SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION
Citation: *P.W. v. C.M.*., 2024 NSSC 169

Date: 20240619
Docket: 096620
Registry: Sydney

Between:

P.W.

Applicant

v.

C.M.

Respondent

Judge:	The Honourable Justice Lorne J. MacDowell
Heard:	February 20th, 2024, in Sydney, Nova Scotia
Written Release:	June 19, 2024
Counsel:	P.W. – self-represented Theresa O'Leary for the Respondent C.M.

Introduction

[1] This proceeding is an Application by P.W. (the father) seeking leave to apply for a variation of his parenting time with 9-year-old J.W. (the child). C.M. is the mother of the child (the mother). The father is required to obtain leave of the Court to pursue any Application to Vary parenting time. The requirement for leave was previously put in place by Gregan, J.

Issues

[2] In this decision, I will address the following issues:

- What are the positions of the parties?
- Should leave be granted so the father can pursue an Application to Vary parenting time.

Background

[3] After a multi day hearing regarding parenting and support, Justice Robert Gregan rendered an oral decision on March 2, 2017, with written release on April 14, 2017, (***P.W. v. C.M., 2017 NSSC 91***) and an Order dated July 12, 2017. A detailed parallel parenting plan was put in place for the child. The Court did not accept the father's argument for shared parenting on an equal time basis. Primary care was granted to the mother. Routine day to day decision making was to be exercised by the parent having care of the child.

[4] The father was, however, granted sole decision making with respect to important aspects of the child's life. These include medical decisions for the child including vaccination, doctors' appointments, and medical treatment. The father was also granted final decision making with respect to religious formation including baptism and ceremonies.

[5] Further, the decision provided for a review regarding education decision making to occur in September of 2017. It also provided that neither parent would enroll the child in organized daycare or education programs without the other's written consent or court approval. The Court ordered therapeutic follow up and review of these provisions by a date certain.

[6] Child support was ordered payable by the father.

[7] The father filed an Application to Vary on September 22, 2017.

[8] On September 25, 2017, the Court dealt with a review regarding daycare and the status of counselling for the parties. The parties disagreed on enrollment of the child in daycare. The Court ordered that either party could enroll the child in daycare provided his attendance occurred exclusively during the enrolling parent's parenting time. An Order was not made regarding decision making as it pertained to other formal education, and neither party was to enroll the child in pre-primary or primary without the written consent of the other parent or Court approval. If the parties were unable to agree on formal education and schooling by the time the child was 48 months old, either party was entitled to bring the matter back to court in accordance with the original Order.

[9] The Court refused to vary parenting time; Justice Gregan was not satisfied there was a change in circumstance and the father's Application to Vary was adjourned without date.

[10] On February 21, 2018, the parties were again before Gregan J. The father was seeking to vary the July 12, 2017, Order and be granted 50/50 shared custody and a variation of child support.

[11] The Court dismissed the father's Application to Vary. The Court determined there was no material change of circumstance.

[12] The Court also ordered that, except for the reviews directed by the Court, that the father was not permitted to make a future Application for variation of the parenting terms under the Order issued July 12, 2017, without first having been granted leave to apply for a variation by a Justice of the Supreme Court of Nova Scotia (Family Division). The mother was also awarded $500.00 costs.

[13] On August 23, 2019, a hearing was held regarding the education provisions of the order. By way of oral decision on August 27, 2019, the mother was granted sole decision making for all areas of the child's education on certain terms and conditions.

[14] On January 2, 2020, an amended Application to Vary was filed by the father. The father was applying to vary parenting time, child support, and sought relief regarding arrears.

[15] On September 25, 2020, the father filed another Application to Vary. Included in that Application was a request for leave to apply for a variation of parenting time, attaching a copy of the Order requiring leave.

[16] On August 2, 2021, the father discontinued the September 25, 2020, Application. The Notice of Discontinuance states: "I, P.W. am discontinuing my Application for leave of the Court because I currently have an appeal in two recent decisions by MacLeod-Archer, J. and I refuse to have her make any decisions until the Court of Appeal has ruled."

