SUPREME COURT OF NOVA SCOTIA
Citation: Doncaster v. Field, 2015 NSSC 310

Date: 20151029
Docket: No. 1207-003679
Registry: Truro

Between:

Ralph Ivan Doncaster

Applicant

v.

Jennifer Lynn Field

Respondent

Decision	
Judge:	The Honourable Justice Jamie Campbell
Heard:	October 29, 2015 in Truro, Nova Scotia
Oral Decision:	October 29, 2015
Written Decision:	November 2, 2015
Counsel:	Patrick Eagan for the Applicant Janet Stevenson for the Respondent

Campbell, J. (Orally)

[1] Ms. Field is present today with her counsel Ms. Stevenson. She has been cross–examined on her affidavit by Mr. Doncaster's counsel Mr. Eagan. Mr. Doncaster is not present but is represented by counsel. The nature of Mr. Eagan's retainer is and has been the cause of some confusion. He is retained to deal with custody and access matters but not to deal with financial matters. Mr. Doncaster may believe that his unexplained absence today might leave open to him an argument that any financial aspect to any order granted would be inappropriate. It should be clearly understood that the matter was scheduled today to deal with the issues raised in Mr. Field's motion for security for costs which included financial relief. Mr. Doncaster has also made a motion for variation of support and I had indicated to him that the issue of whether that would go forward would be resolved today as well.

[2] In spite of Mr. Doncaster's absence my intention is to give reasons orally today. The parties should not have to wait any longer.

[3] Ralph Doncaster and Jennifer Field have been engaged in epically nasty divorce litigation over the course of some years. That happens. Some divorces go septic. Few in Nova Scotia, have consumed what this one has, in terms of legal expenses, emotional resources, court time and judicial attention. There have been ten written decisions from the Court of Appeal on the divorce alone not to mention criminal and civil cases than relate directly or indirectly to the parties and their children. There have been 12 published Supreme Court decisions on the divorce and 9 others that relate to matters touching upon the divorce. Mr. Doncaster has

been before the Provincial Court numerous times, sometimes in matters involving Ms. Field and their children.

[4] Now, Mr. Doncaster wants to make a motion seeking a variation of the corollary relief judgment arising from Justice Bourgeois' 7 March 2013 decision, to allow him to have access to the parties' children. Ms. Field has requested security for costs and the imposition of conditions to be complied with before that motion should be heard.

[5] An informed member of the public who cared to read the many reported decisions that involve Ralph Doncaster could reasonably conclude that he has been able to use the courts as a means by which to harass and harangue Ms. Field, without much real practical cost to himself. Sometimes he is self-represented. Sometimes he has legal counsel. His ability to use technical legal procedures, his ability to cite legal precedents in and out of context, his ability to creatively draw others into the morass, his stubbornness and his willingness to appeal almost every decision, have made him a formidable, frustrating and unpredictable opponent. His failure to pay costs has made him a virtually untouchable one.

[6] The high cost of legal representation can in some cases be an access to justice issue. In other cases, legal fees can act as a deterrent to aggressive litigants. An award of costs is one of the protections that people have from those who would use the court system less as way to resolve a dispute than as a way to perpetuate one. Clausewitz famously said that war was the continuation of politics/diplomacy by other means. Family litigation should not be allowed to be the continuation of inane, repetitive, vengeful, mean spirited and abusive bickering by other means.

[7] Mr. Doncaster has been ordered to pay costs. He has now $81,000 in costs awarded against him that have not been paid. Of that amount $50,000 relates to the original divorce proceeding. That award of costs is under appeal. Justice Farrar of the Court of Appeal has ordered Mr. Doncaster to pay security for costs in the amount of $15,000 with respect to the appeal of the award of costs. That has been paid.

[8] The matter for today is whether he should be required to pay security for costs before the matter of the amendment of the corollary relief judgment can be heard. The reasons set out by Justice Farrar apply to the rules as they relate to security for costs on appeals.

