COURT FILE NO.: 136/03
DATE: 20030527

ONTARIO
SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

O'DRISCOLL, CARNWATH AND SOMERS JJ.

B E T W E E N:	)	
	)	
ISABELLA BARRETT	)	*Patrick D. Schmidt* and *George Karahotzitis*, for the Appellant
	)	
Applicant (Respondent)	)	
	)	
- and -	)	
	)	
	)	
EDUARD KOURIL, in his capacity as executor of the Estate of JAROSLAV KOURIL, deceased	)	*Douglas J. Spiller*, for the Respondent
	)	
	)	
	)	
Respondent (Appellant)	)	
	)	
	)	
	)	
	)	
	)	**HEARD:** May 27, 2003

O'DRISCOLL J.: (Orally)

[1] The appellant, Eduard Kouril, executor of the estate of Jaroslav Kouril, deceased, his brother, appeals to this court from the order of Dyson J., dated January 7, 2002, under the provisions of s.76 of the *Succession Law Reform Act*, R.S.O, 1990, c.S.26, Part V, as amended, (the *Act)*, which reads: "An appeal lies to the Divisional Court from any order of the court made under this Part."

[2] The testator, Jaroslav Kouril, died on October 29, 1993. In his will he made no mention of the respondent, Isabella Barrett. On April 4, 1994, Ms. Barrett commenced an application under Part V, s.58(1) of the *Act* seeking an order for the proper support payment out of the estate to Ms. Barrett, who claimed to be a "dependant" under s.57 of the *Act*. Ms. Barrett claimed to be a dependant under s.57 of the *Act* because the deceased was providing support to her at the time of his death and she claimed to be a "spouse" under the same section of the *Act* in that she and the deceased had cohabited continuously for a period of not less than three years prior to the death of the deceased. Ms. Barrett acknowledged that it had been a conjugal relationship.

[3] The trial Judge said in paragraph 10 of his reasons that the key liability issue was whether the deceased and Ms. Barrett "cohabited continuously for a period of not less than three years" prior to the deceased's death. The trial Judge used the seven descriptive components compiled by His Honour Judge Kurisko in *Molodowich v. Penttinen* (1980), 17 R.F.L. 376 (Ont. Dist. Ct.), in reviewing the evidence of cohabitation. The trial Judge concluded that Ms. Barrett had, based on the ten witnesses called by her counsel, established that issue on a balance of probabilities. The trial judge said:

> [24] "He may well have retained a unit for his own use during this period. However, on the evidence I have heard, which I accept, it is clear that he spent the majority of his time cohabiting with the applicant at 481 Vaughan Road and 540 The West Mall and these residences were his primary abode from at least 1989 until his death."

[4] Section 17 of the *Ontario Evidence Act*, R.S.O., 1990, c.E.23 stipulates that Ms. Barrett was not entitled to judgment that she was a dependent spouse cohabiting with the deceased on a full time basis for a continuous three year period unless her evidence was corroborated from some other material evidence. The trial Judge found an abundance of such evidence in the testimony of the ten witnesses, especially Bishop Wright and Ms. Monica Lovell, who were called by Ms. Barrett's counsel, and in the joint safety deposit box they held from 1988 to 1993 and a parking agreement of September, 1990 regarding the deceased's vehicle.

[5] The trial Judge, regarding corroboration, concluded:

> [17] "There is an abundance of corroborative evidence, which I accept, to find that Jaroslav Kouril cohabited with the applicant at her residence from at least 1989 until his death, which satisfies the three-year period of continuous cohabitation requirement in the *Succession Law Reform Act*."

[6] In deciding on quantum, the trial Judge, as is mandatory, reviewed the list of circumstances set out in s.62(1) of the *Succession Law Reform Act.* The trial judge, in his reasons at paragraph 26, listed several of his findings regarding s.62(1) and he went on to say:

> [27] "The Estate of Jaroslav Kouril was approximately $300,000 of which his one-half interest in the two properties was just over $200,000.
>
> [28] The evidence was sketchy and generally unsatisfactory with respect to his monetary contribution to the applicant during his relationship with her."
>
> [34] "From all of the evidence there is little doubt the deceased contributed to the rent, the purchase of groceries, and family outings. Further, there is little doubt that he benefited from the spousal support and care of the applicant."
>
> [35] "After considering the evidence and the provisions of s.62(1) of the *Succession Law Reform Act*, I assess her claim against the Estate at $75,000. There will be judgment in this amount against the respondent."

[7] In paragraph 7 of his factum, counsel for the respondent states:

> "The issue on appeal remains a quintessentially factual one." With that, I agree.

