IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: Axford v. Axford, 2010 NSSC 7

Date: 20100107
Docket: 1201-060509
Registry: Halifax

Between:

Carol-Anne Axford

Petitioner

and

Darren Axford

Respondent

Judge: Justice Lawrence I. O'Neil

Heard: November 3, 2009, in Halifax, Nova Scotia

Counsel: Mary Jane McGinty, for the Petitioner
Douglas Sealy, Q.C., for the Respondent

By the Court:

Introduction

[1] Ms. (Kelly) Axford filed an application to vary on July 6, 2008; amended July 24, 2008. In response, on January 5, 2009, Mr. Axford filed an application to vary. Carol-Anne Axford next filed an interlocutory notice and application *inter partes* on September 30, 2009. She seeks to strike Mr. Axford's application, as provided by R.14.25 of the Civil Procedure Rules (1972). By virtue of R.92.02(2), this rule continues to apply to proceedings in this court.

Issue

[2] It is argued on behalf of Ms. (Kelly) Axford that no change in circumstances is shown or alleged in the pleadings filed by Mr. Axford. It is her position that there has not been a change in circumstances since the parties executed their separation agreement (July 12, 2006) and since the issuance of the corollary relief judgment (September 26, 2006) and consequently, Mr. Axford's application to vary can not possibly be sustained. It should therefore be struck.

Position of the Parties

[3] It is the position of Ms. (Kelly) Axford that her July 16, 2008 amended variation application erroneously stated that a change in access was sought. It is her position that no change in access was in fact requested. She argues further that Mr. Axford's January 5, 2009 response did not set out a change in circumstances. In her view, his affidavit attached a parenting schedule that was already incorporated in the corollary relief judgment and his request to have it adopted was not an application to vary.

[4] Counsel for Ms. Axford argues further that the same is true of Mr. Axford's affidavit filed June 24, 2009. It is argued on the Petitioner's behalf that the Respondent simply incorporates the parenting arrangement contained in the parties' corollary relief judgment.

[5] On behalf of Mr. Axford, it is argued that he consented to the court's jurisdiction to hear Ms. Axford's application to vary, as amended. He says he did not contest that there was a "change of circumstances" and filed a response on January 5, 2009 on this basis.

[6] In response to the parties' pleadings and as a result of conciliation held on September 30, 2008, a consent variation order was agreed to for issuance on June 30, 2009. The order is dated June 30, 2009, the date of a pre-trial I held with the parties. The order changed ancillary child custody/access issues, i.e. travel outside Canada, school in service days and summer activities. The order, however, also acknowledged that the characterization of the custody arrangement, whether shared or joint, and child support remained to be addressed.

[7] The pre-trial memorandum dated June 30, 2009 identified the categorization of "the parenting arrangement, that is whether it is a shared parenting or a joint parenting arrangement" as an outstanding issue. No procedural or jurisdictional concerns were raised with the court.

[8] As stated, the subject application to strike was filed on September 30, 2009. The subject motion to strike was heard on November 3, 2009. A settlement conference scheduled for October 15, 2009 did not occur. The trial was to be January 7, 2010. It did not take place.

[9] Mr. Axford argues that (1) on numerous occasions, the parties' consented to his application going forward; (2) the jurisdictional issue or threshold was for Ms. Axford to overcome in any case, given that she filed the application; and alternatively, (3) that his affidavit dated October 27, 2009 (exhibit 1) describes five points that represent a change of circumstances. They are:

1. Ms. Axford has remarried;

2. Mr. Axford is in a committed relationship;

3. The children are more mature;

4. The parenting arrangement has become more relaxed over the years; and

5. Ms. Axford now requires more assistance from him in the parenting of the children.

R.14.25 and s.17 of the *Divorce Act* and s.9 of the Guidelines

[10] R.14.25 is the governing rule to be read with s.17 of the *Divorce Act*, R.S.C., 1985 c.3 (2nd Supp.)which provides for variation of a corollary relief judgment. These provisions provide as follows:

> **Rule 14.25**
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> (1) The court may at any stage of a proceeding order any pleading, affidavit or statement of facts, or anything therein, to be struck out or amended on the ground that,
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> (a) it discloses no reasonable cause of action or defence;
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> (b) it is false, scandalous, frivolous or vexatious;

> (c) it may prejudice, embarrass or delay the fair trial of the proceeding;
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> (d) it is otherwise an abuse of the process of the court;
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> and may order the proceeding to be stayed or dismissed or judgment to be entered accordingly.
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> (2) Unless the court otherwise orders, no evidence shall be admissible by affidavit or otherwise on an application under paragraph (1)(a).
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> **Sections 17(1)(b) and (5) of the *Divorce Act***
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> 17. (1) A court of competent jurisdiction may make an order varying, rescinding or suspending, prospectively or retroactively,
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> (b) a custody order or any provision thereof on application by either or both former spouses or by any other person.
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> . . . . .
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> 17.(5) Before the court makes a variation order in respect of a custody order, the court shall satisfy itself that there has been a change in the condition, means, needs or other circumstances of the child of the marriage occurring since the making of the custody order or the last variation order made in respect of that order, as the case may be, and, in making the variation order, the court shall take into consideration only the best interests of the child as determined by reference to that change.

