NOVA SCOTIA COURT OF APPEAL
Citation: ***Doncaster v. Field***, 2013 NSCA 17

Date: 20130206
Docket: CA 400779
Registry: Halifax

Between:

Andrea Marie Doncaster

Appellant

v.

Jennifer Lynn Field and Ralph Ivan Doncaster

Respondents

Judges:	Oland, Fichaud and Bryson, JJ.A.
Appeal Heard:	January 16, 2013, in Halifax, Nova Scotia
Held:	Appeal dismissed with costs payable to the respondent, Ms. Field, in the amount of $500.00, per reasons for judgment of Oland, J.A.; Fichaud and Bryson, JJ.A., concurring.
Counsel:	Andrea Marie Doncaster, Appellant in Person Janet M. Stevenson, for the Respondent Ralph Ivan Doncaster, Respondent in Person

Reasons for Judgment:

[1] Andrea Doncaster and Ralph Doncaster are siblings. Mr. Doncaster petitioned for divorce from the respondent Jennifer Field, with whom he has four children (collectively, the "Children"). He and Andrea Doncaster brought separate motions at different times to change the place where the divorce proceeding and matters such as access would be heard. This decision pertains to Ms. Doncaster's appeal from the unreported oral decision of Scanlan, J. dated June 13, 2012 and his order dated June 18, 2012 which dismissed her motion and ordered costs against her. For the reasons which follow, I would dismiss her appeal.

[2] Any recounting of the facts surrounding Andrea Doncaster's motion necessarily includes some which relate to her brother's earlier motion which had sought the same remedy. Ralph Doncaster filed his divorce proceedings in Truro, the judicial district in which he resided. The Children live and go to school in Elmsdale which is in the same judicial district. In March 2012, after Justice Scanlan denied him interim custody and access, he filed a motion to change the venue of the divorce proceeding to the Family Division in Halifax. Early the next month, Andrea Doncaster filed at that Family Division an application seeking leave to apply for access to the Children. A Court Officer responded with a letter dated April 12, 2012 which advised that her application could not be processed there because the main application to which her application related was in progress in another judicial district and the Children reside in that other district.

[3] On May 3, 2012 Justice Arthur J. LeBlanc denied Ralph Doncaster's motion to change the place where the divorce proceeding would be heard from Truro to Halifax (2012 NSSC 172). After reviewing the evidence, including that the Children's residence was some 57 kilometers from the Truro courthouse and 42 kilometres from the Halifax courthouse, and considering certain *Civil Procedures Rules*, the judge stated:

> [12] . . . The main basis the Petitioner offers to justify the transfer is convenience for counsel and potential witnesses. The children's "real and substantial" connections are to the Central District, and I am satisfied that it is substantially more convenient for the proceeding to remain in Truro, particularly where the difference in the distances between the children's residence and the

> respective courthouses is insignificant. The Petitioner was content to commence the proceeding in Truro; I cannot see any basis to permit him to transfer it into the Halifax Family Division.

[4] On May 8, 2012 Andrea Doncaster filed her motions in Truro to be added as a party and for access to the Children. These motions and other matters pertaining to the divorce were scheduled to be heard there on June 22, 2012. She then applied on May 24, 2012 to change where the divorce proceedings would be heard to the Family Division in Halifax. Her Notice of Motion named Ms. Field and Mr. Doncaster as respondents.

[5] Justice Scanlan heard Andrea Doncaster's motion to change the venue of the divorce proceedings on June 13, 2012. Ms. Doncaster lives in Dartmouth, across the harbour from Halifax. She argued that it was more convenient for Mr. Doncaster, Ms. Field, and their counsel and her if the proceeding were heard in Halifax. Ralph Doncaster did not appear or participate in that hearing.

