NOVA SCOTIA COURT OF APPEAL
Citation: ***Doncaster v. Field***, 2013 NSCA 24

Date: 20130215
Docket: CA 406486
Registry: Halifax

Between:

Andrea Marie Doncaster, Viola Marie Doncaster
And Ivan Ralph Doncaster

Appellants

v.

Jennifer Lynn Field and Ralph Ivan Doncaster

Respondent

Judges:	Saunders, Fichaud and Bryson, JJ.A.
Appeal Heard:	February 14, 2013, in Halifax, Nova Scotia
Held:	Appeal dismissed per reasons for judgment of Saunders, J.A.; Fichaud and Bryson, JJ.A. concurring.
Counsel:	Appellant, Andrea Marie Doncaster in person Appellant Ivan Doncaster in person Appellant Viola Doncaster not participating Janet M. Stevenson, for the respondent Jennifer Field Respondent Ralph Ivan Doncaster in person

Reasons for Judgment:

[1] Jennifer Field and Ralph Doncaster are estranged spouses currently embroiled in a bitter divorce and associated collateral proceedings, which have been delayed and encumbered by other ancillary measures initiated by Mr. Doncaster's parents, Viola and Ivan Doncaster, and his sister, Andrea Doncaster.

[2] In the matter before us yesterday, Andrea, Viola and Ivan Doncaster appeared as appellants who asked us to admit fresh evidence and sought our leave to appeal what they describe in their factum as an "interlocutory appeal of adjournment and costs" stemming from a series of appearances before Nova Scotia Supreme Court Justice J. Edward Scanlan in Truro in June and July, 2012.

[3] I need not spend much time reviewing the circumstances surrounding this troubling saga. Sufficient detail, to provide context, may be found in earlier reported decisions surrounding Ms. Field, her husband and her husband's extended family (see for example, the decision of this Court handed down less than two weeks ago in **Doncaster v. Field**, 2013 NSCA 17 dismissing a different appeal launched by Andrea Doncaster from an earlier decision of Scanlan, J.).

[4] In dispensing with this appeal it is enough to know that Ms. Field and Mr. Doncaster have four children who reside with their mother in Elmsdale pursuant to the terms of an interim order which gives her sole custody of the children and denies the father any access. As we understand the record, there is a further order from the Nova Scotia Supreme Court prohibiting Mr. Doncaster from having any contact with his four children.

[5] On April 3 and April 25, 2012, respectively, Ivan and Viola Doncaster and Andrea Doncaster as applicants, filed separate Notices of Motion seeking similar orders which would abridge time for bringing their motions, add them as parties to Ms. Field's and Mr. Doncaster's divorce proceedings, and give them leave to apply for access to the four children. Their motions were strongly opposed by Ms. Field. The three applicants' motions came on for hearing before Scanlan, J. in Truro spread over 2 days starting June 22 and finishing July 3, 2012.

[6] After considering the *viva voce* testimony and documentary evidence introduced at the hearing as well as submissions from the Doncasters, and Ms. Field's legal counsel, Scanlan, J. rendered an oral decision which maintained the status quo and adjourned the applications until October 12, 2012. A thorough review of the record and the transcript makes it clear that Justice Scanlan's decision to adjourn any final disposition of the appellants' motions was prompted by several things he found troubling. I will only mention a few.

[7] While concluding that all of the relatives had a genuine love for these four children, Scanlan, J. suspected that Mr. Doncaster's parents and his sister hoped, at least in part, that their flurry of interlocutory motions would wear down, deter and defeat Ms. Field in her attempts to maintain sole care and custody of her children. The judge felt that these assorted actions were being managed or supported by Ralph Doncaster who was himself tied up in such an acrimonious divorce with Ms. Field.

[8] The judge expressed the view that adjourning the final disposition of the motions would be a better solution than dismissing them outright, because he anticipated the Doncasters would simply turn around and file similar motions, very shortly thereafter. Foremost in the judge's mind was the concern that all four children had been through too much − because of the family upheaval, seeing their father arrested in their schoolyard and led away, and the obvious friction and bitterness such turmoil had created. In his remarks the judge focused on the best interests of these children, saying they were troubled and in desperate need of counselling, more especially because one of them had talked of suicide.

[9] As Justice Scanlan saw it, the mother's desire to keep her husband's relatives away from the children for the time being was a sensible and preferred solution so that the children could stabilize their lives within a familiar and comfortable structure, thus enabling the professional counselling and assessment he felt was critical to their health and well-being. Finally, the massive legal expense incurred by Ms. Field in having to defend these interlocutory skirmishes, was not lost on the trial judge.

[10] The effect of Justice Scanlan's decision was to deny the applicants' attempts to be given access to the four children, for the time being, and at least until matters cooled down and the entire situation and overall risks to the children could be fully assessed. At the end of the hearing, Scanlan, J. also ordered costs against the Doncasters. Justice Scanlan's directions were confirmed in his order issued August 15, 2012, the operative parts of which I repeat here:

ORDER

BEFORE THE HONOURABLE JUSTICE J. EDWARD SCANLAN

UPON application to be added as a party and applications for leave to apply for access having came on for hearing on June 22 and July 3, 2012 with respect to the applications by each of the Applicants, Andrea Marie Doncaster, Viola Marie Doncaster and Ivan Ralph Doncaster to be added as a party in proceeding ST No. 1207-003679 (0709303) pursuant to Civil Procedure Rule 62.03 and 35.08 and for leave to apply for access and access pursuant to s. 16 of the *Divorce Act* to the children of the marriage of the Respondents, Jennifer Lynn Field and Ralph Ivan Doncaster.

