SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: *Wilman v. Sutton*, 2015 NSSC 193

Date: 20150630
Docket: SFHMCA-068650
Registry: Halifax

Between:

Nancy Ann Wilman

Applicant

v.

Jerome John Sutton

Respondent

Judge: The Honourable Justice Beryl A. MacDonald

Heard:
April 9, 10 and 27, 2015

Counsel: Vanessa L. Jass, counsel for the Applicant;
Gregory L. Englehutt, counsel for the Respondent

By the Court:

[1] On June 11, 2015 I delivered my decision in this matter. I had neglected to include a decision about costs although this had been requested by the Mother. Counsel for the parties had made submissions on costs at the end of the hearing. I have now considered their submissions.

[2] I have frequently written about the factors the court is to consider when a request for costs is made and I do not intend to recite those factors in this decision.

[3] On July 19, 2010 the parties entered into a Consent Order that placed the parties' only child in their joint custody. The Mother was to have primary care and the Father was to have access. The Father was to pay certain section 7 expenses but was not to pay the table guideline child maintenance amount until the child reached 4 years of age. The Father was also to pay $35,000.00 from an investment account the parties had acquired during their relationship.

[4] The parties encountered difficulties in implementing the parenting arrangements and the provisions in respect to child maintenance. The Father had not paid the $35,000.00. Conflict between them increased. On November 22, 2013 the Mother commenced a Variation Application requesting sole custody, a change

to the Father's access and a retroactive and ongoing recalculation of child maintenance. The Father, on February 28, 2014 filed a parenting statement requesting primary care of the child. He had legal counsel since late December but was unable to file all of the requested financial information. The Mother engaged counsel and also filed a contempt application in respect to the Father's failure to pay her the $35,000.00.

[5] At a Date Assignment Conference in March 2014 hearing dates were given for the contempt application, July 7, 2014, later changed upon agreement to July 8, 2014 and the variation hearing, November 13, 2014. On July 8, 2014 the Father's counsel was ill and the contempt matter was rescheduled to October 8, 2014.

[6] The Mother was unsuccessful in her contempt application because of the application of Civil Procedure Rule 89.02:

> A contempt order may not be granted to punish a failure to pay money, unless the failure is in violation of either of the following kinds of orders:
>
> (a) an order for family maintenance or support;
>
> (b) an order for recovery of money that expressly provides that a failure to turn over, or pay, funds may be punished as contempt.

[7] As a caution to counsel it is important not to request a remedy unless you know the court has jurisdiction to grant what you seek. My decision about costs relates solely to the Variation Application.

[8] By November 5, 2014 the Mother's counsel alleged the Father had not filed required financial disclosure. He had not filed a formal Response to the Mother's application. He had not filed an affidavit as required. However, when the Mother's counsel complained about this, and filed her documents later than was required by the directions given at a pre-hearing conference, the Father's counsel explained she had not filed affidavits from her client because she was waiting for the Mother's affidavits, witness list etc. Counsel for the Father also noted that there was historic financial information filed by the Father although his updated information had not been filed. In addition the late filing by the Mother resulted in counsel for the Father just becoming aware she had a conflict of interest in respect to one of the Mother's witnesses.

[9] My review of the file suggests a failure of the Mother's counsel to carefully consider the filing requirements for the hearing. The Mother had filed an affidavit when she first filed her Variation Application. She had also filed detailed affidavits

in early March 2014. The Father had never responded to those affidavits in respect to the Variation Application and, in fact, he filed nothing in response except his parenting statement. The Mother's counsel suggested the Father's counsel knew the Mother intended to rely upon those affidavits and the Father should have responded to them. There was disagreement about this between counsels. The Mother should have made it clear at the pre-hearing conference that she intended to rely on previously filed affidavits.

[10] By November 5, 2014 the Mother did not know what the Father's plan was. The Father knew or should have known what the Mother's plan was. Given his apparent living circumstances at the time it was questionable whether his work schedule could accommodate his original request for primary care. However he had provided nothing that might have suggested potential for settlement.

[11] At the pre-hearing conference counsel for the Mother should have requested the Father to file his information for the hearing first, including a formal Response if she wanted one. I can understand why the Mother would want to know what the Father had to say, and what the witnesses he intended to call had to say, before she filed her affidavits. Her witness list may have changed based upon her

understanding of the case the Father intended to put forward. Unfortunately counsel for the Mother did not request a reversal of the usual filing directions leading to the problems that became evident shortly before the hearing.

