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Dickie: Right But Not Right Enough

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by [Lorna Turnbull](#)

In a very brief judgment the Supreme Court of Canada in *Dickie v. Dickie* 2007 SCC 8 reinstated a finding of contempt against a former spouse and father who "showed an appalling disregard for orders of the court, for his support obligations to his family and for the welfare of his children" (*Dickie v. Dickie* (2006) 78 O.R. (3d) 1; 2006 CanLII 576 (C.A.) at para 69).

Dr. Ken Dickie was a wealthy plastic surgeon practicing in Sarnia, Ontario, before he moved to Bahamas to avoid his obligation to support his three children and former wife (*Ibid* at para 71). Leaka Helena Delia Dickie could not enforce the outstanding support orders against her former husband because the Bahamas does not have legislation permitting the reciprocal enforcement of judgments. The consequences for Mrs. Dickie and her children were "disastrous" (*Ibid* at para 78) and the family faced the threat of losing their home.

Effective January 1, 2001 based on the Child Support Guidelines, Dr. Dickie was ordered to pay \$9067/mo in child support and \$2500/mo in spousal support by Greer J. Mrs. Dickie sought security in Ontario for these support orders since she was unable to enforce them in the Bahamas and on December 3, 2002 two orders were made, one to provide an irrevocable letter of credit of \$150,000 to secure child and spousal support obligations and the second to provide security for costs by paying \$100,000 into his lawyer's trust account. Both orders provided 14 days for compliance. Dr. Dickie did not appeal these orders, nor apply to vary them, and neither did he ever seek to vary the underlying support orders. Dr. Dickie paid little or no support under the January 2001 orders and his arrears exceeded \$100,000 by the time the security orders were granted (*Ibid* at para 74).

In June 2003 Mrs. Dickie brought a motion for contempt of the orders for security which was eventually heard in January 2004. Stewart J. concluded that Dr. Dickie had willfully refused to comply with orders of Greer J. and granted him a further month to purge his contempt. When he did not do so, she ordered him jailed for 45 days. He immediately served his sentence before launching an appeal to the Ontario Court of Appeal on the basis that Stewart J. erred in law by finding him in contempt for failing to make a court ordered "payment of money" contrary to rule 60.11 (1) of the Rules of Civil Procedure (R.R.O. 1990 Reg. 194). The majority held that rule 60.11 (1) precluded making a contempt order to enforce an order for the payment of money, with no exception for family matters, on the basis that both the letter of credit and the security for costs were orders for the payment of money. Mrs. Dickie had also argued that the court should exercise its discretion not to hear Dr. Dickie's appeal under s.140(5) of the Courts of Justice Act (R.S.O. 1990 c. C-43) on the basis of Dr. Dickie's continuing refusal to comply with court orders.

Laskin J.A., writing in dissent, agreed with Mrs. Dickie in this regard and he would have refused to hear the appeal until Dr. Dickie complied with the underlying orders. He noted that Dr. Dickie had "willfully and continuously "thumbed his nose" at the court" ((2006) 78 O.R. (3d) 1 (C.A.) at para 95) and "hearing the appeal before the contempt is purged would impede the course of justice and would impair the ability of the court to enforce its own orders" (*Ibid*).

Laskin J.A. also reviewed the merits of Dr. Dickie's appeal under rule 60.11(1) and concluded that the letter of credit and the order for security for costs did not constitute payments of money because they were directed to be paid "not to the creditor but into court – or its functional equivalent, to a solicitor to be held in trust" (*Ibid* at para 104). Moreover, "the effect of the order [was] not to create a fixed debt obligation, but to secure a debt obligation" (*Ibid*).

The Supreme Court of Canada essentially adopted the reasoning of Laskin J.A. in allowing Mrs. Dickie's appeal and restoring the orders of Stewart J. The court pronounced the question of whether the Ontario Court of Appeal should have exercised its discretion to be moot since that Court had actually heard the appeal, but declared its support for the position of Laskin J.A., stating that had his view been the decision of the majority "we would have found no basis to interfere with the

result". (2007 SCC 8 at para 6) The court also awarded Mrs. Dickie her costs before the Supreme Court of Canada on a solicitor and client basis and in the Court of Appeal on a substantial indemnity basis. Notwithstanding the brevity of the decision, it could be said that the Court was sending a message.

Unfortunately, the Court chose to forego the opportunity to send a message that was richer in analysis and understanding. By adopting the reasons of Laskin J.A., the Supreme Court of Canada affirmed the importance of taking a contextual approach to the issues in the case, one that acknowledged the complex larger issues that were underlying the contempt order. Laskin J.A. was able to discern the willful disregard of Dr. Dickie, both for the well being of his own family and for the authority of the court, and his decision reflects his understanding of that context. What is missing is the recognition that the abuse of power visited by Dr. Dickie upon his family is part of an even larger context of inequality experienced by women, within the family law system and within the family itself.

It is this larger context which the Women's Legal Education and Action Fund, as intervenor, presented to the Court. LEAF argued that the issues in the case relate to the systemic discrimination experienced by women and that they should be analyzed using a section 15 "Charter Values" approach. Such an approach must include a contextualized analysis of the socioeconomic experiences of the disadvantaged group, in this case women and children. Women and children are predominately the ones who suffer poverty after marriage breakdown and it is predominately men who willfully try to avoid making support payments (as opposed to being unable to make them) (Mary Jane Mossman, "Child Support or Support for Children? Rethinking 'Public' and 'Private' in Family Law" (1997) 46 U.N.B. L. J. 63 at 64-5; Bernadette Landry, "What Comes First? A Report on the Payment of Support Orders in New Brunswick" (Fredericton: New Brunswick Advisory Council on the Status of Women, 1990); Jane Gordon, "Multiple Meanings of Equality: A Case Study in Custody Litigation" (1989) 3 C.J.W.L. 256 at 266). LEAF also invited the Court to recognize the potential disadvantage to poor men if they could be found in contempt because of an inability to afford to comply with security orders.

Women's risk of economic disadvantage is exacerbated when payor spouses can "thumb their noses" at courts' support orders with impunity, allowing men to continue to be able to exercise power and control over former spouses and children through such abuses (Department of Justice Canada, "Summary of Report on Research Strategy for Studying Compliance/Default on Child Support Orders", September 1999). A clearer message could have been communicated if the Supreme Court had referenced the Charter Values approach it has endorsed in other cases (eg. *Moge v. Moge*, [1992] 3 S.C.R. 813; *Hills v. Canada (Attorney General)*, [1988] 1 S.C.R. 513) recognizing that this was necessary to guarantee women their full equality rights. The outcome in this case is the right one but the deeper analysis would have shown that it was right, not only on the facts of this particular case, but because Canada's commitment to gender equality requires it.

[filed: Family Law Dickie (2007)]