[8] In *Bryars Estate v. Toronto General Hospital,* [1997] O.J. No. 3727, Laskin J.A., for a unanimous Court, said:

> [22] "This appeal does not raise any point of law. Instead, the appellants seek to overturn findings of fact. A trial judge's findings of fact are, of course, entitled to great deference from an appellate court. An appellate court should not interfere unless the trial Judge has committed a "palpable and overriding error" or a "manifest error", or a "clear error". The adjectives, some of them colourful, are used to signal deference, to ensure that an appeal court reviews factual findings on a standard of unreasonableness, not on a standard of correctness: Canada (Director of Investigation and Research) v. Southam Inc., [1997] 1 S.C.R. 748."
>
> [23] "What kind of error amounts to a "manifest error" justifying appellate intervention? An appellate court may intervene if the trial judge misapprehends or disregards relevant evidence, fails to appreciate the evidence, makes a finding not reasonably supported by the evidence, or draws an unreasonable inference from the evidence: Joseph Brant Memorial Hospital v. Koziol, [1978] 1 S.C.R. 491; Geffen v. Goodman Speight, [1991] 2 S.C.R. 353; and Schwartz v. Canada, [1996] 1 S.C.R. 254. If an appellate court finds such an error, it must then consider whether the error affected the trial judge's decision."

[9] The trial judge saw and heard the witnesses at trial. True, there was conflicting evidence. As the trier of fact, the trial judge weighed and counter-balanced the evidence of various witnesses and decided what was credible and reliable evidence upon which to base his findings of fact. It is not a question of what any one of the members of this panel would have decided. The question is: "Did the trial judge:

(1) misapprehend or disregard relevant evidence;

(2) fail to appreciate the evidence;

(3) make a finding not reasonably supported by the evidence;

(4) draw an unreasonable conclusion from the evidence?

[10] We cannot say that the trial judge committed any of those errors.

[11] In *Fletcher v. Manitoba Public Insurance Company* [1990] 3 S.C.R. 191, 204, Wilson J. said:

> "These authorities, in my view, make crystal clear the test for determining when it is appropriate for an appellate court to depart from a trial judge's findings of fact: appellate courts should only interfere where the trial judge has made a "palpable and overriding error which affected his assessment of the facts." The very structure of our judicial system requires due deference to the trier of fact. Substantial resources are allocated to the process of adducing evidence at first instance and we entrust the crucial task of sorting through and weighing that evidence to the person best placed to accomplish it."

[12] As to the question of quantum, in our view, the trial judge properly considered the stipulated factors set out in s.62(1) of the *Act*. The trial judge found that Ms. Barrett's standard of living had been marginal since she arrived in Canada in September, 1982. The trial judge specifically found:

> [34] "From all the evidence there is little doubt the deceased contributed to the rent, the purchase of groceries, and family outings. Further, there is little doubt that he benefited from the spousal support and care of the applicant."

[13] From the rents in cash which the deceased collected, he provided a substantial upgrading in the lifestyle of Ms. Barrett and her family. We find no error in the method used by the trial

judge to assess quantum nor do we find any error in the quantum fixed by the trial judge. The appeal is, therefore, dismissed.

[14] I have endorsed the back of the appeal book as follows: "This appeal is dismissed for the oral reasons, of even date, given for the court by O'Driscoll J. The solicitors/counsel for Ms. Barrett shall now pay out to her the sum of $101,847.28, paid into their trust account pursuant to the order of Madam Justice Benotto, dated April 1, 2003. We have been given a draft Bill of Costs by counsel for the respondent. We have heard submissions as to costs. We fix costs, as follows, for this appeal:

(1) Fees: $7,500,

(2) Disbursements: $168.41, and

(3) GST

These costs are assessed on a partial indemnity basis. Discussion has taken place about the endorsement with regard to the payer of the costs. Mr. Schmidt does not object to the following addition to the endorsement: 'These costs to be paid personally by Eduard Kouril.' "

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O'DRISCOLL J.

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CARNWATH J.

_____

SOMERS J.

Date of Reasons for Judgment: May 27, 2003

Date of Release: June 12, 2003

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B E T W E E N:

ISABELLA BARRETT

Applicant (Respondent)

- and -

EDUARD KOURIL, in his capacity as executor of the Estate of JAROSLAV KOURIL, deceased

Appellant (Respondent)

ORAL REASONS FOR JUDGMENT

O'DRISCOLL J.

Date of Reasons for Judgment: May 27, 2003
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