[12] On November 13, 2014 counsel for the Father requested an adjournment because of the inability of her client to respond to the late filed documents and the conflict of interest she had in respect to a witness to be called by the Mother. If the matter was to proceed she requested exclusion of the documents filed by the Mother because they were filed late. The Justice presiding refused to exclude the documents and indicated that if an adjournment was granted it would be not be for very long. The Justice required the Father to state his "position on the issues". The Justice was "not inclined to adjourn (the matter) for very long at all" and said "I want his position on the issues and I want it now, if he's not prepared to give instructions I will likely grant most of the relief sought on a temporary basis and set trial dates in the New Year." The parties were given an opportunity to consult with their counsel to determine whether any of the issues could move forward to a hearing on that day or whether some interim arrangement could be agreed upon pending the outcome of an adjourned hearing. With the assistance of the Justice the parties did come to an interim parenting arrangement and the Mother was informed

that the Father was seeking a week on/week off shared parenting arrangement. Detailed filing instructions were given to both parties. Those instructions required all the necessary information from both parties to be filed on or before the end of February 2015. A pre-hearing conference was to be held by the justice doing the adjourned hearing 6 to 8 weeks before that hearing date. At the date set for the pre-hearing conference on January 26, 2015 the Mother appeared with counsel. Neither the Father nor counsel appeared on behalf of the Father. The Father's previous counsel had made no motion to be removed as counsel of record and there was no notice filed suggesting that the Father intended to act on his own. Counsel for the Mother noted that the Father did not file any of the information he was required to file before January 26, 2015. Given the failure to file the required information and the non-attendance at the pre-hearing conference I awarded $250.00 as costs against the Father. New filing instructions were given and these were incorporated into an order of the court that was to be served upon the Father by direct mail to his address provided in the court file. The Father was to file the required information on or before February 27, 2015.

[13] On March 6, 2015 a notice of new counsel was provided for the Father.

[14] On March 9, 2015 the Father filed a number of documents but he did not complete his filing until March 26, 2015. This left very little time for the Mother's counsel to prepare a brief and to respond to new information contained in the documents filed by the Father.

[15] The Mother has requested she receive $15,000 as a cost award. Her counsel has categorized this as solicitor and client costs. However, the tariff for party and party costs could have provided at least this amount for a two-day hearing, which this was. It appears that the Mother's counsel wants to ensure there is an examination of the Father's conduct that added to the Mother's legal fees, hampered the settlement process, and impeded the Mother's ability to prepare for trial. That conduct is alleged to have consisted of:

- A continuing failure to provide up-to-date accurate financial disclosure notwithstanding being ordered to do so.
- A failure to acknowledge factual information prior to the hearing that may have shortened the proceeding had he done so earlier.
- Our propensity to dismiss counsel and engage new counsel very close to conference or hearing dates thus complicating the process in respect to the filing of documents and the conclusion of the proceedings.

[16] There is no question that the Father repeatedly failed to file appropriate, complete, and accurate financial information throughout this proceeding. Costs have already been awarded in respect to one of those failures. There is also no question that he was extremely late in filing his affidavit leaving the Mother essentially "in the dark" about his parenting plan. This did prevent any opportunity to explore settlement in the course of the proceeding.

[17] On the other hand some of the complications faced by the Mother were not solely the responsibility of the Father or his counsel and I have described why that is so earlier in this decision. The deficiencies in the Father's response to these proceedings were not so "high-handed, arbitrary and reprehensible" to justify the imposition of solicitor client costs. These are only to be awarded in rare and exceptional circumstances. I'm not satisfied the facts of this case justify an award on a solicitor and client basis and make reference to *Brown v Metropolitan Authority*, 150 N.S.R. (2d) 43 (C.A.) in support of this decision. However, the court's disapproval of the Father's conduct can be considered in exercising its discretion to award costs.

[18] Costs are generally awarded to the successful party. I did not impose a week on/week off parenting schedule on the parties but I did give the Father more parenting time than the Mother requested. Nevertheless considering the overall situation I do consider the Mother to be the successful party on this issue.

[19] The Mother did not get as much retroactive child maintenance as she requested but again I consider her to be the successful party as I do in respect to imputing some additional income to the Father. The Mother is to be paid costs by the Father and I award costs in the amount of $15,000.00.

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Beryl A. MacDonald, J.