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APPEAL COURT QUASHES ORDER JAILING ESTATE EXECUTOR FOR FAILING TO MAKE PAYMENT

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Three judges of the Ontario Court of Appeal have agreed that a court cannot imprison someone for failing to make a court-ordered payment.

Marcel Lacroix, of the North Bay area, died in 1997 leaving an estate worth about \$900,000 to Michel Lacroix, his son by a previous marriage. He left nothing to Colleen Forrest, his common-law wife of 18 years.

Forrest applied for support, and Justice Michael Bolan of the Ontario Superior Court ordered the Lacroix estate to pay her \$2,500 a month.



Christopher Caruana

He subsequently found that the conduct of the son, who was also the estate's executor, had been "designed to frustrate" Forrest from receiving the support, and in light of that, ordered the estate to pay Forrest a lump sum of \$300,000. He also put the son personally on the hook for any shortfall.

Payment of a third of that sum (\$100,000) was to be made to Forrest by last September, and if Lacroix didn't pay it, she was entitled to have him held in contempt.

Lacroix did not pay, Forrest did apply for the contempt order, and Justice John Valin of the Ontario Superior Court granted it, ordering Lacroix jailed for nine months unless he made the payment, plus interest, plus court costs of \$2,500, in the next 28 days.

Lacroix retained Christopher Caruana of Toronto's Davis & Company to appeal Justice Valin's decision, based on long-standing law that the court cannot send someone to prison for not making a payment, unless the person is also guilty of a criminal act. The appeal court agreed.

Justice Valin's reasoning in granting the contempt order was based on four family law cases (*Estrien, Kapis, Merklinger* and *Pilpel*) that sought to make an exception to the general rule against jailing people for non-payment, in order to hold delinquent fathers to account for alimony or support payments.

“I do not think that they (the four cases) support a conclusion that there is a ‘family law’ exception relating to the application of rules 60.05 and 60.11(1) [of the Rules of Civil Procedure],” Justice John Morden wrote for the appeal court in a review of a host of relevant cases going back to the 1800s.

From Forrest’s point of view, the trouble may have been in the fact that her motion for contempt was launched in the Superior Court, under Rule 60, instead of in family court under the *Family Responsibility and Support Arrears Enforcement Act, 1996*.

Without commenting on its applicability to the case before him, Justice Morden wrote that under this latter statute, the rules allow a family court judge to imprison a delinquent for up to 90 days, unless the court is satisfied that he (or she) does not have the means to make the payment.

Justices Rosalie Abella and John O’Driscoll concurred.

“The Court of Appeal has returned to the plain meaning of Rule 60.11 by overruling the so-called family law exception which had developed in the four cases,” Caruana told *The Lawyers Weekly*. “In doing this, the Court has reaffirmed a very old line of precedents but they have also not precluded other avenues for enforcing support orders through a court’s contempt powers in appropriate circumstances.”

He also said the decision shouldn’t be seen as an opportunity for those with support obligations to shirk their responsibilities.

Lawyer Don Wallace of North Bay had a different take on the case.

“I guess my feeling is that the Court of Appeal is probably right about the law, but they’ve done nothing in the circumstances of this case to assist this lady to collect her judgment and it seems to me they should be taking some steps to deal with somebody who’s deliberately defying the orders of the court. This isn’t somebody who doesn’t have any money.”

He confirmed that Forrest had been receiving interim support payments up until Justice Bolan’s \$300,000 lump sum award, but said they ceased after that, although the lump sum hadn’t been forthcoming. She is currently operating a small business in North Bay.

Wallace said he’s now waiting to hear whether the provincial Family Responsibility Office is willing to do its job and try to collect the judgment, in light of the fact that not only the estate, but Michel Lacroix personally, is on the hook for it.