[17] The father's current Application to seek leave was filed on January 16, 2023.

[18] He also filed a Statement of Contact Information and Circumstances, Parenting Statement, Personal Representation form, Affidavit, and financial documents.

[19] Subsequently, the father filed a copy of the transcript of the proceeding on February 21, 2018, at which time his Application to Vary was dismissed and the requirement for leave imposed.

[20] Prehearing submissions were received from the father and the mother. The father also filed a rebuttal brief.

[21] The mother opposed the leave Application. She filed no evidence in response.

[22] The matter proceeded on February 20, 2024. The father testified and was cross examined by counsel for the mother. Oral submissions were made, and I reserved decision.

[23] The parties have a lengthy history before the Court. The father is, as noted, required to obtain leave as a result of a decision from Gregan, J. on issues regarding parenting time.

[24] The father is also required to obtain leave pursuant to section 54B of *The Parenting and Support* (the *Act*) before filing any new Applications dealing with child support. The Honourable MacLeod-Archer, J. in **P. W. v. C. M., 2021 NSSC 127,** found that the father had habitually, persistently, and without reasonable grounds or merit, started or pursued vexatious proceedings and that he had conducted them in a vexatious manner (para 84). The history of the proceedings between the parties since 2017, including those regarding parenting, were set out in her decision (Schedule C).

[25] The father appealed the decision of McLeod-Archer, J. In dealing with the trial judge's decision to impose the leave requirement pursuant to section 54B of the *Act,* the Court of Appeal determined that the Justice had not acted outside her jurisdiction in applying section 54B. The Court determined there was no error

committed by the Justice requiring an Application for leave on a go forward basis (**Paul Ward v Coralie Murphy, 2022 NSCA 20**, paragraphs 81-84).

[26] Post Hearing oral submissions were provided by the parties at the conclusion of the Hearing. I invited the parties to address what test I should apply.

What are the Positions of the Parties?

[27] The father argues that there is no reason outside of gender to deny him equal parenting time. He argues that he is a victim of parental alienation and there is no reason that exists for him not to have shared custody. The father argues it is time for the child to have equal time and argues that shared parenting reflects the child's wishes. The father submits that the child is in the middle of conflict and that to deny him equal parenting time with both parents, because some other fathers are abusive, is discrimination.

[28] The father alleges that the original decision of Gregan, J., in setting the detailed parenting regime, was in part due to uncertainty regarding his work and availability. He argues that when the decision was made, the Judge believed the father would be out of town for work when the equal parenting time was sought and therefore denied. The father alleges it was unknown whether he would be working out of province at the time of the original March 2017 decision.

[29] The father argues that the best way forward is for the child to have equal time with him. He submits what has happened is not equality and that in the year 2024, this should be about equal parenting time in the child's best interests. The father argues he is here and available; he is the child's father, and he loves his child.

[30] The mother argues that the father is litigious, having twice been found to have habitually, persistently, and without reasonable grounds, started a frivolous or vexatious proceeding, or conducted a proceeding in a frivolous or vexatious manner.

[31] She submits the current leave Application is a further example of this and at a minimum, there must be some evidence that would establish a prima facie case for a variation Application. There must be something compelling to be worthy of the Court's time to adjudicate. The mother submits the father advances no such evidence in the applicant's evidence. Rather, the father's submissions contain facts already adjudicated upon that are wholly irrelevant or are founded upon inadmissible child hearsay.

[32] The mother submits there is nothing in the evidence, presented by the father, that would establish, even on a prima facie basis, that there is a material change in circumstances. The mother seeks dismissal of the leave Application with costs.

Should Leave be Granted so the Father Can Pursue an Application to Vary Parenting Time?

