SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION
Citation: *McIsaac v. Weatherbee*, 2014 NSSC 343

Date: 2014-09-18
Docket: *SFSNMCA* No. 086430
Registry: Sydney

Between:

Amber McIsaac

Applicant

v.

Matthew Weatherbee

Respondent

Judge:	The Honourable Justice Lee Anne MacLeod-Archer
Heard:	August 28, 2014, in Sydney, Nova Scotia
Oral Decision:	August 28, 2014
Written Decision:	September 18, 2014
Counsel:	Jessie Denny for the Applicant Matthew Weatherbee on his own behalf

By the Court:

[1] This matter came before the court on August 13, 2014 for a non-disclosure hearing and to set dates on Ms. McIsaac's application for custody and child support with specified access to Mr. Weatherbee. Ms. McIsaac was represented by counsel at that pre-trial hearing but Mr. Weatherbee failed to appear. The court granted an order for custody and child support in Mr. Weatherbee's absence.

[2] The background to that decision is relevant. Ms. McIsaac filed her Application on May 31, 2013. Mr. Weatherbee was sent a direction to appear for a group intake session on June 4, 2013. He appeared and completed a personal representation form on that date.

[3] On September 24, 2013 Mr. Weatherbee was served with an order to disclose as he had failed to make financial disclosure after intake. He still did not file disclosure and so he was served with a notice to appear in court for a non-disclosure hearing on November 27, 2013.

[4] Mr. Weatherbee did not file a Response to the Application but he filed a parenting statement on November 27, 2013 in which he outlined the proposed parenting arrangements to include specified access for him "every second

weekend, including some holidays including Christmas, from Friday at 6:00 pm to and including Sundays at 6:00 pm return. Saturdays are sufficient if parents are not available [*sic*]." He also filed a statement of income on November 27, 2013 but did not attach the required income information.

[5] When he appeared in court on November 27, 2013 Mr. Weatherbee advised he would file the required documentation that day. He was cautioned by the court that if all documentation was not filed by December 3, 2013 another notice would be served and the court would set a date to deal with the claim for child support. He was advised of the possibility that income could be imputed to him.

[6] Mr. Weatherbee again failed to file the necessary documents and was served with another notice to appear on a motion for disclosure on January 24, 2014. He appeared before Justice Haley on February 18, 2014 at which time his statement of income was tendered as an exhibit. When he appeared that day he still had not supplied all of the required financial information so the court imputed income on the basis of his 2012 income tax return and directed that once he received his 2013 tax return and year-to-date income information for 2014, he should file that with the court and parties. The matter was then referred to conciliation.

[7] Mr. Weatherbee was sent a direction to appear for conciliation on March 27, 2014. The direction required him to bring his 2013 tax return as well as year-to-date income for 2014. He failed to appear at conciliation. He also failed to attend parent information sessions on two occasions.

[8] A fifteen minute non-disclosure hearing and date assignment conference/pre-trial was scheduled on August 13, 2014 before me. Mr. Weatherbee was served on July 23, 2014 with the notice to appear in court which contained the usual cautions:

> **Possible order against you if you fail**
> If you fail to appear in court at the required time, a judge or court officer may do any of the following without further notice to you:
>
> (1) order costs against you in an appropriate amount which is usually $250.00;
>
> (2) make an order directing a person, such as your employer, to disclose financial or other information about you;
>
> (3) dismiss an application, motion, or claim, or any part of it, or stay a proceeding started by you;
>
> (4) make an interim or final order for custody, access, or about parenting;
>
> (5) make an interim or final order for child support or child maintenance;
>
> (6) make any other interim or final order, including an order for spousal support, division of property, division of pensions, or any other order sought.

[9] Mr. Weatherbee did not appear on the scheduled date.

[10] Ms. McIsaac's counsel filed a pre-trial memorandum on August 7, 2014 setting out her position on the issues of custody and access. She sought sole custody of the three children and proposed reasonable access at reasonable times upon reasonable notice with specified access. The access proposed closely resembles the access sought by Mr. Weatherbee in his parenting statement filed on November 27, 2013.

[11] On August 13, 2014 I ordered in Mr. Weatherbee's absence that the interim order issued by Justice Haley would be converted to a final order with Ms. McIsaac exercising sole custody of the three children and Mr. Weatherbee having reasonable access, to include specific access as outlined in the order. Income was imputed at $27,000.00 for a continued payment of monthly child support of $490.00 by Mr. Weatherbee.

