Court of King's Bench of Alberta

Citation: Danis-Sim v Sim, 2023 ABKB 637

Date: 20231110
Docket: 4810 025768
Registry: Red Deer

Between:

Gregory James Sim

Plaintiff/Applicant

- and -

Manon Rolande Danis-Sim

Defendant/Respondent

Reasons for Decision
of the
Honourable Justice G. D. B. Kendell

I. INTRODUCTION

[1] The Father, Gregory James Sim, seeks an order for the following relief:

(a) Dismissing the Mother's June 16, 2017 application to vacate arrears of child support;

(b) Striking the interim order granted in the Mother's June 2017 application; and

(c) Costs against the Mother on a full indemnity basis.

[2] The Father's application was originally returnable on June 22, 2022. Justice Slawinsky heard the application on July 25, 2022. At that time, she directed the matter to a half-day Special Chambers application and made several procedural directions, which I need not repeat here. However, she did direct that in the event the Father's application was unsuccessful, the Court was to set procedural directions for concluding the Mother's underlying application.

II. BACKGROUND

[3] The parties were married on July 22, 1995. They separated in 2003 and obtained a Divorce Judgment on October 10, 2008. The Father was the Plaintiff in the Divorce action and the Applicant in the Desk Divorce application. The Mother was noted in default.

[4] The parties have three children, all of whom are now adults.

Alexandra Sim, born December 13, 1993 (29);
Ashleigh Sim, born March 28, 1996 (27); and
Nicholas Sim, born April 19, 1999 (24).

[5] The Divorce Judgment granted the Father sole custody of the three children, with the Mother having access as mutually agreed upon.

[6] The Father's Guideline Income was indicated to be $53,750.04, and the Mother's Guideline Income was indicated to be $13,219.46.

[7] The Divorce Judgment directs the Mother to pay child support at the rate of $400.00 per month, commencing June 1, 2008. I note that the Section 3 Guideline child support payable for three children based on an income of $13,219.46 was, according to the Guidelines in place at the time, $215.00 per month. The Divorce Judgment is silent as to why the ordered amount exceeds the Guideline amount. At the time of the Mother's June 2017 application, the child support arrears owing were approximately $42,000. The Father opposed the Mother's application.

[8] Justice Little heard the Mother's application on August 4, 2017. He granted an Interim Order which provides as follows:

(a) The Mother's Guideline Income was set at $11,000.00;

(b) Child support arrears were set at $11,150.00 as of August 31, 2017;

(c) The Mother was directed to pay the sum of $100.00 per month, commencing September 1, 2017, until the arrears had been fully paid; and

(d) The Mother was directed to pay ongoing Section 3 child support for the remaining child of the marriage, Nicholas, at the rate of $50.00 per month, commencing September 1, 2017.

[9] The Court further directed that either party could set the matter to Special Chambers for further adjudication.

[10] Neither party set the matter for Special Chambers.

[11] In his March 13, 2022 affidavit, filed in support of the application before me, the Father outlined his steps to move the matter forward. These steps included efforts to schedule hearing dates in 2018, both formal and informal requests for financial information, and the submission of written interrogatories.

[12] The Father deposed that the Mother's financial disclosure was substantially incomplete. In March 2020, the Father served the Mother with an Appointment for Questioning. Due to the COVID-19 pandemic, the Questioning was organized to take place remotely. However, there were technical issues, and the Mother did not have the documents the Father's Counsel provided, which were necessary for the Questioning to proceed effectively. As such, the Questioning was adjourned with a future date to be set. The Father further stated that his Counsel attempted to

reschedule the Questioning, but there was no response from the Mother's Counsel regarding setting a further date.

[13] The Father deposed that when he filed the within application, he had yet to receive answers to the written interrogatories, and the undertakings made during the incomplete Questioning remained outstanding.

[14] The Father deposed that his last communication from the Mother's Counsel was an email dated December 23, 2020, which included some historical bank statements. On July 27, 2021, the Mother's Counsel filed a Notice of Withdrawal. The Father deposed that since that date, he has not had any further communication from the Mother or Counsel on her behalf.

