SUPREME COURT OF NOVA SCOTIA

Citation: Doncaster v. Field, 2013 NSSC 149

Date: 2013-05-07
Docket: Tru No. 1207-003679 (079303)
Registry: Truro

Between:

Ralph Doncaster

Applicant

v.

Jennifer Field

Respondent

Judge: The Honourable Justice Cindy A. Bourgeois

Heard: May 1, 2013, in Truro, Nova Scotia

Counsel: Ralph Doncaster, Applicant, on his own behalf

Janet Stevenson on behalf of the Respondent

Roderick (Rory) H. Rogers, Q.C., on behalf of Deborah Bird

By the Court:

INTRODUCTION

[1] Ralph Ivan Doncaster ("Mr. Doncaster") is a petitioner in a divorce proceeding with his spouse Jennifer Field ("Ms. Field"). In the context of that proceeding, this Court undertook an interim hearing relating to custody and access issues. After hearing evidence and submissions over 5 days, the Court addressed the parties on December 19, 2012 and reserved decision. A written decision was released on March 7, 2012. An order has not, as yet, been issued.

[2] Mr. Doncaster filed a Notice of Motion on March 25, 2012 seeking "an order directing Ms. Bird to comply with a decision of the Honourable Justice Cindy A. Bourgeois in this proceeding by presenting my letters to Max, Mia, Grace and Kate Doncaster". In the motion, he states he relies on the Civil Procedure Rules, notably Rule 80. Both Ms. Bird and Ms. Field have responded to the motion. Their respective positions will be reviewed, however, prior to doing so some additional background may be of assistance.

BACKGROUND

[3] By an interim order issued April 30, 2012 Justice J.E. Scanlan ordered that the four Doncaster children would be in the sole care and custody of their mother, Jennifer Field. Mr. Doncaster was to have no access with the children, pending outcome of psychological and parental capacity assessments, and further order of the Court.

[4] Following completion of the above noted assessments, this Court heard evidence over 5 days. Given the extent of the evidence, which included that addressing the two assessments, the Court reserved decision. The Court did, on December 19, 2012 at the conclusion of the hearing, provide oral comments, in which the parties were provided with some indication of what would ultimately be included in the written decision. As previously noted, the written decision was released March 7, 2013.

[5] The Court's decision contemplated a mechanism whereby Mr. Doncaster could move towards re-initiating some form of access with his children. This was to be facilitated by the children's therapist, Ms. Bird. The Court determined that

she would be in the best position to review letters written by Mr. Doncaster to the children, and determine whether, given the children's emotional and psychological progress and well-being, the letters should be provided to them.

[6] Prior to the release of the written decision, Mr. Doncaster wrote letters to the children, which Ms. Bird did not provide to the children. Mr. Doncaster now seeks to enforce the Court's "decision" rendered orally on December 19, 2012, as well as the written decision of March 7, 2013.

EVIDENCE IN SUPPORT OF THE MOTION

[7] Mr. Doncaster has filed an affidavit in support of the motion, affirmed March 25, 2013. Given its brevity, it is reproduced below, absent the exhibits:

> 1. I have personal knowledge of the matters sworn in this Affidavit except where otherwise stated to be based on information and belief, and in all cases the matters contained herein are true and complete to the best of my knowledge, information, and belief.
> 2. On 2013/01/15 I met with clinical social worker Tanya Broome and provided her with letters for Max, Mia, Grace, and Kate Doncaster. Copies of the letters are included as Exhibit "A".
> 3. I am informed by Ms. Broome and believe to be true that she sent the letters in Exhibit "A" to Deborah Bird.
> 4. On 2013/02/28 I sent a copy of the letter attached as Exhibit "B" to Jacqueline Milner by fax.
> 5. As of 2013/03/25 I believe the letters included as Exhibit "A" have not been presented to my children.

[8] Four letters, addressed to each child were attached as Exhibit "A". Attached as Exhibit "B" is a letter addressed to the Court from Mr. Doncaster and dated February 28, 2013. In that correspondence, Mr. Doncaster outlined his efforts in having the letters for the children reviewed by Tanya Broome, and his concerns that they had not been passed along to the children by Ms. Bird.

POSITION OF THE PARTIES

[9] Mr. Doncaster asserts that Ms. Bird has failed to comply with both this Court's oral decision of December 19, 2012 and the written decision rendered March 7, 2013, as she has not provided the children with his letters.

