NOVA SCOTIA COURT OF APPEAL
Citation: Crewe v. Crewe, 2008 NSCA 115

Date: 20081216
Docket: CA 296160
Registry: Halifax

Between:

Thomas Gordon Crewe

Appellant

v.

Lavada Leslie Crewe

Respondent

Judges: Roscoe, Bateman and Saunders, JJ.A.

Appeal Heard: December 3, 2008, in Halifax, Nova Scotia

Held: Appeal dismissed with costs per reasons for judgment of Roscoe, J.A.; Bateman and Saunders, JJ.A. concurring.

Counsel: Thomas Gordon Crewe, the appellant, in person
Lavada Leslie Crewe, the respondent, in person

Reasons for judgment:

[1] This is an appeal from a decision of Justice Beryl MacDonald of the Supreme Court, Family Division following an application to vary the access provisions of a corollary relief judgment. The decision is reported as 2008 NSSC 113.

[2] The parties separated in 2003 and were divorced on February 7, 2006. The children, boys now aged 14 and 15, were in the joint custody of their parents, with the mother having day-to-day care and the father having reasonable access. In July of 2006, while the children were visiting with the father there was an argument between him and the younger boy. The boys called their mother to have her pick them up and after that the boys did not wish to visit with the father for several months. In August 2006, the father made an application to the Family Division to specify and enforce his access. There were several pretrial conferences and attempts at conciliation and eventually the matter came on before Justice MacDonald.

[3] By the time the matter was heard by Justice MacDonald, access had been restored by agreement of the parties. However, the mother was then concerned about the father's legal use of medical marijuana to help him deal with the symptoms of multiple sclerosis. She asked the court to impose restrictions on his driving his motor vehicle with the children.

[4] Justice MacDonald agreed with the mother and ordered that the father not use marijuana for at least eight hours prior to driving with the children and that he not drive outside of Halifax Regional Municipality with them. The varied corollary relief judgment also provides for specific weekly access, additional access at reasonable times and for a vacation each summer.

[5] The appellant in his notice of appeal, his factum and oral argument, strenuously objects to the following clauses in Justice MacDonald's order:

> 4. When the children are to be in a vehicle driven by Mr. Crewe, he shall only drive within the boundary of the Halifax Regional Municipality. Mr. Crewe may take the children outside the boundary of the Halifax Regional Municipality but when doing so he must have other persons drive his or another vehicle or he must use public transportation.

> 5. Mr. Crewe shall provide Ms. Crewe with a copy of his annual "Driving Evaluation" conducted by Capital Health Occupational Therapy Services on or before March 30 of each year.
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> ...
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> 8. Thomas Crewe shall not use marijuana for medicinal or any purpose for at least an 8 hour period prior to the time when he intends to transport his children in his vehicle.
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> ...
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> 11. Thomas Crewe shall pay costs to Lavada Crewe in the amount of $800.

[6] Mr. Crewe argues that there are no legal grounds to support the driving restriction, that Justice MacDonald exhibited a bias against him because of his use of marijuana, that the Children's Wish Assessment ordered by the court was suspect and should not have been relied upon, that there should have been a full parental assessment instead of the Children's Wish Assessment, and there was no evidence that his sons had expressed concern about his ability to drive. In his oral submission he indicated that if his appeal is unsuccessful, he will likely decide to not drive with the children at all, in order to inconvenience Ms. Crewe. He also indicated that he will continue to fight his cause in the courts and that the next time he will argue discrimination based upon disability. With respect to the costs order, he submits that the respondent should not have received costs because she manipulated the court process by failure to attend one of the settlement conferences. Mr. Crewe also suggests that he should be paid damages for his loss of access during 2006.