[15] The child support arrears, as set by Justice Little, have been paid off in full. Given that Nicholas is no longer considered a "child of the marriage," there is no ongoing child support payable by the Mother.

III. POSITION OF THE PARTIES

A. The Father

[16] The Father deposed that the Mother has not initiated a single step to advance the matter to a final hearing since the Interim Order was granted. At paragraph 43 of his March 13, 2022 affidavit, he states:

> It was my understanding that this was Manon's claim to prove; yet it feels to me that the burden has been placed on me to disprove Manon's Claim, without any obligation for Manon to even engage. This is not fair and it has created nothing but hardship for me.

[17] At paragraph 46 the Father deposed:

> I believe that it should not be my obligation to chase Manon and her evidence to disprove her case. I do not believe that it should be my obligation, as the Respondent to an application to erase child support arrears, to fund the litigation to secure the amounts that Manon should have paid for our children. I should not have to put stress on my life, my health, and my relationship with my wife, while Manon disregards a legal process that she started.

[18] The Father's position is:

a) The Mother's application should be dismissed under Rules 4.31 and 4.33;
b) The Interim Order granted by Justice Little be struck;
c) The arrears vacated by Justice Little be reinstated ($32,500.62); and
d) He be granted costs on a solicitor-client basis.

B. The Mother

[19] The Mother deposed to providing as much information as she was capable of in response to the requests for financial disclosure, written interrogatories, and the undertakings made at Questioning. In her affidavit filed on June 28, 2022, she deposed that she was unaware that the Interim Order was not the final resolution of the matter. At paragraph 30, she states:

> ... I did not realize that this was my Claim and in all honesty, my understanding was that an amount was set and I was given time to pay. Each month, money was deducted from my CPP.... My lawyer at the time reassured me that I had nothing to worry about and that it would be wasting "good money to a bad ??cause??". I was very firm that I wanted a final ruling as I could tell by Gregory's comment: Can I appeal?" that he would likely try.

[20] And at paragraph 31:

> ... A letter was sent and his lawyer never replied; I thought this was finally over.

[21] And at paragraph 33:

> ... I honestly did not feel or understand that I started this legal process. Gregory had requested an amount and I asked for that amount to be reduced. My understanding was that it was re-calculated, and I continued to pay the amount.

[22] To summarize, the Mother's position is that she believed the matter was concluded following the issuance of Justice Little's Interim Order.

[23] I have a number of difficulties with the Mother's position:

1. The Order's title specifies that it is interim in nature;
2. Paragraph 4 of the Order clearly stipulates that either party may seek further adjudication in Special Chambers, suggesting it was not final;
3. The Mother continued to engage in the legal proceedings after Justice Little's Order was granted. This includes responding to written interrogatories and a Notice to Disclose, requesting and receiving adjournments, participating in Questioning, and partly fulfilling some of the undertakings given at that Questioning;
4. The Mother continued to be represented by Counsel following the granting of the Interim Order.

[24] The above four points support my conclusion that the Mother was or should have been aware that the matter was not at an end any time prior to her Counsel's December 23, 2020 correspondence to the Father's Counsel.

[25] The Mother is not opposed to having her application dismissed for delay, on the condition that Justice Little's Interim Order remains in effect and is made final, such that she is not required to pay the arrears that were vacated by that Order. The Mother is not seeking any further relief from the Court and is prepared to abandon her application to vacate the accrued arrears fully, should the Father accept Justice Little's Order as final.

IV. LAW

[26] The delay rules in the *Alberta Rules of Court*, Alta Reg 124/2010 are:

> **4.31**(1) If delay occurs in an action, on application the Court may
>
> > (a) dismiss all or any part of a claim if the Court determines that the delay has resulted in significant prejudice to a party, or
> >
> > (b) make a procedural order or any other order provided for by these rules.

(2) Where, in determining an application under this rule, the Court finds that the delay in an action is inordinate and inexcusable, that delay is presumed to have resulted in significant prejudice to the party that brought the application.