[6] In his decision, the judge observed that their grandparents, as well as Ms. Doncaster, were seeking access to the Children. He described the file as one involving "very complex family dynamics" and the family as being in "absolute crisis". From Ms. Field's counsel he obtained confirmation that the grandparents in Sydney had consented to the hearing of their motion in Truro. The judge stated:

> . . . I am satisfied that the Court would have authority and jurisdiction to transfer this to Halifax if I thought it appropriate. In other words I reference 59.03(4)(b), if it was substantially more convenient to deal with proceeding . . . or step of a proceeding in another jurisdiction, in other words Family Division. I am not satisfied that it would be more convenient, nor more just, nor would it be in the interest of the administration of justice to have this one aspect of the case by Ms. Andrea Doncaster, this situation where she's not even a party to the main proceedings, transfer it out, especially where as I've indicated during my questioning of Ms. Doncaster, this is a family in crisis. The dynamics of this case are quite unique, and the only interest in terms of this case, or the primary interest in terms of this case, is the best interest of the children. And I would want all of the parties together in all aspects of this case. . . . This whole proceeding will be slowed down if we change it to Halifax. The date certainly would be lost at the end of the month, I would expect. The late June dates that we have now for this hearing, and my preference is both to keep it all together and to have it dealt with expeditiously. . . . It should be here. This is the judicial district in which the

> children reside . . . the initial main applications were properly filed in this judicial district. . . . And in terms of distances and access, this is the most convenient. . . ." [Emphasis added]

He also ordered Ms. Doncaster to pay costs of $600.00 prior to the June 22, 2012 hearing.

[7] In her Notice of Appeal, Ms. Doncaster set out several grounds of appeal. These can be summarized and restated as follows: 1. Did the judge err in dismissing her motion to change the place of the proceedings? 2. Did he err in finding that her motion was frivolous? 3. Did he err in awarding costs against her and, if not, in the amount of costs he ordered?

[8] Before addressing the merits of Andrea Doncaster's appeal, I will deal with Ralph Doncaster's request at the outset of the appeal hearing. As recounted earlier, he had previously and unsuccessfully sought the same change of venue. While he was a named respondent, his interests aligned with those of his sister, the appellant. Mr. Doncaster asked permission to raise and speak to a new ground of appeal on her appeal, namely an alleged conflict of interest on the part of the judge who had denied her motion. The Court denied his request and advised that reasons would be provided in the Court's decision on her appeal. These are our reasons.

[9] Mr. Doncaster was not present or otherwise involved when Andrea Doncaster's motion was heard by Scanlan, J. When her appeal was set down for hearing, it was indicated that Mr. Doncaster might not participate on her appeal but wanted to be copied with anything filed. He confirmed that he did receive that material. However, he himself did not file any factum. Nor did he contact the Court to advise whether or not he would be present or intended to participate at the appeal hearing. The proposed additional ground was raised for the first time at the outset of the hearing of Andrea Doncaster's appeal. She had not presented it at the hearing of the motion under appeal. Nor had Mr. Doncaster raised this allegation at the hearing of his own motion before that same judge to move the proceeding to Halifax, or at the hearing of his appeal of that judge's decision. Moreover, he had filed no evidentiary basis in support of any of the allegations he wished to present to assist Ms. Doncaster's appeal. Obviously, the respondent Ms. Field could have no inkling that any new issue was being contemplated and had had no opportunity to prepare any response. In all these circumstances, it would be unfair to Ms. Field

if this issue were allowed to be raised and argued on this appeal. For these reasons, the Court denied Ralph Doncaster permission to present his allegations and argue this issue.

[10] I turn then to the standards of review. The order refusing to change the venue of the divorce proceeding is an interlocutory discretionary order. In an appeal of such an order, this court will not interfere unless wrong principles were applied or a manifest injustice has resulted: *Global Petroleum Corp. v. CBI Industries Inc.*, [1998] N.S.J. No. 486 at ¶ 11. Whether a motion is frivolous is a question of fact, for which the standard of review is palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33 at ¶ 10. Costs awards are discretionary, and appellate intervention is not warranted unless incorrect legal principles were applied or the decision is so clearly wrong as to amount to a manifest injustice: *DRL Coachlines Ltd. v. GE Canada Equipment Financing G.P.*, 2011 NSCA 23 at ¶ 10.