The Law

[33] Section 54B of the *Parenting and Support Act*, (the *Act*) ***RSNS 1989, c 160***, allows a judge to make an order restraining a party from taking further steps in the proceeding:

> Frivolous or vexatious proceedings
>
> 54B (1) Where a Court is satisfied that a person has habitually, persistently and without reasonable grounds started frivolous or vexatious proceedings or has conducted a proceeding in a frivolous or vexatious manner in the Court, the Court may make an order restraining the person from (a) starting a further proceeding on the person's own behalf; (b) continuing to conduct a proceeding, without first obtaining leave of the Court.
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> (2) An Application for an order under subsection (1) may be made by the party against whom the proceeding has been started or conducted, a Court officer or, with leave of the Court, any other person. 2015, c. 44, s. 43.

[34] The *Act* says nothing about the content of the leave requirement. The Court of Appeal addressed Section 54B regarding these same parties in ***Ward (supra)***, where Van den Eyden JA rejected PW's argument that "the judge both erred and acted outside her authority when she invoked Section 54B of the *Act* to require him to obtain leave to file future support-related Applications" (para 81). Justice Van den Eyden continued:

> [83] Ms. Murphy proposed the judge consider making such an order. In examining the request, the judge reviewed the history of court proceedings between the parties concerning or related to their child. The judge described it as "lengthy" and commented that, as had been argued by Ms. Murphy, "the idea seems to be that until P.W. gets a decision he likes, he'll just keep on filing new Applications." Noting Mr. Ward had met with marginal success on the Application, but that it required a six-day hearing to achieve, the judge was persuaded the combination of the history of his litigation with Ms. Murphy and his actions during the hearing justified the imposition of a leave requirement going forward.

> [84] I see nothing in the record to support any suggestion the judge acted outside her jurisdiction in applying s. 54B of the *Act*. That section positions a Court, where it deems appropriate, to manage the potential for frivolous or vexatious proceedings. The judge was persuaded on a balance of probabilities that putting parameters around Mr. Ward's ability to pursue future variation Applications was warranted. There was no error by the judge in exercising that discretion, which was clearly within her jurisdiction. I would dismiss this ground of appeal as I am satisfied there is no basis for this Court to interfere with her conclusion.

Section 54B is substantively all but identical to section 45B of the ***Judicature Act, RSNS 1989, c 240***, which states, in part:

> 45B (1) Where a Court is satisfied that a person has habitually, persistently and without reasonable grounds, started a vexatious proceeding or conducted a proceeding in a vexatious manner in the Court, the Court may make an order restraining the person from (a) starting a further proceeding on the person's own behalf or on behalf of another person; (b) continuing to conduct a proceeding, without leave of the Court.

[35] The *Judicature Act*, unlike the *Parenting and Support Act*, provides some guidance as to the test on a leave Application pursuant to the *Judicature Act* provisions; Section 45D(1) states:

> 45D (1) A person against whom an order has been made under subsection (1) or (2) of Section 45B may make a motion for leave to start or continue a proceeding and, where a Court is satisfied that the proceeding is not an abuse of process and is based on reasonable grounds, the Court may grant leave on such terms as the Court determines.

[36] The Court of Appeal addressed the test for leave under the *Judicature Act*, provisions in ***Tupper v. Nova Scotia (Attorney General), 2015 NSCA 92, [2015] NSJ No 427, leave to appeal [2015] SCCA No. 520:***

[37] **Tupper *(supra)*** confirmed that inherent jurisdiction is available to govern vexatious litigant proceedings; the Court said that section 45B "codifies the Courts' long held inherent jurisdiction to control its own process" (para 23). The Court determined that the burden under 45D is on the vexatious litigant to establish (a) the proposed proceeding is not an abuse of process based upon the pleadings, past and proposed and (b) based on reasonable grounds, suggesting the record be limited to the proposed pleadings and that the clearly unsustainable test used for summary judgment on pleadings (CPR 13.03) be applied.

[38] I find that the *Act* does not expressly impose equivalent requirements to section 45D of the *Judicature Act*, under which leave depends on the Court

concluding that "the proceeding is not an abuse of process and is based on reasonable grounds …".