4.33(1) In this rule,

(a) "applicant" means a party to an action who makes an application to dismiss the action for delay as set out in this rule;

(b) "respondent" means a party who has filed a commencement document;

(c) "suspension period" means, in subrules (5) to (9), a period that ends on

(i) a specific date, or

(ii) the happening of a specific event.

(2) If 3 or more years have passed without a significant advance in an action, the Court, on application, must dismiss the action as against the applicant, unless

(a) the action has been stayed or adjourned by order, an order has been made under subrule (9) or the delay is provided for in a litigation plan under this Part, or

(b) an application has been filed or proceedings have been taken since the delay and the applicant has participated in them for a purpose and to the extent that, in the opinion of the Court, warrants the action continuing.

(3) If the Court refuses an application to dismiss an action for delay, the Court may make whatever procedural order it considers appropriate.

[27] The delay rules are to be interpreted in light of the Foundational Rules and in particular:

1.2 (1) The purpose of these rules is to provide a means by which claims can be fairly and justly resolved in or by a court process in a timely and cost-effective way.

V. ANALYSIS

A. Case Law

[28] It is clear that the delay rules apply to divorce and other family law proceedings. In ***Brost v Kusler***, 2016 ABCA 363 at paras 9-11 the Court asked: Does the long delay rule apply to divorce proceedings?

[9] The short answer to this question is "yes".

[10] The wife submits that the long delay rule does not apply to *Divorce Act* proceedings. She distinguishes recent cases from this court on the basis that none involved family law proceedings governed by statute.

[11] The Family Law Rules in Part 12 of the *Rules* provide a complete answer. The following information note appears between rules 12.34 and 12.35. "Part 4

> [which includes r 4.33, the long delay rule] of these rules applies to proceedings listed in rule 12.2". Rule 12.2(b) is "a proceeding under the *Divorce Act (Canada)*".

[29] Although r 4.33 is mandatory, courts in Alberta have repeatedly chosen not to apply the delay rules on applications under the *Divorce Act*. Moreover, they have raised doubts about the practicality of the rule in actions that lack a limitation period.

[30] In ***Wittenburg v Wittenburg***, 2003 ABQB 154, the Court declined to dismiss a divorce petition for long delay because the limitation period had not expired. Justice Johnstone explained that since the plaintiff could just restart the action, a dismissal would "serve no useful purpose, simply adding to the costs and causing further delay": at para 16.

[31] In ***Boland v Carew***, 2019 ABCA 202 [***Boland***], the Alberta Court of Appeal questioned the practical implications of dismissing a divorce proceeding for delay. Specifically, in paragraph 15, the Court focused on how there was "nothing to prevent Ms. Boland from recommencing her action for divorce, there being no limitation period on commencing such an action."

[32] In ***Soriano v Bacalla***, 2021 ABQB 195 [***Soriano***], Justice Feth declined to apply the delay rules because there was nothing to prevent the wife from relitigating her applications for spousal and child support:

> [28] In the present circumstances, even if I were to treat the wife's spousal support claim as a valid counterclaim and dismiss it for delay, she would not be precluded from commencing a new action seeking spousal support. That outcome would invite the risk of unnecessary expense and delay which the Court of Appeal spurned in ***Boland CA***.
>
> [29] A similar concern arises with regard to child support. […] If I dismissed the notional counterclaim for delay, the wife could commence a new action for child support.
>
> [30] As a consequence, even if I cured the irregularity with the wife's pleading, I would conclude that dismissal for long delay is inappropriate, relying on the reasoning in ***Boland CA***.

(***Soriano*** at paras 28 - 30)

[33] Similarly, in ***Blume v Blume***, 2022 ABQB 539 [***Blume***], Justice Whitling rejected a long delay application in a division of property dispute. In doing so, he seemed to suggest that dismissal for delay should only be considered if the limitation period has expired:

> "It also seems to be a general rule that dismissal for want of prosecution should only be done if the limitation period has expired. Otherwise the dismissal would be likely to be pointless, because the plaintiff could always start a new action."