[11] Ms. Doncaster argues that the *Civil Procedure Rule* 62.04(2) provides that a judge who hears a motion for a change of the place of a proceeding in which an issue about a child is contested must give preference to the place or courthouse nearest the child's residence "unless another place or courthouse is substantially more convenient." According to the appellant, when the distance to the Truro Justice Centre for the parties and their counsel is compared to the Halifax courthouse where the Family Division sits, the judge erred when he found that Halifax would not be "more convenient." She also points to statements that Truro was "more convenient" and "most convenient" rather than "substantially more convenient."

[12] I reject these arguments. In his reasons, the judge referenced *Rule* 59.03(4)(b) which states that a judge may transfer a proceeding to another judicial district where it is "substantially more convenient" to deal with the proceeding. It is clear from his use of that phrase that the judge was fully aware that he was to decide whether Halifax was "substantially more convenient." The fact that he did not repeat the exact words precisely throughout his short decision but also used "more convenient" and "most convenient" does not persuade me that he erred in his appreciation of the criteria. In determining where was "substantially more convenient", he did not limit his considerations to distance, but also incorporated additional important features of this particular proceeding including the family

dynamics, the grandparents' consent to a hearing in Truro, and the upcoming hearing date. His not transferring the proceeding to Halifax did not amount to a manifest injustice.

[13] In his decision, the judge stated "and this application is especially more frivolous in view of the decision of Justice LeBlanc on March 20th." The appellant argues that the judge erred in this description of her motion. She says that the distances from the Children's residence and the convenience for all parties involved favoured a move to Halifax, she lives in Dartmouth for which the judicial district is the Family Division in Halifax, her brother had appealed Justice LeBlanc's decision, and there was little jurisprudence on changing the venue of a proceeding.

[14] Before the judge, the appellant acknowledged that she knew that Justice LeBlanc had denied Ralph Doncaster's motion to change the venue of the divorce proceeding to Halifax. The reasons why Justice LeBlanc had held that the Children's "real and substantial" connections are to the Central District and it was substantially more convenient for that proceeding to remain in Truro, had not changed. In these circumstances, I am unable to detect any overriding and palpable error in the judge's factual finding that Ms. Doncaster's motion to change the venue to Halifax, which sought the same remedy as Mr. Doncaster's earlier and failed motion for the same remedy, was frivolous.

[15] Finally, Ms. Doncaster appeals the judge's costs award of $600.00 payable before the June 22, 2012 hearing. She submits that the judge erred by awarding non-Tariff based costs, costs without any billing information in support, and costs in an amount close to solicitor-client costs where there were no rare and exceptional circumstances. She also argues that he erred by requiring payment before the June hearing of divorce and access issues.

[16] The judge had been involved in the divorce and related issues on an ongoing basis for some time. Ms. Doncaster brought her motion to change the venue of the divorce proceedings less than a month before the June 22, 2012 hearing. In his decision, the judge observed that the appellant had been warned prior to the hearing of her motion that costs were a real possibility if her motion should be denied. He noted that Ms. Field had already borne costs related to Ralph

Doncaster's earlier motion to move the hearing of the proceeding from Truro to Halifax. After obtaining from Ms. Field's counsel an estimate of her client's costs on the motion, namely $650.00 plus HST, he ordered costs of $600.00 payable before the June 22, 2012.

[17] Costs are in the discretion of the trial judge: *Civil Procedure Rule* 77.02. This court will not interfere unless it finds that incorrect legal principles were applied or a manifest injustice has resulted. I am not persuaded that there are grounds for appellate intervention in this case.

[18] I would dismiss the appeal, and order costs of $500.00 payable by the appellant to the respondent Ms. Field.

Oland, J.A.

Concurred in:

Fichaud, J.A.

Bryson, J.A.