SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: Irwin v. Irwin, 2013 NSSC 339

Date: 20031021
Docket: 1201-066753 (SFHD-084520)
Registry: Halifax

Between:

Gerald Scott Irwin

Petitioner

v.

Kimberly Joan Irwin

Respondent

Judge:	The Honourable Justice Beryl A. MacDonald
Written Submissions:	September 18, 2013 from Janet M. Stevenson October 4, 2013 from Kendrick H. Douglas
Counsel:	Janet M. Stevenson, counsel for the Petitioner Kendrick H. Douglas, counsel for the Respondent

By the Court:

[1] On May 9, 2013 I conducted a hearing in respect to three motions filed by Gerald Irwin. He had filed and served a motion requesting consolidation of a divorce proceeding with a proceeding commenced by Kimberly Irwin pursuant to the *Maintenance and Custody Act*, a motion requesting change to the provisions of a previous interim order granted pursuant to the *Maintenance and Custody Act* in respect to his access with his children and a motion striking portions of an affidavit filed by Ms. Irwin on April 23, 2013. Mr. Irwin was the successful party in respect to all motions and has requested costs to be paid immediately.

[2] During the appearance on May 9, 2013 Kimberly Irwin was self represented. She was not prepared to consent to any of the motions. The proceeding, in common with many others, highlighted the challenges self represented persons present to the court which must balance issues relating to procedural rights with those relating to the best interests of children.

[3] Motions generally, and particularly for interim orders, are expected to be heard and concluded within very tight time constraints. In many jurisdictions

interim orders for custody and access are granted on the basis of affidavit evidence with no time provided for cross-examination. This is not the case in Nova Scotia but, in the Family Division of the Supreme Court of Nova Scotia, the parties are required to file affidavits containing their direct evidence and, except in the most unusual of circumstances, no direct oral evidence will be heard. Many self represented persons do not understand this procedural requirement. When they are confronted with reliance upon the affidavit he or she may have filed, requests are often made for adjournments so more material can be placed before the court. While it may seem procedurally fair to adjourn the proceeding to provide the self represented respondent more time to prepare his or her case, an adjournment will result in further delay. That delay may have a negative impact upon children and may prejudice the procedural rights of the other party.

[4] In this case the parties were first before the court on December 21, 2011 in response to an a motion for an interim hearing filed by Kimberly Irwin pursuant to the *Maintenance and Custody Act*. At the time both parties were represented by counsel. The parties were embroiled in an acrimonious dispute with allegations of domestic assault and suggestions of child abuse. The matter was scheduled for an 1 ½ hour hearing. Witnesses were cross-examined on their affidavits. The court

determined the children involved should be in the primary care of Ms. Irwin. Access was established at regular dates and times for Mr. Irwin but access was to be exercised in the home of his parents with one grandparent present. Mr. Irwin was permitted to take the children out of the home during the day unaccompanied. However, the children were to spend their overnights sleeping in the grandparents' home, where the father was also living at the time.

[5] As with all interim orders the expectation of the court was that the parties would return within a reasonable time to conclude the matter either by way of a negotiated settlement or a final hearing. Unfortunately, as is often the case, this did not happen. The parties did change the terms of access on or about March 2012 and Mr. Irwin was no longer required to exercise his access in his parent's home. In the spring of 2013 Ms. Irwin was not as cooperative as she had been with the previous access arrangements prompting Mr. Irwin to file an interim motion pursuant to the *Maintenance and Custody Act* to provide him with specified access and consolidation of the two proceedings as I had mentioned earlier. This motion was served on Ms. Irvin on April 15th. It became apparent Ms. Irwin was, as she had in the past, alleging Mr. Irvin abused the children. However, her affidavit, filed on April 23, 2013 in response to the motion, consisted primarily of hearsay

and irrelevant excerpts from Frank Magazine. A motion to strike portions of her affidavit resulted.

[6] Although Ms. Irwin had engaged two previous counsel in the course of this proceeding, she was self represented at the May 9th motion hearing. She is a teacher and as a result of the previous motion hearing, she was not completely unfamiliar with the court process. She had expected the court to admit her hearsay statements about what a Department of Community Services employee had told her to do as a result of her allegation that Mr. Irwin had abused the children. It was apparent she did not understand why the court would strike those references in her affidavit. Nor did she understand why her attempt to subpoena an employee of the Department had failed. Mr. Irwin indicated the Department's investigation had ended and the case closed. Ms. Irwin believed there was still an open investigation.

