IN THE FAMILY COURT OF NOVA SCOTIA
Citation: W.F. v. X.C., 2013 NSFC 17

Date: 20130925
Docket: FLBMCA-081012
Registry: Bridgewater

Between:

W. F.

Applicant

v.

X. C.

Respondent

Judge: The Honourable Judge William J. Dyer

Heard: September 25, 2013, at Bridgewater, Nova Scotia

Oral Decision: September 25, 2013

Written Release: October 30, 2013

Counsel: David Hirtle, for the Applicant
Rubin Dexter, for the Respondent

By the Court (orally):

[1] W. F. (F.) and X. C. (C.) are the parents of two children, D. and J.. F. started an application under the **Maintenance and Custody Act** (**MCA**) in mid May, 2012 seeking joint custody, with shared day-to-day care and control of the children on a week on/week off basis.

[2] The parties were involved in litigation under the **Children and Family Services Act** (**CFSA**) from in or about August, 2010 to in or about March, 2012. I was the presiding judge in the **CFSA** case.

[3] Although agency involvement ended without opposition when the maximum statutory time limit was reached, as between F. and C., to my memory, the personal dynamics presented as "high conflict". The **MCA** proceeding followed in the wake of the child protection case. Its tone does not seem to have improved much, if at all, over the intervening weeks and months.

[4] In mid December, 2012, with the benefit of independent legal advice, the parties entered into an interim consent order which (among other things) provided that F. and C. will have joint custody and shared parenting of D. and J.. The specifics of the shared parenting arrangement are set out in considerable detail in the order and need not be repeated.

[5] I note the parties did craft and agree to some very precise terms and conditions that would attach to the parenting arrangements. However, the order was certainly not final. Accordingly, should this case continue to a final hearing, the contest will not be about the interim arrangements - rather it will focus on the merits of the underlying original application and the response.

[6] The **MCA** file contains competing affidavits by the parties and others, pre-dating the interim order. None of that proposed evidence has been tested in court. Neither parent submitted affidavits preparatory to the first (**MCA**) review appearance which they had agreed upon about six months before. No explanations have been forthcoming from either camp.

[7] The stated purpose of the mid-June, 2013 docket appearance was review. Importantly, the order did not call for review of the interim arrangements - rather review of the "matter" - which I took to mean the case. In any event, by then, the case was apparently no closer to settlement and there was a change in C.'s legal representation. I am informed that around the same time Mr. Hirtle gave C.'s then lawyer notice, by letter, of F.'s wish to conduct a discovery examination.

[8] By the end of July, the parties had secured disclosure of the local child protection agency's file materials which counsel perceived to be needed to properly advise their respective clients; and F.'s counsel again declared an intention to seek discovery examination of C..

[9] Lawyers are under a professional obligation to advise and encourage clients to compromise or settle disputes whenever it is possible to do so on a reasonable basis and should consider the use of alternative dispute resolution (ADR) when appropriate, inform clients of ADR options, and take steps to pursue those options.

[10] On the record, I encouraged counsel and their clients to work on solutions to the outstanding problems or issues, to maintain a positive attitude, and hopefully achieve a consensual outcome. However, by mid August, the parties were no further ahead on the discovery front and, apparently, not on the road to ADR or other out-of-court settlement options.

[11] F. moved ahead with the interlocutory formalities and met stiff opposition. Both counsel briefed the immediate issue: whether C. should be compelled to participate in an examination for discovery on F.'s motion.

[12] There is no serious dispute about the limited legal framework. Counsel did not cite any cases directly on point. However, they acknowledge the relevance of the **Family Court Rules (FCR's).**

[13] The stated object of the **FCR's** is to secure the just, speedy and inexpensive determination of every proceeding. It is acknowledged that the **Civil Procedure Rules** (**CPR's**) apply at the discretion of the court when there is no provision under the **FCR's** touching on a particular topic. Importantly, the application of the **CPR's** is not mandatory or automatic. That reality begs the question (which I do not think has been asked or answered at the Appeal Court level) as to whether a

Family Court Judge who declines to invoke the **CPR's** may create and impose her or his own *de facto* rules in appropriate circumstances.

[14] In passing, I will also mention that the **FCR's** are flexible and not intended to straight-jacket parties, so to speak. Indeed, **Rule** 2.01(1) provides that a failure in a proceeding to comply with any requirement of the Rules shall, unless the court otherwise orders, be treated as an irregularity and shall not nullify the proceeding, any step taken in a proceeding, or any document, or order.

[15] In the present case, counsel agree that the **FCR's** do not contain any provisions with respect to examinations for discovery of parties or witnesses and that the court may, and should, invoke the relevant **CPR's.**

[16] Without labouring the topic, the **CPR's** have two family law subsets. **CPR** 59 deals with proceedings in the Supreme Court, Family Division and **CPR** 62 governs family proceedings in jurisdictions outside of metro Halifax and Cape Breton.

[17] F.'s counsel cited **CPR** 18 which sets out the **Rules** applicable for discovery of witnesses and the practical modifications authorized by **CPR** 59.28 and 62.07.

[18] Mr. Hirtle submitted that **CPR** 18 contemplates discovery of witnesses as a way to promote the just, speedy, and inexpensive resolution of proceedings. And, it was no surprise when he submitted that Rule 18 is consistent with the stated purpose of the **CPR's** and the **FCR's**. He submitted **CPR** 18 contemplates that discovery of witnesses will happen as efficiently as possible and without necessarily compelling attendance.

[19] It is conceded, I believe, that **CPR's** 18.03, 18.04, and 18.05 contemplate that parties will make efforts to discover other parties and non-parties alike, on a consensual basis, without the unilateral issuance of so-called discovery subpoenas. I do not propose to embark on a dissertation about discovery subpoenas because (in the present case) there is a motion on the table to compel attendance.

