SUPREME COURT OF YUKON

Citation: *C.M.S.* v. *M.R.J.S.*, 2009 YKSC 49

Date: 20090615
S.C. No. 08-B0031
Registry: Whitehorse

Between:

C.M.S.

PLAINTIFF

And

M.R.J.S.

DEFENDANT

Before: Mr. Justice L.F. Gower

Appearances:

C.M.S. — On her own behalf
Kathleen M. Kinchen — Counsel for the Defendant

RULING ON COSTS

INTRODUCTION

[1] This is an application by the defendant father for special costs in a family law matter following the conclusion of the trial in which he was substantially successful. Among the issues at trial was a without-notice order which the plaintiff mother obtained on September 12, 2008. This order granted her interim interim custody of the infant child, born July 26, 2008, a restraining order against the father, and an order that the father was to have only limited and supervised access to child. The order provided the father could apply to vary its terms on two days' notice to the mother without having to

show a material change in circumstances. Although the father retained counsel soon after being served with the without-notice order and commenced negotiations to obtain daily unsupervised access, it was not until November 11, 2008, that the mother agreed to unsupervised visits of 2 1/2 hours duration, four times per week. The father elected not to take further steps to vary the without-notice order until the trial which was held January 19 to 22, 2009.

[2] The main issue at the trial was whether the mother should be awarded sole custody in order to facilitate her desired move with the child back to her home province of Ontario.

[3] At the conclusion of the evidence, counsel agreed to file written submissions in support of their closing arguments. The last of those submissions was filed on February 6, 2009. I issued my reasons for judgment on April 21, 2009 (2009 YKSC 32), which included the following orders:

1. the without-notice order was vacated;
2. the parties were awarded joint custody of the child;
3. neither party is permitted to move with the child outside Whitehorse without the written permission of the other party or a further order of the court; and
4. the residence of the child is to be shared between the parties on roughly an equal basis.

[4] I declined to make a ruling on costs, but authorized a subsequent hearing on the issue if necessary.

[5] Prior to the costs hearing, the mother filed a Notice of Self-Representation. The father's counsel filed extensive written submissions in support of the father’s application

for special costs. At the hearing, the mother appeared on her own behalf and made only brief oral submissions.

ISSUES

[6] The issues raised by the father's counsel appear to be as follows:

1. Did the mother fail to make full and frank disclosure in applying for the without-notice order?
2. Did the mother mislead or misrepresent her case to the court in applying for the without-notice order?
3. Was the mother's failure to give notice to the father in obtaining the interim interim order justifiable in the circumstances?

ANALYSIS

[7] In *Garcia* v. *Crestbrook Forest Industries Ltd*. (1994), 9 B.C.L.R. (3d) 242, the British Columbia Court of Appeal, at para. 17, held that the single standard for the awarding of special costs is that the conduct in question must properly be characterized as “reprehensible”, which in its broadest sense encompasses scandalous or outrageous conduct, but also includes milder forms of misconduct deserving of reproof or rebuke. The Court also referred with approval to an earlier decision in *Leung* v. *Leung* (1993), 77 B.C.L.R. (2d) 314 (S.C.), where Chief Justice Esson held, at para. 6, that “material non-disclosure or misrepresentation” on a without-notice application could be grounds for special costs. In other words, on a without-notice application, the failure to make full and frank disclosure, or any attempts by the applicant to mislead or make misrepresentations to the court, would fall within the category of reprehensible conduct.

[8] In her written submissions, the father's counsel repeatedly alleged that the mother failed to comply with her duty to make full and frank disclosure to the chambers judge in applying for the without-notice order on September 12, 2008. In particular, she alleged that the mother failed to disclose material facts known to her at the time she made the application and that she failed to "fairly state the points made against her" by the father, presumably subsequently at the trial. However, at the costs hearing, the father's counsel conceded that she could not point to any particular piece of evidence which was known to the mother, but not disclosed by her when she applied for the without-notice order.

[9] With respect to whether the grounds presented to the Court were misleading, the father's counsel pointed to the finding in my reasons for judgment, at para. 32, that the claims made by the plaintiff and her mother, K.S., to the Peterborough housing authority that they were fleeing "an abusive relationship", when viewed objectively and in the context of the evidence at trial, was a "misleading overstatement". But, it is important to remember that this evidence did not come out until trial and was not put before the chambers judge on the without-notice application. Rather, the evidence of the plaintiff mother and K.S. in support of the without notice application focused on their subjective fear of the father's anger and his allegedly controlling and unpredictable character. While I described those concerns as "somewhat specious", following a full assessment of the evidence at trial, I would not go so far as to say that the mother *intended* to misrepresent her subjective fear of the father to the Court on the without-notice application, or otherwise mislead the Court in that regard.