[7] The hearing of the motions on May 9th was set for an hour. Ms. Irwin did not want the children to be parented by Mr. Irwin unless his parents were present. Although she did not specifically ask for an adjournment it was evident she did

not understand what was happening. There was little time for cross-examination. Mr. Irvin would be opposed to an adjournment.

[8] Before giving my decision I considered whether I should adjourn the hearing to provide more time to Ms. Irvin to provide sufficient evidence to support her request for supervision. The only information not struck from her affidavit consisted of the children's statements to her about abuse by Mr. Irvin. Mr. Irvin's information attacked the credibility of her information. Without more she could not prove to the court that supervision of Mr. Irvin's contact with the children was necessary. In respect to adjournments the Ontario Court of Appeal in *Law Society of Upper Canada v. Igbinsom,* 2009 ONCA 484 said:

> 37 A non-exhaustive list of procedural and substantive considerations in deciding whether to grant or refuse an adjournment can be derived from these cases. Factors which may support the denial of an adjournment may include a lack of compliance with prior court orders, previous adjournments that have been granted to the applicant, previous peremptory hearing dates, the desirability of having the matter decided and a finding that the consequences of the hearing or

> serious, that the applicant would be prejudiced if the request were not granted, and a finding that the applicant was honestly seeking to exercise his [or her] right to counsel, and had been represented in the proceedings up until the time of the adjournment request. In weighing these factors, the timeliness of the request, the applicant's reasons for being unable to proceed on the scheduled date and the length of the requested adjournment should also be considered.

Justice Richard in *Burtt v. Bolye,* (2011), 382 N.B.R. (2d) 206 (NBCA) commented upon this decision and said:

> 14 In my view, a principled approach to determining whether or not to grant an adjournment involves weighing the factors such as these, if relevant to the circumstances, as well as any other relevant factors, in an effort to do justice. While the objective of a trial court is to secure the just, least expensive and most expeditious determination of every proceeding on its merits, the court also has responsibilities to the administration of justice in general and must administer limited resources accordingly.

[9] At the appearance before me Ms. Irwin chose to be self represented. I do understand she has suggested she was unable to continue to afford legal counsel but I do note she retained legal counsel to make submissions in respect to Mr. Irwin's costs request and in respect to a motion I heard in September 2013.

[10] At the time the matter came before me Mr. Irwin was not having any access with his children. For approximately one year he exercised access without supervision. Ms. Irvin did not suggest that Mr. Irwin's access should be supervised in the Answer she filed to his Petition for Divorce on February 25, 2013 nor did she file a Parenting Statement with that Answer although she was represented by counsel at that time. Her allegations of abuse came shortly after Mr. Irwin made it clear he wanted to move to a shared parenting arrangement and to conclude the division of matrimonial property.

[11] If Ms. Irwin's allegations that Mr. Irwin had abused the children are substantiated by the Department of Community Services an emergency motion may be brought before this court to require supervised access. The motion before me was a second request for an interim order in respect of the parenting

arrangements. The parties need to move this matter forward to a final determination and an adjournment of the motions on May 9th would delay that process. In addition the children may have continued to have no contact with their Father except in the presence of his parents. I did not know whether these grandparents were prepared to supervise as requested by Ms. Irwin.

[12] While Ms. Irwin may have been prejudiced, because she was not able to put forward her best case, an adjournment would prejudice Mr. Irwin who had filed his motions in accordance with the civil procedure rules.

[13] On balance I decided that the best interests of the children and the efficient administration of limited court resources argued against an offer to grant an adjournment.

[14] Mr. Irwin requests costs in the amount of $1,000.00 to be paid immediately.

[15] Civil Procedure Rule 77.03(1) provides as follows:

> Party and party costs of a proceeding must, unless a judge orders otherwise, be fixed by the judge in accordance with tariffs of costs and fees

determined under the *Costs and Fees Act*, a copy of which is reproduced at the end of this Rule 77

[16] The relevant portions of Rule 77.03 state:

(3) Costs of a proceeding follow the result, unless a judge orders or a Rule provides otherwise.

(4) A judge who awards party and party costs of a motion that does not result in the final determination of the proceeding may order payment in any of the following ways:

(a) in the cause, in which case the party who succeeds in the proceeding receives the costs of the motion at the end of the proceeding;

(b) to a party in the cause, in which case the party receives the costs of the motion at the end of the proceeding if the party succeeds;

(c) to a party in any event of the cause and to be paid immediately or at the end of the proceeding, in which case the party receives the costs of the motion regardless of success in the proceeding and the judge directs when the costs are payable;

(d)any other way the judge sees fit.