AND WHEREAS the applications were determined after hearing evidence adduced by affidavit and *vive voce* and after hearing from each of the Applicants Andrea Doncaster on her own behalf, Viola Doncaster on her own behalf, Ivan Doncaster on his own behalf, the Respondent, Ralph Doncaster on his own behalf and Janet M. Stevenson on behalf of the Respondent, Jennifer Field.

On motion of the Court, the following is ordered:

1. The applications of Andrea Doncaster are hereby adjourned until October 12, 2012 at 9:30 a.m.

2. The applications of Viola Doncaster are hereby adjourned until October 12, 2012 at 9:30 a.m.

3. The applications of Ivan Doncaster are hereby adjourned until October 12, 2012 at 9:30 a.m.

> 4. The Applicants, Andrea Doncaster, Viola Doncaster and Ivan Doncaster are jointly and severally liable for $5,000 as a contribution towards costs payable forthwith and no later than October 12, 2012.

[11] The three appellants who are self-represented filed a joint Notice of Appeal on August 30, 2012, in which they listed 13 separate grounds of appeal, many of them sub-divided into several other complaints alleging a host of substantive and procedural errors which, for convenience and context, I would distil and recast as:

- Misapprehension of the facts
- Errors of law
- Failing to consider the best interests of the children, and preserving the *status quo*
- Not considering other access options which would have preserved the children's right to access their (paternal) family while still taking into account their mother's fears
- Placing too much weight on the mother's preferences
- Unfairly limiting the appellants' ability and time to cross-examine;
- Failing to provide adequate assistance to self-represented litigants
- Allowing his own personal prejudices against Ralph Doncaster to override his application of the law and the best interests of the children
- Creating, by his words and actions, a reasonable apprehension of bias (that he favours mothers winning custody cases).

[12] As noted earlier, the hearing to deal with the appellants' motions was adjourned to be continued before Scanlan, J. in Truro on October 12, 2012. That never happened. As part of the fresh evidence application at yesterday's hearing,

the appellant Andrea Doncaster, filed her affidavit sworn December 14, 2012, to which she attached a letter from Justice Scanlan addressed to all three appellants, dated October 1, 2012, which reads:

> You are no doubt aware by now that I have recused from matters involving Ralph Doncaster. I note that October 12, 2012 is set for a continuation of your applications re: access. In view of the fact I have recused, I will not be able to continue with the hearing as was contemplated even though I am seized with the matter.
>
> It will be necessary for you to refile and start a new application so it can be dealt with in its entirety by a different Justice on a different date.

[13] As far as we are aware, no "new application" has been initiated by the appellants and no "different Justice" has been assigned to consider these motions which were adjourned, and have never been concluded.

[14] Because the merits of the appellants' motions have never been conclusively adjudicated upon by the trial court, we are unanimously of the view that there is no basis for this Court to entertain the present appeal. In our opinion, the appellants' attempt to appeal the impugned "decisions" (which are yet to be made) is premature.

[15] So too is their attempt to have us consider the merits of Scanlan, J.'s order purporting to bind them "jointly and severally ... for $5,000 as a contribution towards costs payable forthwith and no later than October 12, 2012".

[16] Since those costs relate to the current ongoing motions which were adjourned but not adjudicated, and now will not be heard by Scanlan, J. (by virtue of his decision to recuse himself) we believe it appropriate to set aside Scanlan, J.'s order with respect to costs. We do so with the express *caveat* that in setting aside his costs order against the Doncasters we decline to offer any view as to the merits or otherwise of such an award, and would leave the consideration of this or any other amount for costs associated with the June and July, 2012 appearances before Scanlan, J. to the discretion and judgment of whomever "new Justice" may be assigned to hear the appellants' motions once resumed in Truro. We understand

from submissions made to us yesterday that the $5,000 "contribution" has been paid to Ms. Field by the appellants, as directed. We leave the determination as to whether all, some, or none of that award should be returned by Ms. Field, to the discretion of the trial judge when the hearing resumes.

[17] In light of our ruling, there is no need for us to consider or comment upon the admissibility or impact of the fresh evidence put forward by the appellants, nor the merits (if any) of the grounds of appeal they have raised. Those issues are not properly before us.

[18] We are mindful of the confusion and uncertainty that likely surrounds the status of these motions, in light of Justice Scanlan's decision to recuse himself. The matter cannot be allowed to languish without early and meaningful judicial attention. Recognizing the paramountcy of the best interests of the children especially in the context of the issues engaged by the appellants' outstanding motions, we think it is imperative that they be heard without delay. To be clear, despite Justice Scanlan's letter of October 1, 2012, directing the parties to "refile" a new motion, in our view refiling is unnecessary and a new judge should consider the original motions that were previously filed in Truro.

[19] Accordingly we would direct that these same motions of Andrea Doncaster, Viola Doncaster and Ivan Doncaster, which are more particularly described in the Order of Scanlan, J. dated August 15, 2012, in the proceeding bearing STCIV 081213, and SFSNMCA 080378, and which were "adjourned until October 12" but have yet to be adjudicated, should be set down for a resumption of the hearing in Truro on an expedited basis before any other Justice of the Supreme Court of Nova Scotia, as may be designated and assigned by that court's Chief Justice. It will be for that judge to determine whether and to what extent the transcript of the evidence given in the hearings before Scanlan, J. will be considered, and whether and to what extent and by what means further evidence may be presented in order to complete the final adjudication of the motions first presented at the hearings in Truro over which Scanlan, J. presided on June 22 and July 3, 2012. His order with

respect to costs following those hearings is set aside so that the whole issue of costs (if any) associated with the disposition of those motions may be addressed and decided by the judge assigned to hear the matter.

[20] Owing to the unusual nature of this appeal and considering the welfare and best interests of the children, we decline to make any award of costs with respect to yesterday's hearing.

Saunders, J.A.

Concurred in:

Fichaud, J.A.

Bryson, J.A.