2008 CarswellAlta 1294, 2008 ABCA 324, [2008] A.W.L.D. 3959, [2008] W.D.F.L. 4718, 56 R.F.L. (6th) 24, 60 C.P.C. (6th) 216, 298 D.L.R. (4th) 620

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Hykawy v. Hykawy

Shirley Helen Hykawy (Appellant / Plaintiff / Applicant) and Mitchell Alan Hykawy (Defendant) and Mary Hykawy and Nicholas Hykawy (Respondents / Transferees / Respondents)

Alberta Court of Appeal

C. Fraser C.J.A., P. Martin, J. Watson JJ.A.

Heard: September 8, 2008
Judgment: September 8, 2008[FN*]
Written reasons: September 30, 2008
Docket: Calgary Appeal 0801-0027-AC

Proceedings: reversed *Hykawy v. Hykawy* ((September 5, 2007)), Doc. Calgary 4801-129431 ((Alta. Q.B.))

Counsel: D.P. **Castle** for Appeallant

S. Flannigan for Respondent

Subject: Family; Property

Family law --- Family property on marriage breakdown — Practice and procedure — Discovery — General principles

In course of divorce and matrimonial property action, wife wished to examine husband and his mother and father separately from one another — Wife had added husband's mother and father to her action under s. 10 of Matrimonial Property Act — Parents refused to consent to separate examinations — Chambers judge held that it had to be exceptional circumstance to justify separated examinations for parents — Chambers judge declined to order separate examinations — Wife appealed — Appeal allowed — Examination of parents was directed to proceed separately — Chambers judge misstated legal test — Wife was not obliged to establish probability of prejudice — It was sufficient for wife to persuade chambers judge by evidence that there was reasonable apprehension of prejudice — This was shown on evidence before chambers judge — It was clear that version of parents as given by their counsel did not match version given under oath by husband — Some sort of explanation or reconciliation of versions was needed — Attempt to discover and check out any such explanation or reconciliation offered by each parent could be impeded, if not destroyed, if both were present when first was questioned — Parents were named as defendants, not on basis of direct obligation to wife but as alleged recipients of matrimonial property from husband — Rationale for exclusion was rooted in preservation of integrity of legal process —

There could be no prejudice to honest defendants in not attending examination for discovery of another defendant.

Cases considered by *C. Fraser C.J.A*:

British Columbia (Minister of Forests) v. Okanagan Indian Band (2003), 43 C.P.C. (5th) 1, 114 C.R.R. (2d) 108, [2004] 2 W.W.R. 252, 313 N.R. 84, [2003] 3 S.C.R. 371, 2003 SCC 71, 2003 CarswellBC 3040, 2003 CarswellBC 3041, 233 D.L.R. (4th) 577, [2004] 1 C.N.L.R. 7, 189 B.C.A.C. 161, 309 W.A.C. 161, 21 B.C.L.R. (4th) 209 (S.C.C.) — referred to

Lambert v. Lomore (1997), 57 Alta. L.R. (3d) 110, [1998] 6 W.W.R. 96, 16 C.P.C. (4th) 75, 212 A.R. 182, 168 W.A.C. 182, 1997 CarswellAlta 1049 (Alta. C.A.) — followed

Secretary of State for Education & Science v. Tameside Metropolitan Borough Council (1976), [1977] A.C. 1014, [1976] 3 All E.R. 665 (Eng. C.A.) — referred to

Statutes considered:

Matrimonial Property Act, R.S.A. 2000, c. M-8

s. 10 — referred to

APPEAL by wife from judgment declining to order separate examinations for husband's parents.

***C. Fraser C.J.A* (orally):**

1 In the course of her divorce and matrimonial property action, the appellant, Shirley Hykawy (the wife) wished to examine Mitchell Hykawy (the husband), and his parents, the respondents, Mary Hykawy and Nicholas Hykawy, separately from one another. Counsel proposed to question the mother-in-law first, the father-in-law second, and the husband last. The wife had added the in-laws to her action under section 10 of the *Matrimonial Property Act*, R.S.A. 2000, c. M-8, on pleadings that they had secretly received matrimonial property from the husband without being *bona fide* purchasers for value, and did so during the period when the marriage was breaking down.