[7] In resolving the issue between the parties, the trial judge was required to determine the best interests of the children, as acknowledged by her at ¶ 18, 27 and 46. In our review of that decision, we are constrained by the standard of review which is as described by Hamilton, J.A. in **MacKay v. Murray**, 2006 NSCA 84:

> 22 It is important to remember that this is an appeal. We are not a court of first instance. We are not to assess the evidence in the record afresh and substitute our discretion for that of the judge of first instance. We are not to overturn a custody or support order unless the judge has made an error in principle, has

significantly misapprehended the evidence or unless the decision is clearly wrong; **Hickey v. Hickey**, [1999] 2 S.C.R. 518, paras. 10, 11 and 12, **Van de Perre v. Edwards**, [2001] 2 S.C.R. 1014, para. 12; **Willick v. Willick**, [1994] 3 S.C.R. 670, para. 27.

23 The relevant standard of review was recently set out in **Zinck v. Fraser** (2006), 240 N.S.R. (2d) 335; [2006] N.S.J. No. 43 (Q.L.):

> [6] In **D.L.W. v. J.J.M.W.** (2005), 234 N.S.R. (2d) 366; [2005] N.S.J. No. 275 (Q.L.), this Court confirmed the exacting standard of review in custody cases:
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> [31] The narrow scope of appellate review is explained by the judgment of Justice Bastarache in **Van de Perre** [**Van de Perre v. Edwards**, [2001] 2 S.C.R. 1014, 2001 SCC 60]:
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> > As indicated in both **Gordon** (**Gordon v. Goertz**, *supra*) and **Hickey** (**Hickey v. Hickey**, [1999] 2 S.C.R. 518) the approach to appellate review requires an indication of a material error. If there is an indication that the trial judge did not consider relevant factors or evidence, this might indicate that he did not properly weigh all of the factors. In such a case, an appellate court may review the evidence proffered at trial to determine if the trial judge ignored or misdirected himself with respect to relevant evidence. This being said, I repeat that omissions in the reasons will not necessarily mean that the appellate court has jurisdiction to review the evidence heard at trial. As stated in **Van Mol** (**Guardian ad Litem of) v. Ashmore** (1999), 168 D.L.R. (4th) 637 (B.C.C.A.), leave to appeal refused, [1999] S.C.C.A. No. 117, [2000] 1 S.C.R. vi, an omission is only a material error if it gives rise to the reasoned belief that the trial judge must have forgotten, ignored or misconceived the evidence in a way that affected his conclusion. Without this reasoned belief, the appellate court cannot reconsider the evidence.
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> [32] This approach is followed in Nova Scotia, recently in **Children's Aid Society of Cape Breton-Victoria v. M.(A.)** (2005), 232 N.S.R. (2d) 121; 737 A.P.R. 121; 2005 NSCA 58:
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> > 26 This is an appeal. It is not a retrial on the written record or a chance to second guess the judge's exercise of discretion. The appellate court is not, therefore, to act on the basis of its own fresh assessment of the evidence or to substitute its own exercise of

> discretion for that of the judge at first instance. This Court is to intervene only if the trial judge erred in legal principle or made a palpable and overriding error in finding the facts. The advantages of the trial judge in appreciating the nuances of the evidence and in weighing the many dimensions of the relevant statutory considerations mean that his decision deserves considerable appellate deference except in the presence of clear and material error: **Family and Children's Services of Lunenburg County v. G.D.,** [2003] N.S.J. No. 416 (C.A.) at para. 18; **Family and Children's Services of Kings County v. B.D.** (1999), 177 N.S.R. (2d) 169 (C.A.); **Nova Scotia (Minister of Community Services) v. C.B.T.** (2002), 207 N.S.R. (2d) 109; **Van de Perre v. Edwards**, [2001] 2 S.C.R. 1014, at paras. 10-16.

[8] With respect to the ground of appeal regarding the costs order, the standard of review is as stated in **Binder v. Royal Bank of Canada**, 2005 NSCA 94:

> [52] Costs are in the discretion of the trial judge. This court will not interfere in a judge's exercise of discretion unless wrong principles of law have been applied, or the decision is so clearly wrong as to amount to a manifest injustice**: Conrad (Guardian Ad Litem of) v. Snair**, [1996] N.S. J. No. 164 at 5; **D.C. v. Childrens Aid Society of Cape Breton (Victoria)** , [2004] N.S.J. 470 (NSCA); and **Fraser v. Westminer Canada Ltd.**, 2005 NSCA 27.

