IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: Zinck v. Fraser, 2006 NSSC 357

Date: 20061123
Docket: SFHMCA 017647
Registry: Halifax

Between:

Crystal Zinck

Applicant/Respondent

v.

Steven Fraser

Respondent/Applicant

Judge:	The Honourable Justice Moira C. Legere Sers
Heard:	May 10 & 11, 2005, in Halifax, Nova Scotia
Final Written Submissions:	Respondent/Applicant - July 22, 2005 Applicant/Respondent - July 26, 2005
Counsel:	Fergus Ford, for the Applicant/Respondent Amy M. Sakalauskas, for the Respondent/Applicant

By the Court:

[1] On February 18, 2004, Ms. Zinck filed an application to vary a Consent Order entered into January 29, 2004. This Consent Order dealt with the issue of mobility and resolved it between the parties. The application of February 18, 2004 revived the mobility issue with the Applicant's request to move with the child to Calgary. The Applicant also requested other relief.

[2] In the meantime, as a result of the mother's relocation to an area immediately outside the HRM district, the parties entered into a Consent Interim Order dated November 29, 2004 to adjust the father's access period.

[3] On November 2, 2004, the father applied for sole custody and opposed the mother's mobility application.

[4] The matter took two organizational pre-trials and was heard over two full days of trial on May 10 and 11, 2005. Written submissions were directed on the issue of costs at Ms. Zinck's counsel's request. They were sent by July 26, 2005.

[5] The Court granted the father's application for a change in the primary residence of the child to the father and continued a joint custody order. The decision was appealed. The appeal was dismissed with costs of $2,000 plus disbursements as taxed or agreed upon.

[6] The father seeks costs of his trial and such costs include disbursements.

[7] The father prepared for the mobility application put forward as a result of the February 18, 2004 application by the Applicant mother. The mobility application was withdrawn shortly after receiving an updated assessment which suggested that the child be placed in the sole care of the father. The withdrawal of the application took place only shortly before the trial was scheduled to commence.

[8] The issue of mobility had been previously resolved by the Consent Order of November 29, 2004, prior to this latest application by the mother.

[9] The father was largely successful in his application. While he did not receive sole custody, he received primary day-to-day care. The assessor recommended sole custody. The Court granted joint custody to continue to support meaningful parental involvement between the child's mother and the child's step-sibling who resided with the mother.

[10] The Court is aware of the directions in Rule 63 as well as *Grant v. Grant* (2002) 200 N.S.R. (2d) 173 (T.D.); *Ghosn v. Ghosn*, 2006 NSSC 214; and *Bennett v. Bennett* [1981] N.S.J. No. 10.

[11] It is clear that successful parties are entitled to costs, costs are in the discretion of the trial judge, and the rules regarding costs apply to family matters.

[12] In this matter, the father was largely and significantly successful in this application, after protracted historical litigation and conflict. The mother applied for mobility which was a repeat of her previous application and settled by Consent Order.

[13] The mother's behaviour was not conducive to a reasonable settlement between the parties on the issues of access and on the issue of mobility.

[14] The father had to pay counsel, which was a significant, financial impairment to his ability to be independent financially. The mother was able to access legal representation without cost to herself.

[15] The mother survives on social assistance and is supporting her other child.

[16] The likelihood of recovery of costs in this matter is minimal.

[17] The Court is currently assessing only the costs associated with the trial and the necessary pre-trials pertaining thereto.

[18] I endorse the comments of the Honourable Justice R. James Williams in *Grant v. Grant*, wherein he cited in *Britt v. Britt*, Ottawa 99-FL-25457 and 96-FL-54226, March 6, 2000:

> The financial ability to pay costs has long been a factor to take into account in fixing the amount of costs in a family case... It cannot be a complete 'defence' to an award of costs, because if it were, this would mean that a party could litigate with financial immunity."

[19] The father has fought the issue of mobility on three occasions. The first successfully concluded in a Consent Order without the need for a trial. The second resulted in an order transferring his child to his primary day-to-day care and custody and denying the mother's application to move. This was appealed to the Supreme Court Appeal Division where the father was successful in maintaining primary care.

[20] Counsel for Ms. Zinck asked the Court to defer on the issue of costs pending the decision of the Court of Appeal.

[21] The Court of Appeal ordered costs of $2,000, together with disbursements as taxed or by consent.

[22] In light of the mother's financial circumstances, the lack of likelihood of recovery, this $2,000 is a significant disincentive to vexatious litigation. Had the Court of Appeal not ordered costs, I would certainly address the

issue of ensuring that litigation is undertaken where there are clearly reasonable and justiciable issues to resolve.

[23] In this instance, after the mobility issue was settled, the issue to resolve was the issue of ongoing conflict between the parties, weighing the plans of the parents to determine which addressed the child’s best interests and the frustration of the father's access.

[24] Any further award of costs pertaining to this trial would be meaningless and likely unenforceable.

[25] I order the mother to pay the father's disbursements as noted in the most recent submission of July 21, 2005: filing fees, $352.00; photocopying, $314.50; service of documents, $37.50, for a total of $704.

Legere Sers, J.