2 Counsel for the husband's parents refused to consent to separate examinations, at which time the wife brought an application to compel that procedure to occur. By that stage, the husband had already been examined for discovery. The chambers judge held that it had to be "an exceptional circumstance" to justify separated examinations for the parents. Although recognizing that credibility was in question, the chambers judge ruled at AB 19 that "the issue is whether there is a probability of prejudice, not a possibility of prejudice" in deciding whether to disallow the parents being present during each other's examination for discovery. The chambers judge declined to order separate examinations.

3 Since the chambers judge's decision involves an exercise of discretion, it can only be interfered with if it is founded upon an error of law, an error in the application of the governing principles or a palpable and overriding error in the assessment of the evidence: *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71, [2003] 3 S.C.R. 371 (S.C.C.) at para. 43. A discretionary decision is also reviewable if it is unreasonable, in the sense that nothing in the record can justify it: R.P. Kerans, *Standards of Review Employed by Appellate Courts* (Edmonton: Juriliber Limited, 1994) at 36-37; *Secretary of State for Education & Science v.*

Tameside Metropolitan Borough Council (1976), [1977] A.C. 1014 (Eng. C.A.) per Lord Diplock at 1064.

4 These circumstances concern a winning lottery ticket worth $300,000.00 that paid off in August of 2006, not long before the parties separated in September of 2006. The chambers judge was told that at the husband's examination for discovery, the husband claimed under oath that his mother had purchased the winning ticket and given it to him as a gift. The chambers judge was also told that the husband had undertaken to particularize the time and place of purchase of the ticket but had not yet met that undertaking. The wife also provided the chambers judge with a copy of a letter from counsel for the husband's parents which asserted that the son had given them two lottery tickets as a gift. While both versions alleged the parents owned the lottery winnings, the provenance of the winning ticket was not the same.

5 The governing principles are said to be set out in *Lambert v. Lomore* (1997), 212 A.R. 182 (Alta. C.A.). We have not been asked to reconsider this decision. We do not find it necessary, on this evidentiary record, to invoke our reconsideration policy as we are able to decide this appeal within the limitations of *Lambert v. Lomore*. Whether those limitations remain appropriate in light of evolving national standards is an issue for another day.

6 We have concluded that the chambers judge mis-stated the legal test. The wife was not obliged to establish a "probability" of prejudice. *Lomore* did not set this high a standard. It was sufficient for the wife to persuade the chambers judge by evidence that there was a reasonable apprehension of prejudice. This was shown on the evidence before the chambers judge. The key ingredient in the facts of *Lomore* was the absence of specific evidence that the various police defendants in that case would tailor their evidence. The majority was not persuaded that the mere fact of "community of interest" between defendants justified exclusion. However, here, it is clear that the version of the parents as given by their counsel does not match the version given under oath by their son, the husband. Some sort of explanation or reconciliation of the versions is needed. An attempt to discover and check out any such explanation or reconciliation offered by each parent could be impeded, if not destroyed, if both are present when the first is questioned.

7 Further, here, the parents are named as defendants, not on the basis of a direct obligation to the wife but as alleged recipients of matrimonial property from their son, the husband. Therefore, the thinking that undelies this court's decision in *Lomore* has limited force in these circumstances.

8 Finally, it must always be remembered that the rationale for exclusion is rooted in the preservation of the integrity of the legal process. There can be no prejudice to honest defendants in not attending the examination for discovery of another defendant.

9 We allow the appeal and direct that the examinations of the respondent parents shall proceed separately. Neither respondent shall have access to the transcript of the examination of the other until the Court of Queen's Bench otherwise orders, or the parties mutually consent.

10 We are agreed that costs of this appeal should be in accordance with the Court's practice direction.

Appeal allowed.

FN* A corrigendum issued by the court on October 7, 2008 has been incorporated herein.

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