[17] Rule 77.05 (1) states that:

> The provisions of Tariff C apply to a motion, unless the judge hearing the motion orders otherwise.

Tariff C provides a range for costs from $250.00 to $500.00 for a motion hearing lasting one hour or less.

[18] Mr. Irwin is requesting additional costs because his motion could have been settled based upon a proposal forwarded by his counsel to Ms. Irwin. That proposal is essentially what was granted by the court on May 9th. In addition the defects in Ms. Irwin's affidavit required an additional motion, a motion to strike, to be prepared and served for a hearing on that same date.

[19] Ms. Irwin submits no costs should be awarded because she was following the directions of employees for the Minister of Community Services who advised she should suspend visits between the children and Mr. Irwin until their investigation had been completed. The problem with this submission is there was no evidence to substantiate this request provided by Ms. Irwin at the hearing on May 9, 2013. Ms. Irwin had made reference to what she had been told by an employee of the Minister of Community Services in her affidavit but those

statements constituted hearsay and were struck. They were provided to prove there was an ongoing investigation and Ms. Irwin had been told to deny access. Whether this information was true could only be provided by the named employee who neither provided an affidavit nor was called as a witness at the hearing. If I erred in striking that information it would not have been persuasive in any event. Mr. Irwin said the investigation had ended with no action taken and the case was closed. The evidence before me was clear that during a previous investigation by the Department, into child abuse allegations made by Ms. Irwin, the Department had found the allegations to be "unsubstantiated ". Ms. Irwin had the burden to convince me to accept her information alone as sufficient to tip the balance in her favor. Without something more to support her statement on such a crucial issue I decided she did not "prove her case" on this point. I cannot now use this same information as a reason to decline a request for costs.

[20] The motion before me did not result in a "final determination" of the proceeding.

[21] Typically the costs of interim motions are left as costs in the cause. However there may be circumstances that suggest otherwise.

[22] In *Smith v. Haley*, 2006 NSSC 182 Justice Hood commented:

> [14] The defendant has been successful in this application and the court is encouraged to make an award of costs at the time of the chambers application rather than leaving it for the trial judge who, in all likelihood, will not have been the chambers judge and some substantial period of time may pass before this matter gets to trial, if it goes to trial. It is difficult for the trial judge to go back and determine what should have been awarded on a chambers application held some time ago. The practice of the court is that we are encouraged to award the costs at the time of the chambers application. I award costs in the amount of $750.00 in any event of the cause.

[23] In *National Bank Financial Ltd. v. Potter*, 2008 NSSC 213 Justice Warner said:

> 13 While at one time it may have been usual to defer costs of interlocutory applications to the end of the case, the length and

> complexity of modern litigation has led to a reversal of that trend except in those circumstances where the primary issue in the interim application is the same as that intended in the ultimate hearing, or where to award costs at an interim stage may prevent the matter from being determined on its merits at a later date. Generally the parties are better able to argue and the Court is better able to make the appropriate costs determination at the time of the application. Unless the costs award may be improved with the benefit of hindsight (after trial), the award should be paid when ordered. A finding after trial that no conspiracy or fraud against NBFL (and/or others) existed, or that Bruce Clarke was not part of any such conspiracy or fraud, is not relevant to this court's decision that this application was not advanced in good faith because it was made without any apparent bona fide reason connected to the issues, but rather appeared to be a tactical or strategic move that would assist in defending against an application and would delay the pleadings process.

[24] Ms. Irwin may be able, at a final hearing, to convince a court to alter the terms of the interim order. She may prove supervision of Mr. Irwin’s access is

required. That may change a court's view of the overall cost award. The parties have financial issues to settle and these can take into account the costs each has incurred in the course of the proceeding. Because judges of the Supreme Court Family Division strive to keep cases in which they have rendered interim decisions, I likely will be the judge who will adjudicate at the final hearing. The issues to be determined are not complex nor should their resolution require lengthy proceedings. I am not prepared to accept, at this stage, that Ms. Irwin's resistance to Mr. Irwin's motion was "in bad faith" or a mere tactical move. I will not assess costs for the motion for access. Those will be in the cause. I will assess costs for the motion to strike and to consolidate. Costs are granted in the amount of $300.00 in any event of the cause to be paid at the end of the proceeding.

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Beryl MacDonald, J.S.C.