[20] Mr. Hirtle points out that both **CPR** 59 and **CPR** 62 incorporate procedures for discovery examinations in family proceedings. He says that **CPR** 59 is slightly more restrictive with respect to discoveries inasmuch as it only permits discovery

examinations regarding issues of child support, where permitted by a judge. By contrast, **CPR** 62 does not have a similar restriction or limitation. Admittedly, both **CPR**s contain restrictions with respect to discovery of children. However, it was submitted that other than the provision regarding the discovery of children, there is nothing contained in either **Rule** that restricts in any way the scope of discovery of parties to a family law case about parenting or so-called custody and access; and, in any event, the provisions of **CPR** 18 apply unmodified.

[21] Mr. Dexter's position does not stand on any contrary interpretation of the **Rules**. He concedes that a Family Court Judge does have the discretion to compel, or refuse to compel, a party to attend for discovery purposes. However, in his words, "the issue is not whether the Family Court has the discretion to order a discovery examination pursuant to **CPR** 18, with or without variation of same as the court deems appropriate, but whether such discretion should be exercised in this case".

[22] With respect, I disagree with the proposition (advanced by Mr. Hirtle) that this case is still in its infancy. As mentioned, the current application was launched in May, 2012.

[23] By agreement of the parties, and (in fairness) for systemic reasons, the case may not have advanced as quickly as first expected. But, the case is not in its infancy; it is more likely in adolescence.

[24] I see no benefit in speculating about why the current **FCR's** do not specifically address examinations for discovery of witnesses and parties - because the harsh reality is that the **FCR's** do not reference a whole range of topics which routinely surface in family law litigation.

[25] Accordingly, we come full circle: under the **FCR**'s, a judge may invoke the **CPR's,** with all of their breadth and depth, in appropriate circumstances.

[26] In my opinion, the presence or absence of interim orders is immaterial to the immediate question, and the so-called right to discovery surely arises once the limited pleadings called for in the Family Court setting are filed, or it is otherwise obvious the underlying proceeding is advancing.

[27] Neither party has submitted any affidavits since approximately mid December, 2012. No reasons were given. Moreover, many months passed before C. gave notice of his discovery examination wish.

[28] In his memorandum, Mr. Hirtle wrote as follows: "At this time, Mr. F. wishes to examine Ms. C. on the affidavit material and evidence which he has previously filed with the court, as well as other materials which have been produced. Mr. F. also wishes to discover Ms. C. as to what has transpired from the filing of her last affidavit."

[29] The reference to "other materials" is an obvious reference to disclosure obtained from the local child protection agency - although the precise time frames have not been disclosed to the court.

[30] The absence of up-to-date affidavits from the parties for the purposes of the interlocutory motion is problematic. Leaving aside agency disclosure, as already noted, there is no explanation for the delay between the filing and service of C.'s affidavit last December and the request for discovery regarding her affidavit.

[31] There is no evidence about the proposed discovery arrangements - for example, when the examination might be held, how long it might take to conclude, whether a transcript will or will not be requisitioned, the expected expense, how the expense will be paid, and the apparent ability (or inability) of the parties themselves to cover their solicitor/client expense and/or to respond to an award of court costs should that be imposed at the conclusion of the proceeding.

[32] Counsel for the parties engaged in civil litigation, and, indeed, self-represented individuals, have a whole range of prehearing preparation options. For example, there can be simple requests for information made by letter, by e-mail, and otherwise. Under the **CPR's,** there is provision for the delivery of interrogatories, and remedies if the process proves ineffective. The parties may choose to engage in face-to-face discussions in settlement-oriented conferences, with or without the benefit of trained mediators, conciliators, or judges. In those settings, it is certainly common for relevant information and evidence to be exchanged on a without prejudice basis.

[33] With respect, in the present case, there is no evidence about the efforts, if any, made to explore or pursue those other avenues in lieu of a formal discovery examination.

[34] In exercising my discretion, I believe I can (and should) take into account my judicial experience when assessing submissions - including those made by Mr. Dexter to the effect that the prehearing discovery is “beyond the ordinary scope of and practice under the **Family Court Rules** and, as such, the burden is placed squarely on Mr. F. to demonstrate the prehearing discovery of Ms. C. as necessary to secure the “just, speedy and inexpensive” determination” of this proceeding. On this point, I will just say that I have presided in Family Court for over two decades, the last 14 years of which have been in the local district. Although I have seen a small handful of subpoenas for discovery, interrogatories, demands for documents, etcetera, my experience is that they have been very few and very far between.

[35] The Family Court has jurisdiction under many statutes. But most of the contested cases are under the **CFSA** and the **MCA**. I cannot speak for or about other judges. However, in my court, this is the first formal application - let alone contested application - by a party to compel another party to attend for discovery in what I consider to be a routine family law case. I say routine because this [case] does not appear to be factually or legally complicated. There are no professional reports or witnesses. There is no competing or complex accounting, taxation, or technical information. As far as I know, there has been no request or effort for discovery examination of non-party witnesses.

[36] The central issues were identified in the originating application and, it seems, that the parents - to their credit - have been able to operate under an interim regime which is either working, from one perspective, or needs refinement from the other perspective.

[37] The court has a responsibility to control its own processes. Based on my experience, I am confident in reiterating that court-sanctioned or imposed discoveries on parties is exceptional and, locally, unprecedented, if my memory serves me correctly.

[38] In the circumstances, I conclude that generalities and broad statements to the effect that the requested discovery will secure a just, speedy and inexpensive determination are insufficient.

[39] Just how such an order would expedite the present case has not been established.

[40] I deny the motion.

Dyer, J.F.C.