Date: 20020131
Docket: CA 174980

NOVA SCOTIA COURT OF APPEAL
[Cite as: Cook v. Tench, 2002 NSCA 17]

Roscoe, Hallett and Hamilton, JJ.A.

BETWEEN:

MELINDA COOK

Appellant

- and -

DANA ANDREW TENCH

Respondent

REASONS FOR JUDGMENT

Counsel:	Mary Jane McGinty for the Appellant Karen L. Hudson for Respondent
Appeal Heard:	January 25, 2002
Judgment Delivered:	January 31, 2002

THE COURT: The application for leave to appeal is dismissed without costs as per reasons for judgment of Roscoe, J.A.; Hallett and Hamilton, JJ.A., concurring.

ROSCOE, J.A.:

[1] This is an appeal from an "interim, interim" custody order made by Justice Leslie Dellapinna of the Family Division of the Supreme Court after a very brief initial hearing on September 25, 2001. The hearing was scheduled as an "emergency", as a result of a disagreement between the parents about which school the children should attend. Justice Dellapinna received affidavits filed only on behalf of the father. The mother's request for an adjournment, based on inadequate notice, was refused.

[2] The order appealed from provides that the respondent father have interim care and custody of the two children of the marriage, aged 9 and 10, that they remain enrolled in the school they were attending in the mother's neighbourhood, that the mother have access for a part of every weekend and one or two additional evenings per week, and that the matter be adjourned for the hearing of the father's interim custody application on October 29, 2001. On the basis of the evidence that was before the court on the application, the order reinstated what had apparently been the status quo until a few weeks prior to the hearing. We are advised that the hearing on October 29, 2001 did not proceed and was further adjourned for a hearing commencing on June 26, 2002. The Family Division has also authorized a home study assessment, scheduled a pre-trial settlement conference and offered mediation services to the parties.

[3] The appellant raises the following issues:

> **ISSUE #1**
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> To what extent can a trial Judge deviate from the *Civil Procedure Rules* in the conduct of a hearing before it will become an error of law, in respect of which the Court of Appeal court will interfere?
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> **ISSUE #2**
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> Can a trial Judge stray from the *audi alteram partem* rule in the conduct of a trial? If so, to what extent can he or she do so before the court of Appeal will interfere?

ISSUE #3

Was the unsworn evidence of the Respondent properly before the court? Further, did the trial Judge's refusal to accept the unsworn evidence offered by the Appellant, while accepting the unsworn evidence of the Respondent, create an appearance of bias on the part of the trial Judge?

ISSUE #4

Should the Court accept new evidence on appeal?

[4] On appeals of interim and interlocutory orders, this court has taken the view that it will only interfere if there has been a substantial injustice. As indicated by Matthews, J.A. in the following passage from **Hickey v. Hickey** (1994), 128 N.S.R. (2d) 321:

> This court has stated, on innumerable occasions, that we will not interfere with interlocutory orders unless wrong principles of law have been applied, material evidence disregarded or patent injustice would result. Appeals from interlocutory orders should be discouraged. The parties should be urged to get on with the proceeding by way of settlement or, failing that, trial.
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> In **ACA Cooperative Association Ltd. v. Associated Freezers of Can. Inc. et al.** (1989), 95 N.S.R. (2d) 35; 251 A.P.R. 35, MacKeigan, J.A., commented at p. 37:
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> > "Interlocutory appeals have become much too frequent and should be discouraged. They, by definition, seek interference by this court in the middle of a proceeding. We must refrain from interfering except in the rankest case of injustice or serious error of law. Our noninterference in the middle of a trial should not, of course, be construed as approving everything the trial judge is doing."
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> Those remarks are especially true in respect to an interim order such as the one before us. The intent of the order is to grant interim measures only pending the hearing before the trial judge. The chambers judge took care to stress that point. Neither the trial judge nor the parties are bound by its provisions at time of trial.

[5] The appellant has tendered several affidavits containing new evidence which she urges us to consider in determining the appeal. While the rule against

introducing fresh evidence which might have been available at the original hearing should not be rigidly enforced in family matters, the new evidence submitted on this appeal, even if we assume without deciding that it meets the usual test for admission on the appeal, (see **Thies v. Thies** (1992), 110 N.S.R. (2d) 177) does not satisfy us, that when taken with the other evidence on the application, it could reasonably be expected to have affected the result of the "interim interim" order which was intended only to be in effect for a few weeks. The fact that the matter did not proceed on the adjourned date, and is now set over for several months, is not sufficient reason for this court to intervene in the Family Division matter at this stage, and assume the roles of deciding credibility and finding of fact.

[6] We have considered the issues raised and the written and oral arguments of counsel. We are not satisfied that there was any reasonable apprehension of bias. While there were procedural irregularities, we are unanimously of the view that the appellant has not shown that Justice Dellapinna committed an error of the type required to upset an interim order. We will not disturb the interim order. The application for leave to appeal is dismissed without costs.

Roscoe, J.A.

Concurred in:

Hallett, J.A.

Hamilton, J.A.