IN THE FAMILY COURT OF NOVA SCOTIA
Citation: M.Q.C. v. P.L.T., 2005 NSFC 27

Date: 20050411
Docket: FLBMCA-026453
Registry: Bridgewater

Between:

M.Q.C.

Applicant

v.

P.L.T.

Respondent

Revised Decision: The text of the decision has been revised to protect the identity of certain parties. This revised version is released on February 13, 2007

Judge: The Honourable Judge William J. Dyer

Heard: December 7, 2004, in Lunenburg
December 16, 2004, in Lunenburg, N. S.

Counsel: Patrick A. Burke, Q.C., for the applicant
Mark A. Taylor, for the respondent

By the Court:

[1] This decision centers mainly on the question of costs on the heels of an application by M.Q.C. against P.L.T. to enforce the child access provisions of a Consent Order. The enforcement application was later enhanced by a contempt of court application.

[2] Following a contested hearing, I determined that the Consent Order in question was clear, unequivocal, not open to interpretation, and consensual in regard to access arrangements for M.Q.C. I found that P.L.T. disobeyed the order and that her actions were deliberate and wilful, upon applying the test of proof beyond a reasonable doubt. (Written reasons were released.)

[3] The matter was set over to a date in early December, 2004 for sentence and review, and when it was also expected that the issue of costs would be addressed. The hearing was aborted in mid-stream when it was learned that P.L.T. was unaware of the court date. By then, both counsel had made lengthy representations on the outstanding issues in P.L.T.'s absence and without the benefit of a response affidavit from her.

[4] P.L.T. filed an affidavit the day before resumption of the case (December 16, 2004). The affidavit was laden with inflammatory, inadmissable evidence. Upon my direction, agreement was ultimately reached on those paragraphs which should be excised. I then continued with the matter, by consent, utilizing the supplemental affidavits of both parties on the understanding that neither was admitting truthfulness of the other's assertions except where counsel stipulated otherwise.

[5] In court, I noted that M.Q.C.'s original applications did not include formal requests for variation; rather they were directed at enforcement. Allowing that the court may have the authority on its own motion in contempt proceedings to vary access orders in the best interests of children, I was reluctant to make wholesale changes without notice and an opportunity for reply. However, there was long-standing notice of one issue and I rescinded (by oral ruling) an earlier prohibition against the children being at the residence of a named third party. The parties were cautioned to comply with the original Consent Order, as amended by me last August.

[6] I also determined that the access default application had been subsumed by the contempt application with the result that the former would be treated as at an end. For all practical purposes, the enforcement and contempt aspects of the case had been consolidated and I am treating it as such in regard to court costs and the other outstanding issues.

Synopsis of Proceedings

[7] An overview of the proceedings follows:

December 9, 2003	Consent Order regarding custody, access, child support and related issues
May 19, 2004	M.Q.C. commenced access enforcement proceedings by Affidavit in Default and Summons
June 22, 2004	First court appearance. Both parties present with counsel. P.L.T. given directions for filing of response affidavit (s). Interim hearing set for September 8, 2004.
August 5, 2004	Rescheduled interim hearing conducted upon court direction. M.Q.C. and counsel in attendance. P.L.T.'s counsel present; P.L.T. not present. No affidavit from P.L.T. Interim Variation Order granted.

August 24, 2004	*Ex parte* application by M.Q.C. for leave to commence contempt application against P.L.T.
September 8, 2004	Court granted leave for contempt application. (Written reasons released September 13, 2004.)
September 21, 2004	Brief filed on behalf of M.Q.C. No brief filed on behalf of P.L.T.
September 27 and 30, 2004	Default of access and contempt hearing. Counsel and parties in attendance. Oral decision finding P.L.T. in contempt. Adjourned for review and "sentence". M.Q.C. plus three witnesses testified on his behalf; 8 substantive affidavits admitted. P.L.T. testified; 1 affidavit admitted. (Written reasons released November 29, 2004.)
December 7, 2004	Scheduled hearing. M.Q.C. and counsel present. P.L.T.'s counsel present; P.L.T. absent. M.Q.C. filed supplemental affidavits (2); no response affidavit. Hearing aborted due to scheduling error by P.L.T.'s counsel. (Agreement by counsel regarding costs of the day subsequently confirmed.)
December 10, 2004	Brief filed on behalf of M.Q.C..
December 15, 2004	P.L.T.'s (supplemental) affidavit filed. No brief filed on behalf of P.L.T.
December 16, 2004	Resumption and conclusion of hearing. Parties and counsel present. No testimony.