> There is abundant evidence to establish that Mr. Doncaster has behaved in an insolvent manner and has failed to pay costs in related proceedings. I am satisfied that the respondent has established "special circumstances" which would justify an award of costs.[1]

[9] Security for costs can be awarded under Civil Procedure Rule 45. A judge can make an order if the responding party will have undue difficulty in realizing on a judgment for costs, provided that the difficulty arises not only from the lack of means of the other party and if it is unfair to allow the claim to continue without an order for security for costs.

[10] Mr. Eagan on behalf of Mr. Doncaster has argued that with respect to custody matters, where the best interests of the children is the paramount consideration, security of costs should be granted only in exceptional

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[1] *Doncaster v. Field* 2015 NSCA 83 para.

circumstances. In *Kaiser v. Wein* [2] the Justice Ruth E. Mesbur of the Ontario Superior Court of Justice dealt thoughtfully and thoroughly with that issue. In that case the mother applied for security of costs when the father made an application for joint custody in which he proposed to call 23 witnesses. Justice Mesbur said that the father could easily be described as a "scofflaw"[3]. He had failed to file documents when required, failed to make financial disclosure, failed to pay child support, and failed to pay numerous costs orders. The children had lived with their mother over a period of two years and the father had access. In light of the history of the matter the plan to call 23 witnesses was claimed by the mother to be vexatious and a waste of time and money intended to drive up her costs.

[11] Justice Mesbur outlined a number of cases and determined that the common theme was that security for costs should be granted only in exceptional circumstances where the best interests of the child are the paramount consideration. She found that case to be an exceptional and usual one and said that it "cries out for a sanction that balances the primary goal of determining the children's best interest with the other objective…namely to enable the court to deal with cases justly"[4]. The Ontario Family Law Rules provide that dealing with cases

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[2] 2014 ONSC 752

[3] That colourful terms was coined in the United States during prohibition and means a person who shows distain for laws that are difficult to enforce. The second part of Ken Burns' three part PBS series, *Prohibition*, is entitled "A Nation of Scofflaws" and documents the origin of the word. It was the winning entry in a 1924 Boston Herald contest seeking the best word to describe someone who drank illegally.

[4] Para. 26.

justly includes insuring a process that is fair to all parties, saving expense and time, dealing with the case in ways that are appropriate to its importance and complexity and giving appropriate court resources to the case while taking account of the need to give resources to other cases. Justice Mesbur determined that the best way to balance those interests was either to require security for costs or to limit the amount of court time available to the father. "He cannot have *carte blanche* in relation to trial time, put the mother to inordinate time and expense, and do so with impunity while thumbing his nose at numerous outstanding court orders."[5]

[12] Justice Mesbur cited *Shumilas v. Porter Shumilas*[6] where a court took a similar approach. Justice Hambly in that case found that there was good reason to believe that a father's case for joint custody was frivolous and vexatious. Justice Hambly concluded that if the father wanted to pursue a claim for joint custody he would be required to post security for costs in the amount of $10,000. If however he claimed only expanded access he would not be required to do so.

[13] Justice Mesbur concluded that the father would be required to deliver an amended witness list and would have no more than 2.5 days in which to present his case. If he failed to do that he would be required to post security for costs in the amount of $1500 which was noted as bring an objectively modest amount but significant in terms of his financial means. It is significant that in *Kaiser v. Wein* there is no mention of the kind of procedural history that characterizes this matter.

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[5] Para. 28.

[6] 2009 CarswellOnt 6166 (S.C.J.)

[14] Ms. Stevenson provided me this afternoon with the decision in *Izyuk v. Bilousov.*[7] In that case Justice Pazaratz addressed the law as it pertains to security for costs in custody matters.