[39] In ***Ward* (supra)** the Court of Appeal has described the leave requirement ordered by MacLeod-Archer, J. in ***P.W. (Supra)*** as imposing "parameters" around P.W.'s ability to pursue future variation Applications, (para 84).

[40] It is apparent from Justice MacLeod-Archer's reasons imposing an order in respect of child support – including her description of Justice Gregan's earlier order pertaining to parenting – that the order was motivated by the multiplicity of Applications brought by P.W., as well as a Small Claims Court proceeding, all of which C.M. has been required to respond to. In imposing the ***P.W. (supra)*** leave requirement in respect of child support, Justice MacLeod-Archer said:

> [82] … This is a case that cries out for such a step. The Courts have limited resources, and the pressures on the docket are enormous. P.W.'s numerous Applications have taken up an inordinate amount of court resources and time, from processing new files, intake procedures, conciliation efforts, pretrial conferences, case management, and numerous Court hearings. As C.M. points out, the idea seems to be that until P.W. gets a decision he likes, he'll just keep on filing new Applications.
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> [83] Schedule "C" outlines the Applications filed by P.W. since 2017. The list is lengthy. Although he met with minor success on a couple of these Applications, for the majority he did not. Likewise with this decision, P.W. met with some success, but the amount of child support he will pay is only marginally lower than ordered in 2017. Yet a six day trial was required in order to reach that conclusion.
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> [84] I find that P.W. has habitually, persistently, and without reasonable grounds or merit, started or pursued vexatious proceedings, and that he has conducted them in a vexatious manner. Some examples include the undue hardship claim he advanced in 2018 but never perfected, as well as the Small Claims matter referenced above. His belligerent attitude throughout this proceeding, as well as the inappropriate comments made to the Court and C.M.'s counsel at the hearing, only compound the vexatious tone and nature of P.W.'s claims.

[41] The requirement for leave was motivated by the need to prevent P.W. from wasting the Court's – and the other party's – time and resources by bringing proceedings to court without reasonable grounds or merit. These are the "parameters" the Court of Appeal spoke of. As such, the "reasonableness" of the proposed Application is relevant, that "reasonableness" must be considered in light of the reasons for which the order was made in the first place.

[42] Although, at the time that Gregan, J. imposed the requirement for leave, his decision did not specify the leave requirement was pursuant to the *Act*, the father's

Application which resulted in the leave requirement, and the current Application were both filed pursuant to the *Act*. The Order requiring leave does not contain the language regarding the leave requirements in the *Judicature Act* nor does it refer to it.

[43] I find the context of this Application and the prior variation Application(s) is pursuant to the *Act*. As such I must determine whether the evidence on the leave Application establishes, on the balance of probabilities, reasonable grounds or merit. There is no burden on PW to satisfy me that the proceeding is not an abuse of process. At a minimum the father must establish a *prima facie* case of a change in circumstance. I must also consider the best interests of the child.

[44] In coming to my decision, I would note that my review of the prior decisions of MacLeod-Archer, J. in ***P.W.*** **(supra)** and the Court of Appeal in ***Ward*** **(supra)** are for the purposes of considering the relevant law applicable to such Applications and the history of proceedings between the parties. Those decisions are not evidence in this proceeding.

Evidence

[45] The evidence before me consists of the father's Affidavit filed January 16, 2023, and entered into evidence as Exhibit "1", upon which the father was crossed examined. Further, the father tendered as Exhibit "2", a photograph that he referred to and explained in his testimony.

[46] In coming to my decision, I have considered the evidence, the written and oral submissions of the parties and the pleadings and prior proceedings. No Application to strike was brought forward regarding aspects of the father's affidavit. I have, however, considered only admissible evidence in coming to my decision.

Decision and Analysis

[47] The father's Application for leave is denied for the following reasons:

No Change of Circumstance

[48] The father has not, by admissible evidence, shown any *prima facie* change of circumstance. I dismiss the father's argument that in 2017, the uncertainty surrounding the father's work led Gregan, J to award less than equal parenting time to him. The father argues that because this uncertainty has since resolved, he has proven, at least prima facie, a material change in circumstances.