This standard is applicable in family law costs appeals as well: **L.K.S. v. D.M.C.T.**, 2008 NSCA 61.

[9] A thorough review of the evidence and careful consideration of the appellant's arguments leads me to conclude that there is no merit to the grounds of appeal and that the appeal should be dismissed. I see no error in principle, misapprehension of evidence or other error made by the trial judge, nor is there anything on the record before us to support the allegation of bias.

[10] The evidence supporting the driving restriction and the trial judge's findings of credibility regarding Mr. Crewe's use of marijuana are set out in the decision under appeal in the following passages:

> 21 Mr. Crewe was prescribed medical marijuana by his physician, Dr. Gibbon, in March 2006 at Mr. Crewe's request. In a letter from Dr. Gibbon dated February 15, 2007, attached as Exhibit "B" to Mr. Crewe[‘s] affidavit sworn October 26, 2007, Dr. Gibbon states:

> Mr. Crewe himself requested this prescription and provided research and data from Health Canada to support the request. All information regarding dosage, efficacy, safety, etc. can be obtained from Health Canada. As a physician, I cannot vouch for the long-term effectiveness of medical marijuana, nor am I convinced that the benefits outweigh the risks (especially if smoked). In terms of safety, I refer to Health Canada's warnings to users of marijuana, in relation to driving and operating machinery.

22 In the material from Health Canada the following appears:

> ... There has only been limited research into the safety of marihuana. The use of marihuana carries with it a number of potential health risks including impaired immune system, interaction with other drugs, dysphoria, depleted energy, impaired short term memory, drug dependence and lung damage (smoked form) ...The use of marihuana may have an effect on your motor skills. Consequently, you should not operate a motor vehicle, ... while under the effects of marihuana ...

...

25 I am satisfied Mr. Crewe uses marijuana daily in smoked form. I am satisfied that he is convinced his abilities are improved by the use of this drug. I am satisfied he will continue to use this drug and that he does not understand why others are concerned about his use of marijuana. He testified that he uses marijuana "three to four times a day after dinner -- at night -- not during the day -- except occasionally on Saturday but never when the boys are in his care". He has tried to use vaporized marijuana but finds it unsatisfactory. It does not alleviate his symptoms as effectively as does the smoked form. If he does not need to drive his children he admitted he would, two to three hours before driving, take a "couple of puffs" of marijuana to alleviate his leg spasms. He only uses marijuana at night when he knows he must drive his children. Mr. Crewe requests that I accept his evidence about his use of marijuana and that I decide his use constitutes no risk to his children. However his own evidence raises questions about that drug use and whether he has been open and frank with this court about that use.

...

28 Therefore, it appears, except when he must drive his children, he will likely use marijuana or at the very least take "a couple of puffs" of marijuana two or three hours before driving because to do so improves his ability to drive safely.

> If he doesn't use this marijuana before driving then perhaps he drives less safely? Also he must have renewed his prescription to use marijuana because he admits to present use. This suggests he may have been trying to mislead the court in March 2007. I do not know how many grams he does smoke in a day but I am satisfied from his description that he smokes more than one gram. I find it unlikely that smoking marijuana more than 8 hours before driving would provide him the benefits he seeks from this drug and the logical conclusion may be that if he believes he needs it he will smoke it. The question is what amount, if any, will provide the benefit without the side effects of dysphoria, depleted energy, impaired short term memory, drug dependence. This I do not know. The evidence before me does not answer this question. In evaluating the safety risk to his children I consider it in their best interest that I be cautious.

[11] As well, Justice MacDonald reviewed the appellant's driving evaluation reports in detail. She recognized that the driving assessors were not informed about his use of marijuana and that many of the other prescription medicines he uses have significant side effects that require that "caution should be used before driving". Justice MacDonald accepted evidence that Mr. Crewe was able to drive safely in the city:

> 36 The most recent assessment report indicates that he has sufficient strength in his legs to stop his vehicle in an appropriate time frame. However, the assessment was conducted "in a residential area of the city to best reflect this client's typical driving patterns" (February 27, 2008 Report). As a result I do not know whether a lengthy drive on highways where the traffic exceeds 80 km per hour would result in the discovery of deficiencies due to leg fatigue, requirement to take medications while driving, or other cause. I do accept that the latest report suggests he is able to drive safely in the city.