(***Blume*** at para 11, citing ***Lui v West Granville Manor Ltd***, 1985 CanLII 155 (BC CA) at p. 19)

B. Dismissal For Long Delay

[34] Although I find that more than three years have passed without a significant advance in this application, I decline to grant the Father's application to strike for the following reasons:

i) Dismissing the Mother's application due to long delay would not prevent her from initiating a fresh application and restarting the entire process all over again.

[35] The Mother's ability to restart this application is not affected by the fact that her children are no longer "children of the marriage," or that she is seeking to cancel arrears.

[36] In ***Brear v Brear***, 2019 ABCA 419, the Alberta Court of Appeal held that an application to retroactively vary a child support order under s 17 of the *Divorce Act* could be made even after the children were no longer "children of the marriage." The only requirement is that the applicant must demonstrate there was a material change of circumstances.

[37] This rule applies regardless of whether the applicant is pursuing retroactive child support or seeking to cancel arrears. See: ***Colucci v Colucci***, 2017 ONCA 892; ***Buckingham v Buckingham***, 2013 ABQB 15.

ii) The principle of Res Judicata does not extend to actions/applications that are dismissed for delay.

[38] Case law is quite clear that dismissing an action for delay does not involve a finding on the merits. In ***Papasotiriou-Lanteigne v Tsitsos***, 2023 MBCA 66 at para 19, the Manitoba Court of Appeal confirmed this by stating, "*res judicata* cannot be founded on a dismissal of an action for delay because such an order is interlocutory and does not affect substantive rights".

iii) Dismissing for delay when the Mother can simply restart the process would not be in the interests of justice.

[39] Sending the parties back to the starting point by dismissing the Mother's application would serve no purpose and lead to needless cost and delay. The Alberta Court of Appeal shared this concern in ***Boland*** at para 15, when it recognized that dismissing the action "would lead to unnecessary expense and delay with no resulting benefit."

[40] Furthermore, returning the parties to the start of the litigation process would run counter to the foundational principles of the *Alberta Rules of Court* (r. 1.2). Justice Whitling expressed this sentiment in ***Blume*** at para 14:

> Sending the parties back to "square one" would not be in the interests of justice. Given that the overarching purpose of the *Alberta Rules of Court* is "to provide a means by which claims can be fairly and justly resolved in or by a court process in a timely and cost-effective way" (r. 1.2(1)), the Plaintiff's matrimonial property claim should proceed in the present action, and not in a new and duplicative action.

[41] Considering that no obstacles prevent the Mother from initiating a new application, I find that dismissing the Mother's application for delay would be impractical and inappropriate.

*iv) Justice Little's Order was clear: "**either** party may set this matter to Special Chambers for further adjudication". (emphasis added)*

[42] Clearly, the Mother was content with the interim order granted and thus did not pursue further adjudication. Justice Little's Order was permissive, allowing for either party to set the matter down for Special Chambers. Nothing prevented the Father from seeking further adjudication. Yet, the Father did not utilize this option to advance the case, such as by bringing an application to compel further and/or better answers to the written interrogatories, securing

responses to undertakings, or requesting the Court to draw an adverse inference against the Mother for any alleged insufficient financial disclosure. Again, since Justice Little's Order was an interim order, any party dissatisfied with such an order can seek a more fulsome hearing and obtain a final order. The Father failed to do so.

[43] Given that either party could have set the matter down for further adjudication, which I acknowledge is the case for any interim order but was expressly outlined in Justice Little's Order, it would run counter to the fundamental principles of parental support obligations to dismiss the Mother's application. Matters brought before the Court concerning children who rely on their parents to promote their best interests and to ensure they receive support from both parents' incomes should be determined on their merits. Children do not benefit when their parents neglect to address child support obligations, as this support is the right of the child, intended to meet their needs.

[44] During oral submissions, Counsel for the Father did argue that it would be risky to proceed to Special Chambers without the requested financial disclosure and documentation. There was concern that the Court would not impute income to the Mother or make an adverse inference against her for not providing full disclosure. However, this was a tactical decision made by the Father. The Mother cannot be held responsible for any consequences of that decision.

