

2014 ONCJ 84
Ontario Court of Justice

McKenzie v. Johnson

2014 CarswellOnt 1979, 2014 ONCJ 84, [2014] W.D.F.L. 1870, 238 A.C.W.S. (3d) 935

Desiree McKenzie, Applicant and Rico Johnson, Respondent

Carole Curtis J.

Heard: December 16, 2013
Judgment: February 20, 2014
Docket: Toronto D56694/12

Counsel: Philip Viater, for Applicant
Julie Stanchieri, for Respondent

Subject: Civil Practice and Procedure; Family

Related Abridgment Classifications

Family law

[XVII Practice and procedure](#)

[XVII.6 Discovery](#)

[XVII.6.c Financial disclosure](#)

Headnote

Family law --- Support — Child support under federal and provincial guidelines — Practice and procedure — Disclosure of financial information

Parties had relationship from 2007 to 2011 that produced one child — In 2012, mother applied for custody, child support, disclosure and restraining order — Central issue in litigation was disclosure of father's income and assets — Mother served detailed request for information on father — Parties agreed to order that father would give full response to request by specified date — Father failed to comply with order and mother brought motion to strike his pleadings — Court struck father's pleadings regarding financial issues, imputed income to him and increased temporary child support — Father brought motion to reinstate his pleadings — Motion granted — Objective of sanction ought not to be elimination of adversary, but rather one that persuaded adversary to comply with court orders — After order striking his pleadings, efforts made by father to comply with disclosure order were more than just token attempts at compliance — Father's financial situation was more complex than that of average family law litigant — Justice would be best served by allowing father to participate at trial — Extent of father's disclosure could lead trial judge to conclude that his income or assets exceeded figures disclosed — Determination was best left to trial judge, based on all evidence, including any further evidence father provided — Father's pleadings should be reinstated notwithstanding fact that he was not in full compliance with child support order.

Table of Authorities

Cases considered by *Carole Curtis J.*:

Chiaromonte v. Chiaromonte (2013), 2013 ONCA 641, 36 R.F.L. (7th) 11, 2013 CarswellOnt 14325, 311 O.A.C. 113 (Ont. C.A.) — referred to

Kovachis v. Kovachis (2013), 36 R.F.L. (7th) 1, 2013 ONCA 663, 2013 CarswellOnt 15040, 311 O.A.C. 228 (Ont. C.A.) — referred to

Purcaru v. Purcaru (2010), 2010 ONCA 92, 2010 CarswellOnt 563, 265 O.A.C. 121, 75 R.F.L. (6th) 33 (Ont. C.A.) — referred to

Savion v. Savion (2012), 2012 CarswellOnt 6282, 2012 ONSC 307 (Ont. C.J.) — referred to

Rules considered:

Family Law Rules, O. Reg. 114/99
Generally — referred to

R. 1(8) — referred to

R. 2 — considered

R. 17(18) — referred to

Forms considered:

Family Law Rules, O. Reg. 114/99
Form 14B — referred to

Regulations considered:

Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.)
Federal Child Support Guidelines, SOR/97-175

Sched. I, s. 4(a) — referred to

Family Law Act, R.S.O. 1990, c. F.3
Child Support Guidelines, O. Reg. 391/97

Generally — referred to

s. 24.1 [en. O. Reg. 25/10] — referred to

s. 25 — referred to

MOTION by father to reinstate his pleadings in child support matter.

Carole Curtis J.:

Over-view

1 This is the decision regarding the father’s motion to re-instate his pleadings in this application.

Background

2 The mother, the applicant, born 3 March 1978, is 35 years old.

3 The father, the respondent, born 4 July 1971, is 42 years old.

4 The parents never lived together, but had a relationship from January 2007 to September 2011 that produced a child, Elias Diego Johnson, born 10 June 2008, now five years old.

Litigation History

5 The mother brought this application in May 2012, claiming custody, child support, disclosure, and a restraining order. The father filed an Answer in December 2012 claiming access.

6 Both parents have been represented by lawyers throughout the litigation, and there has been a great deal of material filed by both sides in this case. The litigation has been acrimonious, and there have been motions, conferences and several court appearances.

7 The central issue in the litigation has been disclosure of the father's income and assets, in order for the mother to support her claim to impute income to the father for child support purposes.

8 In the application the mother claimed that the court should impute \$500,000 per year to the father as income. The mother says that the father has a very lavish lifestyle and earns a great deal of money, but is secretive about his business and has always hidden his assets. The mother says that the father owns numerous properties, numerous businesses, and has owned and leased many extraordinarily expensive cars. While together, the father took the mother on many vacations. The father claims that the mother has exaggerated his income and assets.

