bonds totalling \$850,000. He has been paying tax annually on the interest, and accruing the balance. His wife's assets consist of an R.R.S.P. worth \$500,000, a parcel of real property worth \$500,000, for which she paid \$100,000, and liquid non-taxable bonds in the amount of \$150,000. The calculation of their assets and liabilities (without taking disposition costs into account) results in the wife being required to pay an equalization amount to the husband of \$150,000. From a practical standpoint, she must satisfy the equalization payment to her husband from the bonds, because she cannot meet the test of needing to sell the real property or the R.R.S.P. to satisfy the equalization. A few years later she, being of retirement age and wishing to maintain her standard of living to the extent possible, needs to sell the real property and take the R.R.S.P. in the form of an annuity. In so doing, her ultimate tax liability will be substantially in excess of the amount she was required to pay to her husband as an equalization sum.

31 The decision in *Heon*, in my view, points up a different possibility of unfairness. For example, apply the *Heon* approach of a notional disposition on valuation day, and assume that the parties in the above example were both in their early forties. The wife could deduct the full amount of tax which would have been payable on disposition of her R.R.S.P. and realty as if she had disposed of them on valuation day, resulting in a deduction of tax of approximately \$350,000, and real estate commission of approximately \$25,000. Her husband would have to pay to her an equalization payment of approximately \$37,500 -- a difference of \$187,500 from the result applying the approach pressed by counsel for Mrs. Sengmueller. This result would obtain even if she had no intention of disposing of those assets for some substantial period of time.

32 It would be much fairer to require her to adduce evidence (see s. 4(3) of the Act) from which the trial judge could assess the likely time of disposition, the likely disposition costs at that time, and the present value of those costs as at the valuation date. The deduction allowed would be substantially less than would be the case if assets were valued as if disposed of on valuation day. It is true that such calculations are not exact, but courts have never refused to make assessments merely because the evidence available is less than precise.

33 From the *McPherson* case I glean three rules to apply in all cases:

- (1) Apply the overriding principle of fairness, i.e., that costs of disposition as well as benefits should be shared equally;
- (2) Deal with each case on its own facts, considering the nature of the assets involved, evidence as to the probable timing of their disposition, and the probable tax and other costs of disposition at that time, discounted as of valuation day; and

- (3) Deduct disposition costs before arriving at the equalization payment, except in the situation where "it is not clear when, if ever" there will be a realization of the property.

Under the Family Law Act it does not matter whether the third rule is applied as part of the valuation of the asset involved, or whether the deduction is made as an inevitable liability which exists on valuation day, although it is not payable until some time in the future.

34 The fresh evidence in this case was admitted, as stated earlier, for the express purpose of preventing an unjust result. The McPherson case, decided under another statute, did suggest the appropriateness of deducting disposition costs, but the reasons were not specific as to the nature of the evidence required in order to determine when such deductions should be allowed, and their amount. The Starkman decision, decided under the present statute, had not been released at the time of the trial in this case. Although it decided that the principles in McPherson should be applied to cases under the Act, it did not answer the most important proposition pressed by the appellant in this case, that is, that disposition costs should only be allowed if it were necessary to dispose of the asset involved to satisfy the equalization payment.

35 Had the latter proposition been accepted by this court, it would have been impossible for the respondent to reply to it without the admission of evidence showing that realization of at least some of the assets involved was necessary for that purpose. Given the uncertain state of the law at the time of the trial, it was necessary for the court to have before it all evidence necessary to assist it in dealing with the realities of this case without resort to a costly retrial.

36 In the particular circumstances of this case, I would not disturb the trial judge's decision. The fresh evidence shows that the R.R.S.P. has been seized, and that the two pieces of property are on the market. The evidence at trial indicated the age of Mr. Sengmueller at that time and was to the effect that the company only operates with his involvement. While this evidence does not, of course, indicate the present value of the disposition costs, its effect shows the relative imminence of the dispositions and justifies the affirmation of the trial judge's decision in preference to directing a new trial.

Pre-judgment and post-judgment interest

37 Counsel for Mrs. Sengmueller argues that the trial judge allowed only 11 per cent pre-judgment interest when the statutory rate was 15 per cent, and that he did not properly exercise his discretion in so doing. Counsel for Mr. Sengmueller argues that on the facts of this case, and given the fresh evidence on appeal, it would be unfair to require any payment of pre-judgment interest.

38 The trial judge considered in some detail the cases dealing with pre-judgment interest. Although he did not specifically state why he reduced the rate from 15 to 11 per cent, he did refer to the fact that spousal support was being paid by Mr. Sengmueller. His order terminated that spousal support payments on satisfaction of the equalization payment. It follows logically that he took support into consideration in exercising his discretion with respect to interest. Given that fact, and also the position I take with respect to deduction of disposition costs, I would not interfere with that portion of the judgment. As far as the cross-appeal is concerned, I see no basis for denying pre-judgment or post-judgment interest.

Costs

39 Although Mr. Sengmueller was successful at trial as far as a substantial and lengthy argument of constructive trust was concerned, this is not, in my view, a proper basis for interfering with the disposition of costs.

Disposition

40 I would dismiss the appeal and the cross-appeal. I would award the respondent one-half of the costs of the appeal and make no order respecting the costs of the cross-appeal.

Appeal and cross-appeal dismissed.