

SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION

Citation: *McNeil v Christie*, 2017 NSSC 247

Date: 2017-09-20

Docket: *SFSNMCA* No. 104022

Registry: Sydney

Between:

Bruce Gerard McNeil

Applicant

v.

Ashley Nicole Christie

Respondent

Judge: The Honourable Justice Lee Anne MacLeod-Archer

Heard: May 3rd and June 6th, 2017, in Sydney, Nova Scotia

Oral Decision: June 21, 2017

Submissions on costs: Received June 26, 2017 by Respondent

Counsel:

Stephen Jamael for the Applicant

Greg Englehutt for the Respondent

By the Court:

Background

[1] This is a decision on costs arising from a contested interim hearing. The parties have one child together, L.M., born May *, 2013. Ms. Christie sought interim primary care of L.M., while Mr. McNeil asked for a shared parenting order. A hearing was held and a decision was rendered on June 21, 2017. Ms. Christie was granted primary care, and Mr. McNeil was granted interim supervised access with L.M.

[2] The two day hearing included a lengthy *voir dire* into the admissibility of two recorded conversations between Ms. Christie and Mr. McNeil. The recordings were disclosed in advance, as an exhibit to Ms. Christie's affidavit, which was filed on March 27, 2017. On April 10, 2017 a pretrial was held in which evidentiary issues were discussed. The admissibility of the recordings was not raised. On April 25, 2017 counsel for Mr. McNeil wrote to the court objecting to the admissibility of the recordings. The hearing was scheduled to begin on May 3, 2017.

[3] The hearing proceeded on May 3, 2017, but a *voir dire* was held first, to determine the admissibility of the recordings. On cross-examination, Mr. MacNeil acknowledged that in a couple of short snippets, the recording contains his voice. However, he alleged that the voice on the rest of the recording is that of Ms. Christie's brother-in-law, Mr. Wall. Although he had denied it is his voice on the recordings, Mr. MacNeil had not previously identified the male voice he alleged can be heard on the recording. An adjournment was therefore granted to allow Ms. Christie to call Mr. Wall to provide rebuttal evidence on the *voir dire*.

[4] At the conclusion of the *voir dire*, I admitted the recordings. I determined that the male voice on the recordings is that of Mr. McNeil. I rejected the suggestion that it is Mr. Wall's voice heard on the recording. I also found that the recording had not been manipulated. Mr. MacNeil's argument that the recordings were inadmissible for a number of other reasons was likewise rejected.

[5] Those recordings formed an important part of the court's decision on interim parenting and, in particular, the need for supervised access between Mr. MacNeil and L.M. A parental capacity assessment was also ordered, along with anger management counselling for Mr. MacNeil.

Costs

[6] Ms. Christie seeks costs arising in relation to the interim hearing. Mr. Christie made no submissions on costs.

[7] In support of her claim, Ms. Christie relies upon **Civil Procedure Rule 77**, and several cases including Justice Beryl MacDonald's decision in **Gomez v Ahrens**, 2015 NSSC 3, which outlines some general principles applicable to costs awards.

[8] I agree with Justice MacDonald that parties have the right to a hearing to determine what arrangements are in the best interests of their children. However, as she noted, there are cases where one party advances an unrealistic plan, yet insists on having a full hearing into the merits. This is such a case. The interim hearing was prolonged by a *voir dire* and an adjournment, both necessitated by Mr. MacNeil's unreasonable denial that it is his voice on the recording.

[9] Those recordings disclose some very troubling behaviour and comments made by Mr. MacNeil. In them, he is clearly agitated. He is heard yelling, swearing, and directing threats at Ms. Christie, all in the presence of L.M.

[10] Ms. Christie argues that Mr. McNeil attempted to mislead the court by claiming that the voice was someone other than himself, which led to wasted court time. I agree.

[11] Ms. Christie also points out that the hearing was adjourned once before, because Mr. McNeil filed late affidavits from witnesses whose names had not been disclosed. A considerable amount of court time has been spent on this file.

[12] In addition, Ms. Christie points out that after the case was closed and pending a decision, Mr. McNeil filed additional materials (on his own behalf, not through counsel) without filing a motion to reopen the evidence under the **Civil Procedure Rules**. The court did not review the materials; they were returned to him. Ms. Christie's counsel argues that this was an unfair attempt to influence the court's decision. I agree. It appears that Mr. MacNeil was not happy the recordings had been admitted, and realized the implications for his case. This was his attempt at damage control.

[13] Costs are generally awarded to the party who is more successful in a hearing. Such awards are in the discretion of the court. They are usually based on the amount at stake in the proceeding, but in parenting cases there is no dollar amount involved.

[14] As Justice MacDonald said in **Gomez** (*supra*):

16 ... Many parents want to have primary care or at the very least shared parenting of his or her children but that desire must be tempered by a realistic evaluation about whether his or her plan is in the best interest of the children. The potential for an unfavorable cost award has been suggested as a means by which those realities can be brought to bear upon the parent's circumstances.

[15] The reality is that Ms. Christie was wholly successful in the interim motion.

Mr. MacNeil's position was unrealistic and his approach to the evidence was unreasonable. Ms. Christie is therefore entitled to costs.

[16] In assessing the appropriate amount of costs, Ms. Christie suggests using the "rule of thumb" of \$20,000.00 per day for purposes of determining the amount involved. This was the approach taken by Justice MacDonald in **Gomez** (*supra*) and more recently by Justice Michael Wood in **Day v Valade**, 2017 NSSC 242.

[17] This hearing took two days of court time, so the amount involved would be \$40,000.00. Based on that, under Tariff A the award would be \$6,250.00 plus \$2,000.00 per day for a total of \$10,250.00. However, Ms. Christie suggests that the award should be made under Tariff C, which does not rely on an amount involved, rather it sets a figure based on the nature of the hearing and the time involved. The awards are less under Tariff C than Tariff A.

[18] I am satisfied that Ms. Christie's request for costs under Tariff C in the amount of \$4,000.00 is reasonable. I exercise my discretion in awarding costs of \$4,000.00 payable by Mr. MacNeil to the Nova Scotia Legal Aid Commission. Counsel for Ms. Christie will prepare the order.

MacLeod-Archer, J.