[12] The trial judge accepted the qualifications of Elizabeth Simms, M.A. who prepared the Children's Wish Assessment and accepted her report that the boys each had reservations and discomfort about their father's ability to drive. Justice MacDonald reasonably concluded, based on the evidence, as follows:

> 44 The children have expressed reasonable concerns about their father's use of marijuana and its possible effect on his driving. I am satisfied they have developed this concern on their own as a result of their direct observation of their father. It is possible their reaction has been heightened by their mother's reaction to their information but this [is] an understandable family dynamic and is not an indication of her attempt to "alienate" the children from their father. Ms. Crewe wanted to protect her children from potential harm. I am not satisfied that Mr.

> Crewe's use of marijuana is benign and without potential risk for his children. I am not satisfied he is able to drive safely on routes that permit speeds of over 80 km per hour if the drive is lengthy. I am not satisfied it is in the best interest of Matthew and Mitchell to ignore these risks or to place the entire responsibility for monitoring their safety on their young shoulders.
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> 45 Mr. Crewe does not consider it appropriate that his good judgement should be questioned by the imposition of restrictions in respect to his driving with the children. While I understand his outrage, the best interest of his children requires a recognition of their concern in written form.
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> ...
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> 47 I am satisfied that concerns relating to Mr. Crewe's medical condition and his use of marijuana can be managed to some extent if the children continue to have, as they do in the present varied Corollary Relief Judgment, the right to decide whether or not they will at any given time be driven by their father. However, that right is more easily exercised within the confines of the Halifax Regional Municipality than it is to transportation to places outside of the Municipality. In the Municipality they can merely refuse to drive with their father and make their way home by buses, by walking, or by calling their mother. Returning from a trip outside of the Municipality would require a request that their mother transport them or a requirement that they stay where they are until their father was sufficiently recovered to drive safely. I find that this would be too much responsibility to put upon these adolescents and I find it to be in their best interest that there be restrictions on their father's driving while they are passengers in his vehicle.

[13] Justice MacDonald did not make a material error in principle; she did not misapprehend the evidence, nor are the terms of the order restricting the appellant's driving with the children clearly wrong. Mr. Crewe is insistent that either the children do not fear driving with him, or, if they are concerned about his driving, it results from Ms. Crewe's influence. The record supports the judge's finding that the children's concerns are genuine and not caused by any effort by Ms. Crewe to undermine his relationship with the children. Therefore, there is no basis upon which this court should interfere.

[14] Mr. Crewe also takes issue with the award of costs made by the trial judge. The reasons for the order were as follows:

> 47 Ms. Crewe has requested a cost award. She is the successful party in this proceeding. Restrictions have been imposed upon Mr. Crewe. Costs are in the discretion of the Court but they generally are awarded to the successful party. The amount of a cost award should "represent a substantial contribution towards the parties' reasonable expenses in presenting or defending the proceeding, but should not amount to a complete indemnity" (**Landymore v. Hardy**, [1992] N.S.J. No. 79, 1992 CarswellNS 90). In **Kaye v. Campbell** (1984), 65 N.S.R. (2d) 173 (NSCA) it was held that the ability of a party to pay a cost award is a factor that can be considered.
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> 48 Success at trial is reason enough to justify a cost award. Ms. Crewe as a self-represented party does not have the expense of legal counsel. However, she has lost considerable time from her work because of these proceedings. Mr. Crewe's late filing of his documents in contravention of explicit instructions must also be censured. In one instance it contributed to the rescheduling of a hearing. His explanation for late filing is that the notice at the filing desk said "All documents must be filed by noon (12:00) the day before the Court Date". This notice is for those who have not had a judicial direction in respect to filing dates. Mr. Crew is not entitled to ignore judicial direction. I am satisfied Mr. Crewe can pay a cost award. I award Ms. Crewe costs in the amount of $800.00.