9 The mother served a detailed Request for Information on the father on 13 August 2012. The parties agreed to an order on 31 August 2012 that the father would give a full response to the Request for Information (and any additional Request for Information) by 17 October 2012. The disclosure order included a process for the father to deal with information that was part of the Request for Information, but which was unavailable. The consent order made 31 August 2012 also included final custody to the mother, and a temporary without prejudice order for child support as follows:

- a) the table amount of \$380 per month, from 1 September 2012, on imputed income of \$42,200; and,
- b) the father shall contribute 50% towards all special and extraordinary expenses starting 1 September 2011.

10 At a case conference on 8 November 2012, the court changed the child support order to specify a particular special expense, that is, babysitting costs. The order was a temporary without prejudice order for \$250 per month from 1 November 2012. The father was ordered to pay mother's costs of the case conference under Rule 17(18), fixed at \$2000.

11 In December 2012, the mother brought a motion to strike the father's pleadings for failure to comply with the consent disclosure order, for the court to impute income to the father of \$500,000 per year, to order child support on that basis, for a restraining order and for other issues. The father brought a motion for an order compelling the mother to comply with the Request for Information served on her dated 4 December 2012.

12 The motions were heard on 28 December 2012. In the following detailed endorsement, the court struck the father's pleadings regarding the financial issues, imputed income to the father, and increased the temporary child support order that had been made on 31 August 2012:

Endorsement 28 December 2012:

2 motions, both contested.

A detailed consent order was made regarding disclosure on 31 August 2012.

Father has failed to comply with many of the specific items, including he has failed to produce his applications for lines of credit and for mortgages.

Father's finances and income and assets appear to be complicated and may be substantial, but without this disclosure, it

is difficult for the court to know the details.

Father's pleadings regarding financial issues are struck under Rule 1(8).

If father has not fully complied with consent disclosure order by Thursday 31 Jan. 2013, mother may proceed unopposed to seek final orders on financial issues. Mother shall file Form 14B up-dating the court after this date. It is not clear whether this hearing would be by Form 14B, affidavit 23C and other evidence, or whether this would require an oral hearing.

Mother shall serve Form 14B with update on father, but if matter proceeds unopposed after that (on financial issues) father is not entitled to notice.

It is very difficult to determine father's income for child support purposes. This may be due to the lack of disclosure.

However it is clear that father's expenses and recent lifestyle suggest an income which exceeds significantly the \$42,200 imputed income agreed to by the parents, without prejudice, on 31 August 2012.

Father shall pay temporary child support, without prejudice, of \$880 per month, starting 1 Sept. 2011, on imputed income of \$100,000.

Father shall pay special expenses of \$375 per month for babysitting (75%) from 1 Sept. 2011.

Child support order is without prejudice to parents' rights to claim a different amount or a different start date.

Father shall produce to mother every year by 1 June, starting in 2013, copies of his Income Tax Returns and Notices of Assessment, pursuant to ss. 24.1 and 25 of the Child Support Guidelines.

Other matters claimed in mother's motion adjourned.

Father's motion dismissed without prejudice and may be renewed and rebrought if matter proceeds as contested on financial issues.

13 In effect, the father's pleadings on the financial issues were struck, but he was given a further 30 days (until 31 January 2013) to produce the material ordered. The father was given a further opportunity to comply with the court order. The mother could not proceed to seek final orders on an unopposed basis until that one month had passed.

14 On 28 December 2012, the court also made a restraining order against the father, ordering no direct or indirect contact with the mother and the child (other than in accordance with the access order). It is concerning that both parties appear to have attended at the discovery of the other party in a separate civil court case currently on-going, despite this restraining order preventing any direct or indirect contact. It is also concerning that these breaches of the restraining order appear to have taken place in the presence of both civil litigation lawyers for the parties, as each is represented by a different lawyer in that action than in the family law case. The parties' family law lawyers shall send the civil litigation lawyers a copy of this endorsement and a copy of the restraining order.

15 The order of 28 December 2012 striking the father's pleadings was not appealed.

16 On 14 January 2013, the father changed lawyers. The father produced and filed a very large amount of material in response to the Request for Information, much of which was produced and filed in January 2013.

17 The mother did not file a Form 14B updating the court on the status of the father's disclosure. The mother did not immediately seek an unopposed hearing after the 31 January 2013 deadline, and has not yet sought such a hearing.

18 It appears that the parties' lawyers spent a good deal of time in 2013 negotiating about the disclosure, whether it was complete, and what additional information was required. The father was asking the mother's lawyer to consent to the re-instatement of his pleadings.

19 On 20 February 2013, the father was ordered to pay the mother's costs of the motion to strike:

Endorsement 20 February 2013:

Mother claims costs of 2 motions, contested, heard 28 December 2012.

Mother was successful on motion, father was not, and mother is entitled to her costs R. 24(1).