Applicable Legal Principles/Conclusion

[11] I am satisfied that the merits of the application and evidence of the change of circumstances should be considered as part of the same hearing. I have come to this conclusion for a number of reasons.

[12] Firstly, I am persuaded that these parties acquiesced to the court considering the merits of their respective applications to vary the corollary relief judgement. The court's jurisdiction resulted from the application to vary filed by Ms. Axford. The court's jurisdiction to consider the response also arose from that application. I do not agree that the court's jurisdiction to vary the custody and access provisions of the corollary relief judgement once vested, limits it to consider only the changes sought by the applicant. The response to the application raised different aspects of the custody/access provision. There was no need for the respondent to re-establish the court's jurisdiction.

[13] Secondly, Rule 14.25(2) permits the court to consider affidavit evidence. I have decided to consider the affidavit of Mr. Axford dated October 27, 2009 (exhibit 1). It reveals some circumstances that could represent a change of circumstances within the meaning of s.17(1) of the *Divorce Act*. This is not the stage of the proceeding to decide whether those changes justify the requested variation of the parties' corollary relief judgment. The application is not obviously unsustainable.

[14] Justice Roscoe, speaking for the court in *Mabey v. Mabey* [2005] N.S.J. No. 71 overturned a trial judge's conclusion that the wife's application was obviously unsustainable. The wife applied for spousal support and a retroactive variation of child support.

[15] At paragraph 13, 18 and 25 she stated:

> 13 It is well settled that the test pursuant to Rule 14.25(1)(a) is that the application will not be granted unless the action is "obviously unsustainable". In considering an application to strike out a pleading it is not the court's function to try the issues but rather to decide if there are issues to be tried. The power to strike out pleadings is to be used sparingly and where the action raises substantial issues it should not be struck out: Vladi Private Islands Ltd. v. Haase et al. (1990), 96 N.S.R. (2d) 323. An application for variation should not be struck out unless it is certain to fail, or it is plain and obvious that it will not succeed. Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the respondent to present a strong defence should prevent the applicant from proceeding with his or her case: Hunt v. Carey Canada Inc., [1990] 2 S.C.R. 959.
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> . . . . .
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> 18 In my view, the chambers judge erred in delving too far into the merits of Ms. Mabey's application, and in so doing did not properly apply the established test under Rule 14.25. The inquiry should have been limited to answering the question: is the application obviously unsustainable?
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> . . . . .
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> 25 Based on Miglin, Ms. Mabey's application was not obviously unsustainable. She was entitled to proceed to trial to have the court inquire into the merits of her claims based on this two phase approach. Mr. Mabey promised, in writing, that he would "be responsible for the repayment of the additional United States Federal Plus Loans ... and that [his] sole recourse shall be against Melissa Mabey." He referred to this as being the same undertaking he had given in the separation

> agreement with respect to the 1995-96 loan. According to Ms. Mabey's affidavit, relying on that promise she agreed to obtain the loans. He unilaterally stopped paying and his former wife is now exposed on the loans - the very thing Mr. Mabey promised would not happen. At the trial, in addition to all of the factors discussed in Miglin, the significance of the indemnity agreement, despite being signed only by the party who now wishes to denounce it, and its impact on the original agreement, can be canvassed in full based on all of the evidence. As well, the foreseeability of both Mr. Mabey's and Melissa's refusal and/or inability to pay the student loans can be assessed taking into account the understanding of the parties at both the time of the original agreement and the time of the indemnity agreement.

[16] Justice Cromwell, on behalf of the Appeal Court in *Nova Scotia (Attorney General) v. MacQueen* [2007] N.S.J. No. 144 considered R.14.25. The case involved a claim against the Crown and an operator of a steel and coal plant, by landowners and involved the release of contaminants on their lands.

[17] At paragraph 42, Justice Cromwell concluded in part:

> 42 The success of any such arguments is yet to be determined. At this point it is only for us to consider whether there is an issue to be tried. Canada and Nova Scotia have not satisfied me, in light of their alleged contact with the respondents, that it is plain and obvious the respondents could not have reasonably expected that Canada and Nova Scotia would act in their best interests with respect to the operation of the plant and/or ovens, and especially with respect to the dissemination of information regarding the nature of the emissions (notwithstanding the statutory objectives in their respective enabling legislation).