[10] The focus of the father's counsel at the costs hearing was on the third issue noted above: the failure of the mother to give even short notice to the father of her intention to make the application. The father's counsel further suggested that, based on the way the evidence came out at trial, had such notice been given, the father would have been able to respond in such a way that the order would not likely have been granted, or at least not on terms so prejudicial to the father. In particular, counsel pointed to the observation in my reasons for judgment, at para. 35, that, over the period from September 12 to November 11, 2008, and coupled with the inconvenience of having to find appropriate supervisors, the father's access to the child was significantly limited to less than two hours per visit for only three evenings a week.

[11] The father's counsel particularly relies on the *Leung* decision, cited above, for the proposition that a party should not proceed to apply for an order without-notice if there is any reasonable alternative and, if they do so, they must be prepared to justify the failure to give notice, or risk special costs being awarded. In cases such as the one at bar, the most usual justification is that there is an element of great urgency, usually coupled with a question of safety in relation to the best interests of the child involved. In *Leung*, Esson C.J.S.C. addressed the question of notice at paras. 7 and 9:

> "7 That leaves the matter of the application having been brought ex parte. The power of the court to grant injunctions without notice to the party enjoined is a valuable one; one which is sometimes indispensable to prevent injustice. But care must be taken to confine it, so far as possible, to such cases. In general, the cases in which an ex parte application is justified fall into two categories. The first, as in the case of the Mareva injunction, is where there is reason to fear that, if notice is given, the horse will be out of the barn before the hearing. <u>The second is where the element of urgency is so great that it would be impracticable to give notice.</u> This case

> is clearly not in the first category. The question is whether it falls within the second.
>
> **...**
>
> 9 Having regard to what I have called the tightness of the timing, it may seem hypercritical to visit any consequences upon the party who applied ex parte. But it is important that parties who decide to apply for an injunction be encouraged in all reasonable ways to not proceed without notice where there is any reasonable alternative. That is the kind of deterrent consideration which lies at the root of the rule respecting material non-disclosure or misrepresentation, a rule which can have the harsh consequence of depriving a plaintiff of an injunction to which on the merits it was entitled. Anyone considering whether to proceed ex parte should reflect that they do so at the risk, if they cannot later satisfy the court that the failure to give notice was justifiable, of special costs being awarded. As with any such discretionary rule, consideration must be given to all of the circumstances. Having done so, I hold that the applicants are entitled to special costs." (My emphasis)

[12] I am satisfied that there was no genuine sense of urgency to the mother's without-notice application. Indeed, based on the evidence at trial, I would go so far as to say that there was no reason that the mother could not have given the father the full eight days notice required by the *Rules of Court*. At the very least, she could have asked the chambers judge to proceed on short notice. She was represented by counsel at the time and had the benefit of legal advice. Therefore, I assume she was aware that, should she subsequently be unable to justify her failure to give notice, then she risked an assessment of special costs being awarded against her. In short, I find that the mother's failure to give notice to the father was not justifiable and that the father is entitled to special costs.

[13] The question remains as to whether the father should be awarded special costs for the entire proceeding. As the parties are aware, special costs used to be called solicitor and client costs, which ordinarily entitle the successful party to complete indemnification for his or her legal fees, as opposed to the partial indemnification provided by party and party costs: see *Garcia,* cited above, and *Fullerton* v. *Matsqui (District)* (1992), 74 B.C.L.R. (2d) 311 (C.A.), at paras. 15 and 16. If the father is awarded special costs throughout, the mother will face a substantial financial burden. According to the evidence at trial, the father's gross income for 2008 was $44,113.44, and the mother's gross income for the same year was $32,074.90. The mother is currently on maternity leave and does not expect to return to full-time employment until the end of July. It is uncertain what amount of income the mother will be a capable of earning once she returns to work, although I commented in my reasons for judgment, at para. 72 that, given her background and apparent skills, I expect she will be able to find relatively lucrative employment. I have also not forgotten that the father has voluntarily paid child support to the mother since October 2008, and agreed at trial to continue paying the table amount of child support going forward, which is currently $413 per month. So, in a way, the financial position of the parties is somewhat comparable. Nevertheless, I have a lingering concern that requiring the mother to pay special costs to the father for the entire proceedings could financially cripple her for some time to come, and that ultimately it may not be in the child's best interests.

[14] In exercising my broad discretion in this area, I conclude that it is appropriate for the father to receive special costs for the period between the granting of the without-notice order on September 12, 2008, and November 11, 2008, the date on which the

mother agreed to unsupervised access. It was during that period that the father was significantly prejudiced by the mother's actions. While the father continued to be prejudiced by the without-notice order until it was set aside following the trial, he could have pursued an application to vary the terms of that order prior to trial if he wished. The fact that he did not do so indicates to me that, having successfully negotiated unsupervised access for 2 1/2 hours duration, four times a week, he was relatively content with the *status quo* and was prepared to wait until the trial in January 2009 to seek further changes.

CONCLUSION

[15] The father is awarded special costs for the period between September 12 and November 11, 2008. Thereafter, the father is awarded party and party costs to the conclusion of the trial, including this costs hearing, at Scale B.

GOWER J.