Discussion/Decision

[8] The court's authority to award costs will be found in section 13 of the **Family Court Act**, section 21 of the **Maintenance and Custody Act**, and **Family Court Rule 17**. The latter two confirm that costs shall be awarded at the court's discretion and collected in accordance with maintenance collection procedures or as the court otherwise directs.

[9] Costs have been awarded in many custody and access cases, following the event. Some have considered poverty of the "unsuccessful party" as irrelevant to the entitlement issue. However, the quantum of the successful party's award may be affected by the other's financial plight. [See **Vanden Elsen v. Merkley** (2004), 49 R. F. L. (5th) 439 (Ont. S.C.J.); **Richter v. Richter** 2004 BCSC 214] And, one can find examples of discounted costs or deferred payment where an immediate and full payment award would negatively impact on a party's ability to maintain a child. [See **Ladisa v. Ladisa** (2004), 2004 Carswell 1088 (Ont S.C.J.)]

[10] Courts are also mindful that some litigants may consciously drag out court cases at little or no actual cost to themselves (because of public or third-party funding) but at a large expense to others who must "pay their own way". In such cases, fairness may dictate that the successful party's recovery of costs not be thwarted by later pleas of inability to pay. [See **Muir v. Lipon**, 2004 BCSC 65].

[11] Those who engage in unreasonable family law litigation conduct may face an award of increased costs. **Vanden Elsen** (*supra*) is an example. There the father was awarded substantial costs because the mother refused to obey court rulings, failed to attend court on her whim, and forced a routine hearing into an extraordinary one. And, extreme misconduct producing "rare and exceptional" litigation circumstances may result in a costs award determined on a solicitor/client basis. [See **J.E.A. v. C.L.M.** [2002] N.S.J. 373 (S.C.)].

[12] That contempt proceedings may attract substantial costs is exemplified by **Einstoss v. Starkman** (2003), 37 R.F.L. (5th) 77 (Ont. S.C.J.) **Einstoss** has some similarities with the present case. Arguably, it

was more extreme (findings of contempt in relation to three court orders; two and one half days of hearing), but the case involved a wife's failure to adhere to Minutes of Settlement dealing with child access (among other matters.) As in the present case, the court found the ensuing orders to be "clear and unambiguous in their language and intention" and that the wife/mother had known them throughout as she was personally instrumental in settling the orders. The court, in finding the mother in contempt of the court orders, declared she had "nonetheless wilfully and repeatedly knowingly breached the terms of the orders". The Ontario court had the benefit of its own Rules and (costs) Tariff. Counsel for the father sought full counsel fees and disbursements of about $9,400. The sought-after award was characterized as being on the "substantial indemnity scale" under the Ontario Rules. In **Einstoss**, Laforme, J. used the term "substantial" interchangeably with "solicitor-and-client"; and the term "particular indemnity" interchangeably with "party-and-party". In that context, the court wrote (at paragraph 9):

> Two basic costs principles are:
>
> (I) That substantial indemnity costs as opposed to partial indemnity costs will only be awarded in rare and exceptional cases; and
>
> (ii) Where a defendant's acts are a deliberate attempt to frustrate the proceedings by fraud or deception; where the conduct of the

> defendant is calculated to harm the plaintiff; or where the unreasonable conduct of the defendant compounds the complexity of the proceedings, there are proper grounds to order substantial indemnity costs.

[13] In relation to contempt matters it was said (at paragraph 10):

> The appellate jurisprudence regarding substantial versus partial indemnity discloses no cause of action for which substantial indemnity is presumed. Therefore, it would seem that any presumption in favour of substantial indemnity for any particular cause of action would be inconsistent with the basic premise that substantial indemnity is to be reserved for those exceptional cases. If substantial indemnity is the general rule, or the usual order for contempt cases, such awards would be - by definition - no longer “rare and exceptional”.

[14] And later (at paragraph 14):

> It would seem that some note of caution when dealing with contempt cases ought to be sounded. Courts should be wary of confusing the issues of costs in the main action (i.e., the action generating the contemned order), and costs in the contempt action. While it may be that person’s contemning an order made in the main action would be strong evidence of deliberate frustration, it does not automatically follow that it is. Substantial indemnity should be awarded in the contempt action only if the contempt itself or the conduct of the contempt trial evinces a deliberate attempt at frustration. This no doubt will occur frequently but it is not necessarily inevitable, since the contempt itself may not be sufficiently egregious.