> But high conflict parenting disputes are often the most time consuming, financially draining, and emotionally damaging cases we deal with in family court. Quite often the best gift we can give children is a break from the family siege mentality and perpetual stoking of conflict which accompanies endless litigation. [8]

[15] The judge went on to address the suggestion that security for costs might actually be more appropriate in custody cases and referred to the decision of Justice Quinn in *Stefureak v. Chambers*.[9] There it was said that where the position being espoused by a party was a waste of time or a nuisance and the party does not have funds to pay costs, it shouldn't matter that custody is in issue. "I can think of no better case to stop in its tracks than an unmeritorious claim for custody."[10]

[16] The circumstances of this case cannot be considered without having regard to the unrelenting barrage of court motions, applications and appeals to which Ms. Field has been subjected by Mr. Doncaster. He is perhaps not a "scofflaw", the term used by Justice Mesbur. He does not, it seems, hold the law itself in distain. It might not be fair to call him an "obsessed litigant" because that implies some kind of diagnosis. The term "recreational litigant" suggests that the process and not the outcome is the point. To some extent Mr. Doncaster is focused on his desired

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[7] 2015 ONSC 3683

[8] para. 42

[9] 2005 CarswellOnt 1076

[10] para. 18

outcome. He can fairly be described, perhaps with some sense of ironic understatement, as a "persistent litigant". Mr. Doncaster's motion for a variation to allow access has to be seen in that context. It should be judged on its own merits. The best interests of the children is of course the paramount consideration. Yet, it is undeniably another product of one of the province's most prolific litigants aimed at his most usual target.

[17] Once again referring to Justice Mesbur's comments, with that context, this case too "cries out". What it really cries out for an end. That will not come anytime soon. There will be more appeals and more motions and more applications. There will be more paper generated and more time spent grinding away at it. Perhaps the best that can be hoped for are some limits. The imposition of those limits might serve to enforce an uneasy truce. But more likely, the limits themselves will become a new focus for even more litigation. The sad legal legacy of *Doncaster v. Field* may eventually be to point out that there is always a way to keep trouble brewing.

[18] Mr. Doncaster has unpaid costs awards and unpaid child support. He does appear to be experiencing some degree of financial difficulty. His unwillingness to pay costs awards is not related solely to his claimed impecuniosity. He is able to pay when it is in his immediate self-perceived interest to do so. He has been able to access $15000 to allow him to continue with his appeal. It is clear in this case that in the absence of an award for security for costs Ms. Field would have extraordinary and undue difficulty in recovering any costs from Mr. Doncaster.

[19] The nature of Mr. Doncaster's motion is significant given that the best interests of the children are paramount. He is requesting access to the parties'

children. His affidavit in support of that motion was filed on 14 September 2015. It addresses three main areas. The first area involves his medical treatment. Mr. Doncaster says that he had not been prescribed any medication for his mental health as of a December 20, 2012 appointment with his psychiatrist, Dr. A. Abdel Aty. In 2013 Dr. Aty took a one-year sabbatical and discharged Mr. Doncaster as a patient. He followed up with his family doctor at least once a year since that time. On 23 June 2015 Mr. Doncaster had an appointment with CEH Health Centre to request to resume seeing Dr. Aty. And that's all it says about medical treatment.

[20] The second area addressed is his own perception of his mental state. He says that since 2013 he has felt much calmer than he was during his relationship with Ms. Field and since that time had been in "full control" of his emotions. He says that he has been in a respectful and loving relationship with his new wife and has never, at any time lost his temper or even yelled at his two step children. He says that he is confident that he would never lose his temper with his own children. And that's all it says about his current condition.

[21] The first part of the affidavit sets out a list of recent cases involving Mr. Doncaster in which he was successful, being either acquitted of charges or having had charges withdrawn against him. Most of the affidavit is devoted to that. The affidavit devotes more space to court matters than to mental health matters.

[22] What is significant is what the affidavit does not address. It does not even mention participation in cognitive behavioural therapy. Justice Bourgeois' decision in March 2013 was clear.[11] She stated that Mr. Doncaster was to have no access to

[11] *Doncaster v. Field* 2013 NSSC 85

the children except "as otherwise contemplated in this decision". She went on to state that Mr. Doncaster was to continue with treatment and follow the recommendations of Dr. Taylor and Dr. Amr Aty. "Before considering access the court will need to know the status of his ADHD treatment and to what extent his behavioural symptoms are under control." Justice Bourgeois went on to say that Mr. Doncaster should commence cognitive behavioural therapy with a component of anger management. Mr. Doncaster's successful participation in that therapy was set by Justice Bourgeois, if not as a precondition to access at least as a very important factor in deciding whether access should be reinstated.