[15] As indicated above, the standard of review on appeal of a costs order is highly deferential. This court will not interfere with a trial judge’s exercise of discretion to order costs to the successful party unless wrong principles of law have been applied or the decision is so clearly wrong as to amount to a manifest injustice. The appellant has not persuaded me that there is reason to interfere with Justice MacDonald’s order.

[16] Our rules of court and jurisprudence recognize that costs are generally intended to provide successful litigants partial indemnification, and that the court is entitled to take into account the conduct of the parties which may have complicated or delayed the proceeding, both matters considered by Justice MacDonald. See for example: **L & B Electric Ltd. v. Oickle**, 2004 NSCA 42 and **Rule** 63.04.

[17] This Court awarded costs to a self represented litigants in **McBeth v. Dalhousie College and University**, [1986] NSJ No. 159. The reasoning in **McBeth** may no longer be valid, since it was based on an analysis of s. 15 of the **Charter** which has since been superseded by subsequent decisions of the Supreme Court of Canada. See: **Fong v. Chan** (1999), 46 OR (3d) 330 (C.A.), ¶ 21- 22. However, as determined in **Fong v. Chan** and **Skidmore v. Blackmore** (1995),

122 DLR (4th) 330 (BCCA) referred to therein, the principles underlying the awarding of costs could not justify a rule denying costs to self represented parties. I agree with and adopt the following statements by Sharpe J.A. in **Fong**:

> [24] A rule precluding recovery of costs, in whole or in part, by self-represented litigants would deprive the court of a potentially useful tool to encourage settlements and to discourage or sanction inappropriate behaviour. For example, an opposite party should not be able to ignore the reasonable settlement offer of a self-represented litigant with impunity from the usual costs consequences. Nor, in my view, is it desirable to immunize such a party from costs awards designed to sanction inappropriate behaviour simply because the other party is a self-represented litigant.
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> [25] I would add that nothing in these reasons is meant to suggest that a self-represented litigant has an automatic right to recover costs. The matter remains fully within the discretion of the trial judge, and as Ellen Macdonald J. observed in **Fellowes, McNeil v. Kansa**, *supra*, there are undoubtedly cases where it is inappropriate for a lawyer to appear in person, and there will be cases where the self-represented litigant's conduct of the proceedings is inappropriate. The trial judge maintains a discretion to make the appropriate costs award, including denial of costs.
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> [26] I would also add that self-represented litigants, be they legally trained or not, are not entitled to costs calculated on the same basis as those of the litigant who retains counsel. As the **Chorley** case, *supra*, recognized, all litigants suffer a loss of time through their involvement in the legal process. The self-represented litigant should not recover costs for the time and effort that any litigant would have to devote to the case. Costs should only be awarded to those lay litigants who can demonstrate that they devoted time and effort to do the work ordinarily done by a lawyer retained to conduct the litigation and that, as a result, they incurred an opportunity cost by forgoing remunerative activity. As the early Chancery rule recognized, a self-represented lay litigant should receive only a "moderate" or "reasonable" allowance for the loss of time devoted to preparing and presenting the case. This excludes routine awards on a *per diem* basis to litigants who would ordinarily be in attendance at court in any event. The trial judge is particularly well-placed to assess the appropriate allowance, if any, for a self-represented litigant, and accordingly, the trial judge should either fix the costs when making such an award or provide clear guidelines to the Assessment Officer as to the manner in which the costs are to be assessed.

[18] There is no basis in this case upon which to interfere with the discretion of the trial judge in ordering costs be paid by the appellant.

[19] I would therefore dismiss the appeal. As for costs on the appeal, since Ms. Crewe was required to take significant time off from her work without pay in order to prepare for the appeal, I would order that the appellant pay her costs of the appeal fixed in the amount of $1,000 inclusive of disbursements.

Roscoe, J.A.

Concurred in:

Bateman, J.A.

Saunders, J.A.