[49] I reject the father's reasoning because in 2018, Justice Gregan rejected that same argument. On February 18, 2018, the father filed an affidavit in which he detailed his work history and future employment plans. The father confirmed that he would live and work in Cape Breton. Justice Gregan, in dismissing the father's Application to Vary the parenting plan, specifically dealt with that evidence, and noted that there was nothing new therein. It is to be remembered that this was the proceeding where the leave requirement was imposed.

[50] There is no evidence of a *prima facie* material change in circumstances. For example, I give no weight to the hearsay statements of the child contained in the father's affidavit. I also note that the child's alleged desire for more time with the father was raised in his 2017 Application to Vary which was dismissed. Complaints regarding the mother's refusal to negotiate additional time were also rejected.

[51] The father's comments during his cross examination, the content of his evidence and arguments during this hearing are consistent with past positions which have been rejected. The father lacks insight as to the reason the leave requirement was imposed and feels he has and is being discriminated against.

Child's Best interests

[52] The limited evidence before me indicates that the child is doing well under the current parenting regime. There were only conclusory statements, without evidence, that the child's best interests would be enhanced by changing the parenting plan. I do note however, that the father's evidence that he is engaging in discussions about current parenting structure with the child, are concerning. Such discussions are not in the child's best interests.

Summary of Leave Decision

[53] The father's personal beliefs regarding gender equality, his rights or the child's right to equal parenting time, and his evidence regarding his positive adherence to the current Order, provide no basis to support its variation. Submissions are not evidence. Following a Court Order does not equate to a reward to change it.

[54] The father's motivation was evident in his testimony. In cross examination, he said that he had been "entrenched in everything and that this Application is always on the table for me, but I have never given up on it. I mean I'll never give up on equal parenting time." The evidence and submissions are consistent with the position taken on February 21, 2018. At that time, while acknowledging the Justice's prior decision

not to order equal parenting time, he noted he was doing a great job being a father and felt that he deserved 50% of the time.

[55] I would note that, although the father has strongly argued for equal time, there is no legal presumption in favour of shared parenting or equal parenting time. The focus is on the child's best interests in each particular case. (***Baerndregt v. Grebliunas, 2022 SCC 22).***

[56] The father has not established, on the balance of probabilities, that pursuing the Application to Vary is reasonable. For the reasons noted, I find that the Application to Vary is not based on reasonable grounds nor does it have merit.

[57] Allowing the advancement of the father's Application to Vary by granting leave is not in the child's best interests.

[58] Since the imposition of the leave requirement, the parties have been before the Court consistently - all at the father's initiation. On the totality of the evidence and considering the history of this family's litigation, it is evident that the father will more likely than not, continue to file Applications hoping to get the answer he likes. This is unfortunate. The father is an integral part of a complex parallel parenting structure within which the child, on the meagre evidence I have, appears to be doing well.

[59] The imposition of leave on a litigant, pursuant to the *Act* or otherwise, cannot be an automatic death knell for any future Application to Vary. Circumstances can change. However, on the evidence before me, the father's Application for leave must fail and is hereby dismissed.

Costs

[60] The mother submitted, at the conclusion of the Hearing, that she should be awarded costs in the amount of $2,000.00 based upon "the daily chambers Application".

[61] The father submitted he was seeking the same amount on the same basis.

[62] Rule 77 of the *Civil procedure Rules* states that costs are discretionary. Tariff C is the presumptive costs award in chambers matters (See ***JH v. RH, 2023, NSSC 380***) (Forgeron, J.).

[63] The matter occupied one half day of chambers. Pretrial submissions were prepared by both parties.

[64] I award costs to the mother in the amount of $2,000.00. In accordance with Tariff C, for one half day. Given the requirement of pretrial submissions and time involved, I find costs of $2,000.00 would do justice between the parties. These costs are to be paid within 60 days of the issuance of the Order in this matter.

MacDowell, J.