[18] Recently, MacDonald, C.J.N.S. considered whether a claim by the Cape Breton Regional Municipality (“CBRM”) against the Province of Nova Scotia, had no chance of success (*Cape Breton (Regional Municipality) v. Nova Scotia (Attorney General)*, 2009 NSCA 44). The claim turned on the interpretation of s.36 of Canada’s Constitution Act, 1982. That section enshrines equalization principles in the Canadian constitution.

[19] At paragraph 17 and 18, MacDonald, C.J. summarized the legal principles as follows:

> 17 Rule 14.25 offers a drastic remedy. It provides for an action to be dismissed summarily, thus denying litigants their "day in court". Understandably, therefore, any defendant seeking such relief bears a heavy burden. The Chambers judge would have to consider this claim at its highest, by assuming all allegations to be true without the need to call any evidence. Then even with this assumption, it must still remain "plain and obvious" that the pleadings disclose no reasonable

cause of action. In Hunt v. Carey Canada Inc., [1990] 2 S.C.R. 959 at p. 980, the Supreme Court of Canada, when considering the corresponding British Columbia provision:

> Thus, the test in Canada governing the application of provisions like Rule 19(24)(a) of the British Columbia Rules of Court is the same as the one that governs an application under R.S.C. O. 18, r. 19: assuming that the facts as stated in the statement of claim can be proved, is it "plain and obvious" that the plaintiff's statement of claim discloses no reasonable cause of action? As in England, if there is a chance that the plaintiff might succeed, then the plaintiff should not be "driven from the judgment seat". Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case. Only if the action is certain to fail because it contains a radical defect ranking with the others listed in Rule 19(24) of the British Columbia Rules of Court should the relevant portions of a plaintiff's statement of claim be struck out under Rule 19(24)(a).

18 In following Hunt, our court has recently confirmed that in order to strike pleadings under Rule 14.25 (1)(a), they must appear to be either "certain to fail" (Sable Offshore Energy Inc. v. Ameron International Corp., 2007 NSCA 70 at para. 13) or "absolutely unsustainable" (CGU Insurance Co. of Canada v. Noble, 2003 NSCA 102 at para. 13).

[20] Finally, the court concluded:

> 85 The simple reality is that this is not a matter for the courts because s. 36 cannot be reasonably interpreted as bestowing a constitutional right on municipalities such as the CBRM.

[21] Justice Beryl MacDonald in *Ponsford v. Eknes*, 2008 NSSC 290 at para 12-13 stated:

> 12 Mr. Ponsford asks for a variation in the description of the parties parenting arrangement from joint custody, as appears in the separation agreement, to shared custody, representing the actual parenting structure. The parenting schedule as outlined in the Separation Agreement may well result in the children being in Mr. Ponsford's care for 40% or more of their time. However, this was the schedule that has existed since the Separation Agreement was signed by both parties. Mr. Ponsford signed the Agreement and had legal counsel representing him at the time. Notwithstanding the parenting schedule the Agreement described their arrangement as joint custody. No request for change was made when the Corollary Relief Judgment was granted. There is no change in the "condition, means, needs or other circumstances" of the children since the Corollary Relief Judgment was granted.

> 13 There will be no variation to the description of the parenting arrangement.

[22] An examination of Mr. Axford's response to the variation application reveals that the relief he seeks is in addition to that sought by Ms. Axford. Ms. Axford sought changes in access and Mr. Axford sought changes in the description of the access and Mr. Axford sought a change in the custody arrangement and child support.

[23] In his accompanying parenting statement he described his desired change to be a categorization of his parenting arrangement as "shared custody instead of joint custody". However, he also stated that he wanted no change to the attached schedule, being that contained in the consent variation order. This statement however, is subject to the qualification in his affidavit filed the same day, that changes sought by Ms. Axford and dealing with in service days, storm days and vacation days, were agreed to. Clearly, the jurisdiction of the court was not an issue for either party.

[24] Mr. Axford is arguing that the parties have a shared parenting arrangement and he now wishes to have a recalculation of child support on the basis of s.9 of the Federal Child Support Guidelines. To date, his child support obligation has been based on the tables as required by s.3 of the Guidelines.

[25] Section 9 of the Guidelines defines how child support may be calculated in a shared custody situation:

> 9. Where a spouse exercises a right of access to, or has physical custody of, a child for not less than 40 per cent of the time over the course of a year, the amount of the child support order must be determined by taking into account
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> (a) the amounts set out in the applicable tables for each of the spouses;
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> (b) the increased costs of shared custody arrangements; and
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> (c) the conditions, means, needs and other circumstances of each spouse and of any child for whom support is sought.

[26] I am satisfied that the parties agreed that the merits of their respective applications would be considered by the court. It would be unfair to the

Respondent to deny him the opportunity to be heard after he consented to changes sought by the Petitioner.

[27] In addition, the evidence offered by the Respondent in response to the Petitioner's application to strike, satisfies me that his application is not obviously unsustainable. The Petitioner has therefore not met the burden upon her to justify striking Mr. Axford's application.

J.