[10] In his reply submissions, he expands his arguments, after having the opportunity to review the submissions filed on behalf of Ms. Bird and Ms. Field.

Contrary to the shared position of Ms. Bird and Ms. Field, Mr. Doncaster asserts that the Court's "oral directions" of December 19, 2012 and written reasons of March 7, 2013 are capable of enforcement. He relies on several Civil Procedure Rules and writes in his submissions as follows:

> Both respondents claim that despite your oral directions on 2012/12/19 and your written decision on 2013/03/07, no lawful order is in place yet. No authority on point has been cited by either party. I suggest this is because the position is untenable.
>
> CPR 78.01(2) states, "Directions and rulings are orders". CPR 78.03(4) states:
>
> A direction in a record certified by a court reporter or judge may be enforced in the same manner as a written order issued by the court.
>
> At page 3, paragraph 2 of the transcript of your decision, you stated:
>
> That being said, there are certain findings that will be included in my decision, and there are certain directions that will be included in my decision . . . that I know will be included today. I'm going to provide the parties with an opportunity to start on those directions now, as opposed to waiting 'til a written decision is released, perhaps next month or later.
>
> Given CPR 78.01(2), your directions are orders, and according to CPR 78.03(4), "may be enforced in the same manner as a written order issued by the court".
>
> CPR 78.07(1) states:
>
> A written order is in effect when it is issued and an order made orally is in effect from the time it is spoken, unless the order provides otherwise.

[11] Mr. Doncaster submits that Ms. Bird is bound to abide by the Court's directions, as she consented to the Court's jurisdiction at trial. In light of her position however, and in the alternative, Mr. Doncaster submitted he would be in agreement with Ms. Bird no longer being tasked with reviewing his letters, suggesting the following new terms:

- Once Mr. Doncaster commences cognitive behavioural therapy he can, with the guidance of his therapist, begin contacting the children via written letter, to each child, on a twice monthly basis. The letters are to be reviewed by Mr. Doncaster's therapist initially, and following that review are to be sent to the children by mail. They may respond, either in writing or by email if they wish. Copies of all letters should be retained for any necessary review by the Court.

- Mr. Doncaster's therapist and the children's counsellor shall consult with one another with regard to Mr. Doncaster's progress and the children's response to the written contact with him.

[12] Ms. Bird submits that Mr. Doncaster's motion should be dismissed, and raises several arguments in support of that position, including:

- As Ms. Bird is not a party to the proceeding, or a proper respondent in the motion, this Court has no jurisdiction to consider the matter;
- As there is no issued order arising from either the Court's December 19, 2012 commentary, or March 7, 2013 written decision, there is nothing to be enforced;
- As a non-party to the proceedings, the Court cannot compel Ms. Bird to undertake any actions;
- The Court cannot delegate decisions regarding access to Ms. Bird;
- If the Court determines there is an enforceable decision, Mr. Doncaster has not established a contravention warranting enforcement.

[13] In addition to seeking a dismissal of the motion, Ms. Bird has made known to the Court that she does not wish to undertake the "gatekeeper" role relating to the review and assessment of Mr. Doncaster's letters to the children. She asserts this gives rise to a real potential for conflict with Mr. Doncaster which would interfere with her important therapeutic role with the children.

[14] Ms. Field also submits that there is no enforceable order yet in place, and procedurally Mr. Doncaster's motion must accordingly be dismissed. In her oral submissions, Ms. Field's counsel stressed that Ms. Bird's continued therapeutic involvement with the children is jeopardized if she remains in a "gatekeeping" role as contemplated in the Court's written decision. It is submitted that if the Court removes Ms. Bird from this role, that this responsibility should not fall on the shoulders of Ms. Field. It will only result in added litigation and challenges initiated by Mr. Doncaster.

[15] Ms. Field submits that this Court should, in light of the circumstances, consider removing the access via correspondence until such time as Mr. Doncaster establishes he has meaningfully commenced cognitive behavioural therapy and gains real insight into the impact of his behaviours.

ISSUES

[16] The motion as framed by Mr. Doncaster appears quite straight forward. It is not. To resolve the matter, the Court must address the following issues:

1. Is there an enforceable decision in place, either by virtue of the Court's December 19, 2012 oral comments, or by virtue of the March 7, 2013 written decision?
2. If there is an enforceable decision, should it be enforced?
3. What continuing role, if any, should Ms. Bird have in this matter?
4. What changes, if any, can or should the Court make to its written decision of March 7, 2013?