[15] Applying the general principles to family law matters, the court opined (at paragraphs 15 - 19):

> Before concluding I think it is necessary to consider another area of law that has diverged somewhat from the strict norms of usual costs awards, namely, family law issues. It is now well settled that the rules with respect to costs in family matters have tended to be somewhat different than in other civil litigation.

Although the trial solely considered issues of contempt and therefore did not strictly amount to a family matter, the acts of contempt arise out of family law orders and that considered solely a family matter (i.e. child access). Thus, the different treatment must nonetheless be considered although perhaps not as rigidly as in a case of a pure family issue. This is because, in my view, the rationale for the different approach in family issues is still present.

One example of different treatment is that a court's discretion in family law cases includes consideration of the ability to pay as a more significant factor. Indeed, there is a non-exhaustive list of factors the court should consider in awarding costs in family law matters:

(a) The success of the parties: because success is often divided the success of the parties is not as important as in ordinary civil litigation:

(b) The conduct of the parties prior to the commencement of the litigation. This includes such matters as a mother who has, without just cause, refused access to the children;

© The conduct of the parties during the litigation. This will include such matters as unreasonable delay in prosecuting or defending the action, the neglect or refusal to admit something that ought to have been admitted (Rule 678), the use of wrong or defective procedures, the furnishing of wrong or misleading information, the use of delaying or other improper tactics at trial;

(d) The income and assets of each party, the relative means of each party to bear his or her own costs, and the effect of the award on the ability of a party to meet the obligations imposed on him or her by the judgment.

And finally, a costs award may be used to discourage litigation.

Other Costs Factors:

As well as considering the above, pursuant to Rule 57.01(1) - other factors that I have taken into account in the fixing of costs include (I) the success of the proceedings; (ii) the apportionment of liability; (iii) the importance of the issues; and (iii) the length of the trial.

[16] One final cautionary note sounded regarding the role of the judge in fixing costs was that costs should be fixed pursuant to a statement of account with careful consideration as to whether or not the costs were reasonably incurred.

[17] Mr. Burke seeks solicitor/client costs to be taxed. I asked counsel for an estimate of the solicitor/client expenses to help assess the potential liability of P.L.T. should such an award be granted, in whole or in part. It was disclosed that as of the December 7th court appearance, total fees, disbursements and HST were already in the range of $9,900. Thereafter, there was a final court appearance which attracted more costs.

[18] M.Q.C.'s case was procedurally meticulous; and substantively well-prepared and documented, at every step. Legal memoranda were filed on his behalf. (They should be in all complex, contested cases without court insistence.) By contrast, a minimum amount of attention and effort was demonstrated by P.L.T., despite court directions, warnings and admonishments.

[19] M.Q.C. was put to the strict proof of his case at each stage and was successful in the final result. P.L.T.'s deliberate absence from court for one critical hearing last summer, and her chronic failure to file and serve appropriate response documents on a timely basis, has needlessly frustrated and complicated the entire process. She seemed oblivious or indifferent to the increasing inconvenience and costs flowing from her conduct.

[20] P.L.T. did not file any current information regarding her income, expenses, assets or liabilities. Her final affidavit was devoid of admissible evidence about her current financial circumstances. When the 2003 Consent Order was approved, she had employment income of about $18,000 annually; M.Q.C.'s was about $40,000. From the limited evidence before me, I find P.L.T. is still employed with an income not less, and likely more, than it was in 2003. She apparently owns and occupies a residence, but little else is known. M.Q.C. is also still employed at the same or a higher income; and he now cohabits with the person with whom (the children's) contact had been prohibited by virtue of the Consent Order.

[21] A general plea of limited means [to respond to a costs award] does not merit serious attention if there is little or no foundation in the evidence to support it. P.L.T. had ample opportunity to muster such evidence and a principled defense but, consistent with her approach throughout, little was done to counter the substance of M.Q.C.'s long-standing position on the crucial issue of costs. Rather, after minimizing M.Q.C.'s ongoing concerns, she proffered assurances through her counsel that things were improving and simply argued that she should not be penalized with costs.

[22] With respect, it is easy to submit that it is "self-evident" that a substantial award could only be recovered by way of off-setting reductions in child support, or that P.L.T.'s ability to help support the children from her own income will be compromised, or that she will have trouble meeting her own living expenses. Such arguments may have emotional appeal but, with respect, little else without supporting evidence. I am not prepared to assume, or to speculate, that P.L.T. cannot pay an award, if imposed. As noted elsewhere, payments of awards may be deferred or structured by the court as warranted by the circumstances.