[23] The matter was, of course, before Justice Bourgeois again in May 2013. Justice Bourgeois noted that it is highly unusual for a parent to be prohibited from exercising access. There has to be cogent and compelling evidence to justify such an order. But that was the case here. She noted that it was hoped that with "specific interventions" that could be rectified. The question will be whether he has "meaningfully undertaken the steps required to gain control over his behavioural unpredictability and gain(ed) insight as to the impact of his actions on his children." She went on the say that Mr. Doncaster would be "well advised" to provide evidence as to the status of his medical treatment in relation to ADHD as well as his participation in cognitive behavioural therapy.

[24] Any application for access that does not fully address those issues is not likely to succeed. It is not barred form proceeding but it unlikely to succeed.

[25] Ms. Field should not be required to be exposed to more litigation of that kind especially given that she would be very unlikely to recover on any award of costs. While the best interests of the children are paramount there is a balancing of

interests required. Mr. Doncaster should not have *carte blanche* to drag Ms. Field into that litigation simply by claiming that the best interests of the children are involved.

[26] Mr. Doncaster has not raised issues in that affidavit that suggest in any way that his children's best interests are now at risk. If there were issues of a more imminent or immediate concern that would be significant. If there were real and specific concerns raised about the children and their best interests nothing should stand in the way of those being addressed. That is not the case here. The nature of the issue raised and the token manner in which it has been put forward by Mr. Doncaster militates in favour a balancing of considerations rather than the fairness concerns being trumped absolutely by the mere invocation of the best interests test.

[27] The court has jurisdiction both to make an order for security for costs and to control its own process by issuing a stay, subject to conditions being met. Both are appropriate here.

[28] Mr. Field should not be exposed to litigation unless she can be assured that she can collect on an award of costs. Given the nature of the issue to be resolved and the history of the procedural complications that have characterized them at almost every turn, security for costs should be paid in the amount of $8000 with respect to any motion for custody or access. That is based on the potential that the matter will expand into at least two days with expert evidence likely required from both parties.

[29] Before any such custody or access motion is scheduled, a report should be received from a qualified professional, whether it be a medical doctor, psychologist or counsellor, addressing the issue of Mr. Doncaster's current mental health

condition and dealing specifically with whether he has completed or is currently undergoing any kind of therapy.

[30] Those conditions deal with custody and access matters.

[31] Mr. Doncaster has made a motion for variation of child support. He should not be permitted to proceed with any further motions, including variation of support obligations, until some other outstanding issues have been resolved as well. He still has not paid costs award to Ms. Field. He still owes a substantial amount in child support. He has made a bankruptcy proposal. Before any more motions of any kind can be heard at Mr. Doncaster's instigation he should be required to disclose information that relates directly to those outstanding issues and to post security for costs.

[32] The security for costs on other issues will not be as substantial as the amount involved with custody and access issues. In any matter not relating to custody or access Mr. Doncaster will be required to post security for costs in the amount of $3000 for each motion.

[33] Before any motion not related to custody or access is brought Mr. Doncaster will be required to disclose the source of the $15,000 paid a security for costs.

[34] He will be required to disclose all bank accounts held in his name.

[35] He will be required to disclose the source of funds used to pay his current legal fees.

[36] He will be required to provide all information with respect to mortgages listed in his consumer proposal.

[37] Once that information has been provided to Ms. Stevenson, Mr. Doncaster will be at liberty to make further motions.

[38] I am not satisfied at this stage that payment of arrears of child support or other payments should be required as a precondition to the making of further motions.

[39] Costs on this motion are awarded in favour of Ms. Field in the amount of $1000 payable forthwith. Those costs must be paid before any further applications of any kind can be brought by Mr. Doncaster against Ms. Field.

J.