[45] I also note that the Father had the option of appealing Justice Little's Order; however, I cannot fault his choice not to pursue an appeal. The Court of Appeal has made it clear that rather than expending resources to vary or appeal an interim order, parties should proceed to trial for a final determination of the issue.

VI. CONCLUSION

A. Comments on Interim Orders

[46] Since I have declined to grant the Father's application to dismiss for delay, it is not necessary for me to address the Father's application to strike Justice Little's Order and to reinstate the vacated arrears. However, I do wish to provide some comments on the matter.

[47] An interim order serves as a temporary measure to manage the parties' affairs until a final determination is rendered. The interim order in this case was made in Morning Chambers amidst competing affidavit evidence, which is typical for interim decisions. These orders are often made on the basis of an incomplete record and are subject to change or reversal upon a more fulsome review by the Justice hearing the full application on its merit.

[48] Upon reviewing the FTR recording of the proceedings before Justice Little, it was evident that he was very much alive to the fact that his order was interim in nature. He went so far as to make a direction that either party was at liberty to seek further adjudication at a Special. However, it was also apparent that Justice Little hoped his interim order would be sufficient for both parties, potentially circumventing the need for further litigation.

[49] The financial and emotional toll that litigation can have on families undergoing a relationship breakdown is tremendous. The Justices of our Court are aware of this reality and recognize that, for some families, an interim order from Chambers with the assistance of legal counsel is all that a party can reasonably afford. Consequently, Justices often try to craft interim orders that could form the basis of a final consent resolution.

[50] It is also a frequent occurrence for parties to obtain an interim order and then allow that order to govern their affairs regarding child support and/or parenting indefinitely. It is not uncommon for years to pass after obtaining an interim order before parties seek a final divorce judgment, often on the same corollary terms as the interim order.

[51] Parties should, however, take active and timely steps to finalize court actions and applications to avoid situations such as this matter before me. Allowing interim orders to linger when they are meant to be temporary results in the Court having to address child support on a retroactive basis. The more time that passes, the more difficult it is for the Court to have reliable and accurate information in order to make a proper final determination.

[52] Children deserve consistent financial support as they grow up. Retroactive adjustment does not necessarily benefit children when it is ultimately received and is often a poor substitute. As the Supreme Court stated in ***DBS v. SRG***, 2006 SCC 37 at para 103: "From a child's perspective, a retroactive award is a poor substitute for past obligations not met." In the same way, delays in finalizing child support decisions can work against a child's best interests. It is better to address these matters promptly, ensuring children receive the support they need when they actually need it.

B. Decision

[53] I find that the appropriate outcome in this matter is to set procedural directions for the Mother's 2017 application to proceed to a final determination. Justice Little directed the matter to Special Chambers. However, given that there is conflicting affidavit evidence - notably, the Mother's claim of an agreement regarding the CPP Disability Child Benefit being received in lieu of child support – [I note that the issue of the treatment of the CPP Disability Child Benefit was addressed by Justice Lee in ***Kaupp v Kaupp*** 2008 ABQB 372, however, Justice Lee: "did not consider the implications (if any) of s.15.1(5) of the *Divorce Act* ***CSH V EMH*** 2013 ABQB at para. 28] - and the Father's claim of forgery on the purported agreement, *viva voce* evidence will likely be required.

[54] The parties are hereby directed to provide a proposed Litigation Plan/Procedural Order for my consideration within 45 days. If the parties are unable to agree on the terms, I will set a date to hear submissions from the parties as to the appropriate procedural directions, including the mode of hearing.

[55] If the parties are unable to agree on costs of this application within 45 days, I will also hear submissions from the parties on costs.

Heard on the 22nd day of March, the 4th day of May, 2023 and the 20th day of June, 2023.
Dated at the City of Edmonton, Alberta this 10th day of November, 2023.

G. D. B. Kendell
Justice of the Court of King's Bench of Alberta.

Appearances:

Andrew Koeman
for the Plaintiff/Applicant

Angela D. Keibel
for the Defendant/Respondent