

SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION

Citation: *Colbert v. Warner*, 2015 NSSC 247

Date: 2015-08-25

Docket: *SFSNF* No.006756

Registry: Sydney

Between:

Todd Colbert

Applicant

v.

Heather Lynn Warner

Respondent

Judge: The Honourable Justice Lee Anne MacLeod-Archer

Heard: July 17, 2015

Written Release: August 28, 2015

Counsel: T.J. McKeough, Counsel for Todd Colbert
Stephen Andrea and Emma Astephen (Articles Clerk),
Counsel for Heather Lynn Warner

By the Court:

[1] This matter came before the court on July 17, 2015 for a hearing on the Application filed by Mr. Colbert on September 16, 2013. He sought variation of custody and access, as the dependent child was no longer living with the mother, but rather with him in Alberta.

[2] He also sought variation of his child maintenance obligations and forgiveness of arrears under a 2011 Alberta court order in which income was imputed to him at \$150,000.00 after he failed to disclose his income. Child maintenance was set at \$1,310.00 per month, payable by him effective March 6, 2009. According to Alberta Maintenance Enforcement office records, those arrears as of July 1, 2013 totalled \$33,080.00.

[3] The parties participated in conciliation, at which time they agreed to changes in custody, access and child maintenance, because the child had moved to Alberta to live with his father in June, 2013.

[4] At that point, the only outstanding issue was the arrears which had accumulated under the 2011 Alberta order. Ms. Warner did not agree with the arrears being forgiven, thus court time was scheduled for a hearing.

[5] A hearing date of July 18, 2014 was scheduled, but was adjourned because Mr. Colbert had not disclosed his income. In an affidavit filed in his Application, Mr. Colbert indicated he earns approximately \$150,000.00 per year, but this includes a retention benefit of \$20,000.00 per year which he has to repay. He also says he has not filed income tax returns for the previous three years.

[6] The matter came back for scheduling on September 21, 2014 at which time Mr. Colbert's counsel requested the matter be put over until the following summer, as the dependent child was expected to graduate high school at that time. A return date was set for April 6, 2015.

[7] The matter returned on April 8, 2015 for a pretrial conference and scheduling. Justice Wilson sent counsel a detailed memo following this appearance, outlining the history of the proceeding and the court's direction that both parties must file their income tax returns and notices of assessment by June 1, 2015.

[8] Mr. Colbert works in Alberta and his counsel advised he was only available between July 13 – August 14, 2015 for a hearing. The date of July 17, 2015 was set to accommodate his schedule. Despite this, Mr. Colbert failed to appear for the

hearing. His counsel appeared that morning and requested another adjournment, which was denied.

[9] Mr. Colbert did not file financial disclosure as directed by Justice Wilson on April 8, 2015. Ms. Warner's counsel has been provided with some documentation (which was not filed with the court) which was incomplete.

[10] After Mr. Colbert's adjournment request was denied on July 17, 2015, counsel for Ms. Warner requested that his Application be dismissed with solicitor-client costs in favour of Ms. Warner.

[11] I dismissed the Application and invited submissions on costs. Deadlines were set for Mr. Colbert's submission, and Ms. Warner's reply.

[12] Mr. Colbert's submission were received a week after the deadline. On the day they were due, Ms. Warner's counsel wrote the court to advise that no submissions had been received from Mr. Colbert. In a fax sent after receipt of Mr. Colbert's late submission, Ms. Warner's counsel asked the court to disregard the submission, citing late filing, which reflects "a pattern on this particular file". Counsel declined to respond to the late submission, unless directed to do so by the court.

[13] Civil Procedure Rule 77.03(1) provides the court with discretion to award costs in appropriate circumstances. These are appropriate circumstances. Mr. Colbert filed a Variation Application but refused to provide the financial disclosure necessary to assess his claim. He was given ample opportunity and was clearly advised by the court of his obligation to do so. He not only failed to file the disclosure as directed, but he also he failed to appear for the scheduled hearing.

[14] Ms. Warner filed a number of documents in response to the Application, including her income information. It is not clear when she learned that Mr. Colbert would not be attending the hearing, but she and her counsel attended court on July 17, 2015. Mr. Colbert did not request an adjournment prior to the morning of the hearing.

[15] Costs are in the discretion of the court, but such discretion must be exercised judiciously. Civil procedure Rule 77.03(2) gives the court discretion to award solicitor and client costs where “exceptional circumstances recognized by law” exist. Although Mr. Colbert’s conduct has been disrespectful to both the court and Ms. Warner, it does not amount to the reprehensible conduct illustrated in other cases where solicitor-client costs were awarded.

[16] The Application was scheduled to be heard in Chambers over a full day on July 17, 2015. Under Tariff C the costs award would normally be \$2,000.00 for each day of hearings. Although there was no hearing, I take into account the following factors in setting costs in this case:

- Mr. Colbert did not appear for the hearing;
- He chose not to file disclosure;
- He chose not to alert the court before the hearing date that he would not be appearing and would seek an adjournment;
- Ms. Warner consented to the changes required to the order at conciliation and an Interim Order was issued;
- There was at least two earlier hearings scheduled which did not proceed due to lack of disclosure;
- There have been a number of court appearances at which Ms. Warner and her counsel have appeared but Mr. Colbert did not;
- Ms. Warner filed a Response to the Application and supporting documents, including the required income information.

[17] In all of these circumstances, I opt to exercise my discretion in awarding a sum which exceeds the usual range. This should send a clear message to Mr. Colbert and others who choose a similar path. A party cannot with impunity flaunt orders and directions from the court, waste court dates by not appearing, and put the opposite party to the expense of hiring counsel, filing responding documents, and appearing for a hearing that did not proceed.

[18] I order Mr. Colbert to pay costs of \$2,500.00 to Ms. Warner within thirty days. Counsel for Mr. Colbert will prepare the order and submit it to the court within seven days.

MacLeod-Archer, J.