DETERMINATIONS

Is there an enforceable decision in place, either by virtue of the Court's December 19, 2012 oral comments, or by virtue of the March 7, 2013 written decision?

[17] As noted earlier herein, there are several Civil Procedure Rules which are helpful to addressing the above inquiry. Most notably:

> 78.01(2) Directions and rulings are orders.
>
> 78.03(1) An order must be in writing, except directions and a ruling may be given orally and other kinds of orders may be given orally if the order is to be enforced before a written order can be made.
>
> (2) A court reporter must make a record of an order made orally in open court.
>
> (3) A judge who makes an order orally other than in open court must make a record of the order.
>
> (4) A direction in a record certified by a court reporter or a judge may be enforced in the same manner as a written order issued by the court.
>
> (5) A judge who makes an order orally may provide that the order is to be replaced by a written order and give directions for the drafting of the replacement order.
>
> 78.07(1) A written order is in effect when it is issued and an order made orally is in effect from the time it is spoken, unless the order provides otherwise.
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> 78.08 A judge may do any of the following, although a final order has been issued:
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> (a) correct a clerical mistake, or an error resulting from an accidental mistake or omission, in an order;
>
> (b) amend an order to provide for something that should have been, but was not, adjudicated upon;
>
> (c) extend the time for doing something required to be done by an order that provides a deadline;
>
> (d) set a deadline for complying with an order that does not set a deadline.

[18] Interestingly, both Mr. Doncaster and Ms. Stevenson submit the above rules support their respective positions.

[19] The Court of Appeal has recently had the opportunity to consider Rules 78.03(1) and 78.07(1) (in addition to other provisions) in **MacDonald v. MacDonald** 2010 NSCA 34. In that instance, the Court was considering whether

an appellant had brought an appeal within the required time frame. To address that issue it was necessary to determine whether the order under appeal was "made" when the oral decision was given, or alternately when the Corollary Relief Judgment was issued. The Court determined, notwithstanding that the Court had given a full oral decision; the order was effective when the written judgment was issued.

[20] In reaching the above conclusion, Justice Hamilton writes:

> 25 These Rules support the conclusion reached in **Duffy, supra** and applied in **Arsenault, supra** and **Murray, supra** that a CRJ is "made" pursuant to s. 21(3) when it is issued, not on the date of the decision.
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> 26 Interpreting s. 21(3) in this way is also consistent with the law that applies in most civil cases, that until a written order is issued, the judge has discretion to withdraw, modify, or even reverse his or her decision; **Burke v. Sitser**, 2002 NSCA 115, [2002] N.S.J. No. 416.; **Credit foncier Franco-Canadien v. Fort Massey Realities Ltd.**, (1981), 49 N.S.R. (2d) 646.

[21] In light of the above, I return to Rule 78.03(1), which I view as being ultimately determinative of this issue. It bears repeating:

> 78.03(1) An order must be in writing, except directions and a ruling may be given orally and other kinds of orders **may be given orally if the order is to be enforced before a written order can be made**. (Emphasis added)

[22] The bolded words are key. An oral direction can be enforceable if the Court intends it to be prior to a written decision being issued. Absent such intent, a decision or direction is enforceable upon a written order being issued. This is consistent not only with the above rule, but the jurisprudence.

[23] What was the Court's intent in this instance? On December 19, 2012 the Court had heard evidence and submissions over 5 days. This included a consideration of parental capacity and psychological assessments and the lengthy *viva voce* testimony given in relation thereto. The Court made clear, both in its oral comments and in the subsequent written decision that notwithstanding its concern regarding Mr. Doncaster's lack of access to his children, the primary and paramount consideration was the best interests of the four children.

[24] The Court was able to readily conclude after the close of the hearing that Mr. Doncaster lacked insight into how his behaviours impacted negatively, both

directly and indirectly, on his children. It was clear, as recommended by the assessor, that he would require not only pharmacological intervention in relation to his ADHD symptomology, but also cognitive behavioural therapy. From the evidence presented at trial, it was apparent that finding various professionals willing and able to engage in providing services to members of this family had been at times challenging. As opposed to waiting for the issuance of a full written decision, the Court felt it prudent to give Mr. Doncaster the opportunity in advance of the release of a decision, to firstly find an appropriate therapist, and then initiate therapeutic intervention.