[23] I conclude this a unique, rare and exceptional litigation circumstance. Indeed, the contempt action is unprecedented in the years I have presided in this jurisdiction. I conclude this case should result not just in an award of increased costs but it should result in an award related to M.Q.C.'s solicitor/client expenses, from commencement of the original application to and including the final court appearance. Having regard to all of the circumstances, I exercise my discretion and award Mr. M.Q.C. 60% of his solicitor/client fees, disbursements, and HST. On reflection, and having regard to the case law on this subject, I conclude it is appropriate that those expenses be subject to formal assessment [taxation] rather than a simple global award; and I will so order. Unless otherwise agreed between the parties, the court costs shall be paid by P.L.T. in 24 equal, consecutive monthly instalments, commencing 30 days after taxation.

[24] And, again on reflection, it does seem appropriate to deal at least with some of the incidental issues raised by counsel, if only to make the prior orders more workable or clear.

[25] In reviewing submissions of P.L.T.'s counsel on December 7, 2004 I noted the following:

> It would seem to me appropriate, given the nature of the contempt order for Your Honour to make what I would have otherwise thought a variation to the consent order, but to make as part of the redressing the contempt situation, to make an order regarding perhaps what my learned friend has asked for, in regard to the Friday night starting access and also the issue of deleting the D.W. provision, and perhaps given the fact that it was in the previous order, the Ed McClare counselling. It seems to me that if Your Honour wishes to censure P.L.T.'s past behaviour, and I wish to call it past behaviour, it was at the time leading up to September and with a hope or with a guiding principle of improving things between these parties that certainly some type of further counselling along the anger management lines might be a way of punishing, if I can use that word, or censuring P.L.T.'s behaviour, while yet providing for remedy that may actually help the parties in the future as far as dealing with these issues. (Emphasis added.)

[26] I note at the last court appearance, when P.L.T. was present with counsel, that the emphasized portions of the submissions were not significantly modified, if at all. In the result, in the children's best interests (which are paramount under the **Maintenance and Custody Act**), I am prepared to further vary the Consent Order (as amended) so as to change to commencement time of alternate weekend access to Friday evening, no later than 6:30 p.m., unless the parties agree in writing to a different time.

[27] I accept Mr. Burke's submission that the local counseling services of Mr. Ed McClare were intended by both parents to address M.'s problems

as well as communication issues between the adults. The Consent Order said as much. In my opinion, those issues have not been resolved; the need for counseling continues. It is perverse for P.L.T. to now construe her own agreement, and the court's insistence that services be continue, as "punishment". I am not prepared to rescind paragraph 7 of the Consent Order at this time. That said, there is nothing preventing the parties from voluntarily and cooperatively engaging the services of other professionals to help with their situation.

[28] I am not prepared to order P.L.T. into "anger management" services absent any credible information about availability, cost, and her suitability for such a program.

[29] For the reasons expressed in court, I am not prepared to enshrine access rights to the paternal grandparents in an order. (They are not parties to the proceedings; and may exercise access incidental to M.Q.C.)

[30] I am prepared to refine paragraph B of the original Parenting Plan so as to additionally require P.L.T. to provide M.Q.C., at least once weekly,

with a schedule or list of the children's upcoming school, medical, religious and community activities and commitments; and to promptly provide him with copies of all reports from those sources received by her as the primary care-giver. Further, I order that the parties exchange written copies of their employment schedules (or changes in those schedules) as soon they become known.

[31] Allowing that neither parent testified at the last court appearance, the impact of the last volley of competing affidavits is that access by M.Q.C. remains problematic on many fronts and that P.L.T. still sees herself as a victim rather than the prime instigator of the current personal conflicts and problematic access. Therefore, the notion of periodic review, as proposed by M.Q.C., does have merit. Whether or not P.L.T. will pay heed to the spirit and words of the various orders remains to be seen. She has an unenviable history of non-compliance with and resistence to court orders. Her past conduct speaks volumes about the prospects for positive change. But, she will have every opportunity to prove I am incorrect. I order that the case be reviewed at least every six months in the short term, commencing

with a brief docket appearance in July, 2005. Counsel should seek a date in consultation with court staff.

[32] Counsel for M.Q.C. shall submit an appropriate order.

Dyer, J.F.C.