[12] Before this order was issued by the court, Mr. Weatherbee filed a motion with the court asking me to reconsider my decision, reopen the case and allow him to present evidence on the issue of custody and access. In support of his motion he cites *Civil Procedure Rule 82.22*.

[13] *Civil Procedure Rule 82.22(2)and(3)* provides:

> **82.22 (2)** A party may make a motion for permission to present further evidence before a final order and after one of the following events:
>
> (a) the party closes the party's case at trial;
>
> (b) the party chooses to present no evidence at trial;
>
> (c) a jury begins deliberation or a judge reserves decision.
>
> **(3)** A party may make a motion to re-open the trial or hearing of a proceeding concluded by final order only in the limited circumstances in which the re-opening is permitted by law.

[14] A judge's discretion to reopen a proceeding or vary a final order is limited under the *Civil Procedure Rules*. I find Mr. Weatherbee has not shown that *Civil Procedure Rule 82.22(2)* applies in these circumstances. This is not a case of his having attended the hearing and offered no evidence, rather he claims that he simply forgot to appear on the date scheduled for the hearing.

[15] Nor does *Rule 78.08* assist Mr. Weatherbee. This is not a case of a clerical mistake, nor am I inclined to exercise my discretion to amend the order as contemplated in *Rule 78.08(b) and (c)*. It is clear from Mr. Weatherbee's motion that he was served with the notice to appear on August 13, 2014. He says he failed to appear because he forgot to note the date on his calendar. However this is not the first time that Mr. Weatherbee has failed to appear in response to a notice issued by the court and Mr. Weatherbee has failed to comply with several directions and orders to disclose as well. In order to reopen the case, I would have

to be satisfied that not only are the interests of justice served, but also that it is in the children's best interest, as the order deals with custody and access.

[16] Justice Jollimore reached a similar conclusion on an adjournment request in **P.H. and R.H. v. L.T.** 2014 NSSC 221. Allowing Mr. Weatherbee to reopen the case to present evidence is akin to adjourning the matter. Justice Jollimore stated:

> 8 "The decision to grant or refuse an adjournment is within the discretion of the presiding judge", according to Justice Cromwell, then of the Court of Appeal, at paragraph 33 of *Moore v. Economical Mutual Ins.*, 1999 CanLII 7248 (NS CA). At paragraph 35 of this decision, Justice Cromwell adopted the British Columbia Court of Appeal's statement in *Sidoroff v. Joe*, 1992 CanLII 1815 (BC CA), at paragraph 8, as a succinct and accurate summary of the principle which governs my exercise of this discretion:
>
> > The settled principle is that the interests of justice must govern whether to grant an adjournment. The interest of justice always require a balancing of interests of the plaintiff and the defendant. (The emphasis is Justice Cromwell's.)

[17] Given the following factors, I am not prepared to reopen the case and exercise my discretion to allow further evidence:

1. Mr. Weatherbee has failed to appear on a number of court dates.
2. The application was filed May 31, 2013 and custody has been addressed under a court order in the interim issued by Justice Haley on March 3, 2014.

3. The parenting arrangements in this order closely reflect those proposed by Mr. Weatherbee in his parenting statement.

4. There is no evidence to suggest the parenting arrangements in the current order are not in the best interests of the children.

5. Mr. Weatherbee failed to attend the parenting information programs and as such is not in a position to advance a claim for custody.

6. When Mr. Weatherbee appeared before Justice Haley on February 18, 2014 the parties expressed hope that they could resolve parenting issues through conciliation, but Mr. Weatherbee failed to attend the conciliation appointment scheduled for March 27, 2014.

7. In balancing the interests of the children and the parties and considering the court time lost due to Mr. Weatherbee's delays in filing disclosure and failures to appear, I find the interest of justice are served by concluding an order on the terms proposed by Ms. MacInnis on August 13, 2014.

[18] If Mr. Weatherbee feels there is a change of circumstances which would warrant a variation of the order, he can take the appropriate steps to file an application to vary and present evidence at a future hearing.

[19] The order as determined by the court on August 13, 2014 will be issued accordingly.

MacLeod-Archer, J.