[25] Although it was hoped the comments on December 19, 2012 would allow Mr. Doncaster to get started on the process contemplated by the Court, the comments were not intended to be enforceable against either party or Ms. Bird. Further, until a written order is issued, the Court is of the view that the written decision released March 7, 2013 also remains unenforceable.

[26] On that basis, Mr. Doncaster's motion is to be dismissed. Notwithstanding the Court expressing its intent regarding the oral comments and written decision, should the view above be found to be in error, the second inquiry will be addressed.

If there is an enforceable decision, should it be enforced?

[27] If either the oral comments or the written decision were determined to be enforceable, the Court would decline to do so. The provision of letters to the children cannot be isolated from the broader context of what the Court felt was in their best interests. The letters were intended to be a tool in support and part of Mr. Doncaster's cognitive behavioural therapy, not just a means of access with the children. To facilitate this goal, Mr. Doncaster was to engage a qualified therapist who would in turn, not only serve as a conduit for the letters to Ms. Bird, but utilize the letter writing process as a tool assisting Mr. Doncaster to gain insight into the impact of his behaviours on the children. Although Mr. Doncaster advises he has been referred to social worker Tanya Broome, the Court is unaware of whether cognitive behavioural therapy has commenced, or whether Ms. Broome has the requisite qualifications to embark upon that process. Without being satisfied as to the above, considering whether the letters should have been conveyed to the children is premature.

What continuing role, if any, should Ms. Bird have in this matter?

[28] At the hearing Ms. Bird was called to provide evidence as the children's therapist. She conveyed to the Court their respective progress with therapy. She further conveyed their wishes as it related to having access with their father.

[29] In response to inquiries from the Court as to her willingness to be involved in efforts to reinitiate access, Ms. Bird expressed a willingness to be so involved. Through her counsel, Ms. Bird indicates she is no longer willing to voluntarily assist with such efforts, although she is prepared to continue her therapeutic relationship with the children.

[30] I agree with the submissions of Mr. Rogers that in the circumstances of this case, there is a good probability that Ms. Bird's involvement as a "gatekeeper" of the letters will place her in conflict with her professional obligations to the children. This motion is proof of that proposition – Ms. Bird should not be concerned that a refusal to provide a letter based upon her professional assessment of how it may negatively impact on one of the children, may result in her being brought before the Court on an enforcement or contempt motion. It was further acknowledged by Mr. Doncaster that he has made a misconduct complaint against Ms. Bird to her professional governing body.

[31] In a perfect world, a professional involved therapeutically with the children could provide very helpful guidance as to whether proposed letters to the children would be beneficial or harmful to their emotional well-being. Sadly, it is not a perfect world. Given that this Court has made factual findings that the children are afraid of their father due to the unpredictability of his behaviour, and that they have suffered emotional harm as a result thereof, their continued involvement in therapy is paramount . Ms. Bird's ongoing therapeutic involvement with the children cannot be jeopardized by her undertaking a "gatekeeping" role in relation to letters from their father, and the resulting probability of her being drawn into the vortex of this litigation.

[32] Ms. Bird's role, should she be willing to continue as such, will solely be the provision of therapeutic intervention to the children.

In light of this motion, what changes, if any, can and should be made to the Court's written decision of March 7, 2013?

[33] As was outlined above, Mr. Doncaster submits that the Court, absent consent of the parties, is *functus*, and unable to make any substantive changes to the March 7, 2013 decision. Although the Court can "tweak" the access provisions to permit his therapist to review the letters to the children, he submits the Court has

no ability to now reconsider the access provisions as suggested by Ms. Field's counsel.

[34] The Court is not *functus* in terms of reconsidering the terms of access contemplated in the March 7, 2013 decision. **MacDonald, supra** as noted earlier herein, is authority for that proposition. The Court also finds instructive the comments of Justice Oland in **Burke v. Sitser**, 2000 NSCA 115 as follows:

> [7] In our respectful opinion, the chambers judge erred in determining that he was *functus*. Until the order issued, he had the discretion to withdraw, modify, or even reverse his decision. In *Lunenburg v. Bridgewater Public Service Commission* (1983), 59 N.S.R. (2d) 23 (N.S.S.C.A.D.), where the issue was whether the judge erred in reversing his oral decision, Cooper, J.A. reviewed the case authority pertaining to *functus officio* at para 8 and para 9. He stated at para 10:
>
> > . . . in my view Judge Clements was here not *functus*. He could only be so if an order giving effect as a judgment to his oral decision had been entered. I quite recognize the word of caution entered by Bridges, J., in the *Fruehauf Trailer Co.* case, *supra*, to the effect that the right to modify or vary a decision in circumstances such as we have here is one which "a court should be most reluctant to exercise and should only do so in an exceptional case", but in my opinion this is such a case. Judge Clements frankly said that he had not clearly dealt with the main argument of the Commission and, that being so, it seems to me highly desirable that he exercise his right to vary his oral decision.
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> [8] We would also refer to *Temple v. Riley*, [N.S.J. No. 66 (QL) wherein Saunders, J.S. stated at para 60:
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> > The general rule is that a trial judge may change or amend his/her judgment at any time before issue and entry thereof, but that after the judgment has been issued and entered, he/she is *functus officio* and relinquishes any power to do so, subject of course to the provisions of the Rules. See, for example, *The Law of Civil Procedure*, W.B. Williston and R.J. Rolls, Vol.2, Butterworths (Toronto: 1970), p. 1059.

[35] In many respects, this is an exceptional case. It is highly unusual for a parent to be prohibited from exercising access to their children. There must be cogent and compelling evidence that access would not be in the best interests of the children. The Court found that this was such a case, but was hopeful that with specified interventions undertaken by Mr. Doncaster, that situation could be rectified.

[36] This issue is much broader than whether letters have been passed along to the children or not. The real issue is whether Mr. Doncaster has done what was

expected of him in preparation of those letters being sent. Has he meaningfully undertaken the steps required to gain control over his behavioural unpredictability, and gain insight as to the impact of his actions on his children?

[37] The above inquiry is relevant to what the Court should now do, in light of the fact that Ms. Bird will no longer be involved in reviewing the letters intended for the children. I am not satisfied that Mr. Doncaster being permitted to send letters directly to the children is appropriate. Further, the Court has no evidence before it at present to establish that Mr. Doncaster has engaged an appropriately trained therapist or that he or she would be willing and able to knowledgeably review his letters. As such, I do not consider it appropriate to assign a "gatekeeping" role to either Ms. Broome or some other person unknown to the Court.

[38] Should Ms. Field be expected to receive and assess the appropriateness of letters from Mr. Doncaster? No. Although that may not be an unreasonable request of a custodial parent in some circumstances, given the highly conflictual nature of this family dispute, placing Ms. Field in such a position would almost certainly generate additional conflict and litigation.

[39] So where does that leave the Court in terms of considering access between Mr. Doncaster and his children? Although both are extremely important considerations, the best interests of the children must take precedence over Mr. Doncaster's right of access. The Court previously concluded that direct access was not in the best interest of the children. Implementing access via correspondence is simply not workable at the present time. There is no other form of access that the Court views as being in the best interest of the children at this time.

[40] Accordingly, the March 7, 2013 decision of the Court will be modified as it relates to the access provisions. Mr. Doncaster is to have no contact directly or indirectly with the children. The appropriateness of access may be reviewed in future, no earlier than 3 months from the issuance of the order incorporating the March 7th decision, as supplemented herein. On any future review, Mr. Doncaster would be well advised to provide evidence as to the status of his medical treatment in relation to his ADHD, as well as his participation in cognitive behavioural therapy.

[41] In order to better understand the issues of concern to the Court, Mr. Doncaster is to provide to his treating physicians and therapist copies of Ms. Komissarova's psychological assessment, the Court's written decision of March 7, 2013, as well as this decision.

CONCLUSION

[42] Mr. Doncaster's motion is dismissed.

[43] The Court's written decision of March 7, 2013 is varied to remove reference to Mr. Doncaster exercising access to the children by letter. Further in light of the circumstances addressed herein, a review of this access decision shall not be undertaken for at least a minimum of three months from the date of issuance of the Court's order. At any subsequent review, the Court will re-consider what access, if any, is in the best interests of the children.

[44] I would ask that Ms. Stevenson draft an order dismissing Mr. Doncaster's motion, but also serving to incorporate the terms of the March 7th decision, as modified herein. Mr. Doncaster and Mr. Rogers should be provided with the opportunity to comment as to the form of the order. If agreement cannot be reached regarding the form of the order, the Court can be asked to settle the terms.

[45] If either Ms. Bird or Ms. Field seek costs in relation to this matter, their written submissions should be provided no later than May 24, 2013. Mr. Doncaster shall provide any written response by June 7, 2013.

Bourgeois, J.