Father has behaved unreasonably R. 24(5), particularly regarding his repeated failure to make full, proper and timely disclosure, despite court orders.

It has been very difficult for the mother and for the court to determine father's income largely due to his lack of disclosure.

Father shall pay mother's costs on a full recovery basis fixed at \$6,525.75 all in (fees + HST, disbursements + HST) to be enforced as support.

20 The costs orders (8 November 2012 and 20 February 2013) were paid.

21 In September 2013, the father brought a motion to re-instate his pleadings on the financial issues, and for other relief (including reducing child support, for disclosure by the mother, to terminate the restraining order and to change access). Only the motion to re-instate the pleadings was argued on 16 December 2013. The other matters were adjourned.

22 Where information was not available to the father, he provided an explanation as to why the information could not be obtained and provided details of his efforts to obtain the information. It appears that additional information was requested and produced during this period.

The Parents' Claims and their Positions at the Motion

23 On this motion, the father's position is that he has produced all or almost all of the material covered in the disclosure order, that his pleadings on the financial issues should be re-instated, and that the financial issues should be allowed to proceed for a determination on the merits on a contested basis. The mother's position is that the father is still not in full compliance with the disclosure order, and is not in compliance with the child support order, that this motion should be dismissed, and the financial issues resolved on the basis of an unopposed hearing.

Analysis

24 Disclosure is always important in family law cases. It is required by the [Family Law Rules](#) and the Child Support Guidelines, and by a considerable, and extensive body of case law. Disclosure is particularly important in this case, where the father is not a T4-receiving employee, and where the mother seeks to impute income to the father. Failure to make disclosure frustrates the court's ability to determine or impute the correct income to the father for child support purposes, and interferes with the court's ability to order the proper amount of child support. *Savion v. Savion*, 2012 ONSC 307 (Ont. C.J.) (Can LII), para 14.

25 The decision to strike pleadings and to determine the parameters of trial participation is a discretionary one. In a case management system, it is a decision within the discretion of the case management judge.

26 Trials should ideally proceed with the participation of the parties. The court must balance the competing interests. The adversarial system, through cross-examination and argument, functions to safeguard against injustice. For this reason, the adversarial structure of a proceeding should be maintained whenever possible. *Purcaru v. Purcaru*, 2010 CarswellOnt 563, [2010] W.D.F.L. 913, [2010] W.D.F.L. 917, 75 R.F.L. (6th) 33, 265 O.A.C. 121, 185 A.C.W.S. (3d) 616 (Ont. C.A.), para 49, 51.

27 The rationale for this principle is obvious. Without one side's participation in the trial, there is a risk the court will not have either enough information or accurate information to reach a just result. If the judgment provides for continuing obligations that can only be varied on changed circumstances, as family law judgments do, the injustice may be perpetuated. *Kovachis v. Kovachis*, 2013 CarswellOnt 15040, 2013 ONCA 663, 36 R.F.L. (7th) 1, 235 A.C.W.S. (3d) 440 (Ont. C.A.), para 25.

28 Accordingly, the objective of a sanction ought not to be the elimination of the adversary, but rather one that will persuade the adversary to comply with the orders of the court. *Purcaru v. Purcaru*, 2010 CarswellOnt 563, [2010] W.D.F.L. 913, [2010] W.D.F.L. 917, 75 R.F.L. (6th) 33, 265 O.A.C. 121, 185 A.C.W.S. (3d) 616 (Ont. C.A.), para 49.

29 Under Rule 2, the court and the parties and their lawyers all have a positive obligation to promote the primary objective of the [Family Law Rules](#), that is, to deal with cases justly. [Rule 2](#) gives the court wide discretion to ensure that the primary objective is met.

30 After the order of 28 December 2012 striking his pleadings, the efforts made by the father to comply with the disclosure order were more than just token attempts at compliance. The father's financial situation is more complex than that of the average family law litigant. This is not to suggest that the father's disclosure has been perfect.

31 It is time for a determination of these issues on the merits, with as much relevant information as is available, for the trial judge. Justice would be best served, and the primary objective would now best be met, in this case, by allowing the father to participate at trial. The extent of the father's disclosure may well lead a trial judge to conclude that his income or assets exceed the figures disclosed. That determination is best left to the trial judge, based on all the evidence, including such further evidence as the father may provide to substantiate his position. *Chiaromonte v. Chiaromonte*, 2013 CarswellOnt 14325, 2013 ONCA 641, [2013] W.D.F.L. 5609, 36 R.F.L. (7th) 11, 235 A.C.W.S. (3d) 439 (Ont. C.A.), para. 37, 38.

32 The mother claims that the father's pleadings should also not be re-instated as he is not in full compliance with the child support order. The court took this into account. In all of the circumstances, it is consistent with the directive in [Rule 2](#) for the father's pleadings on the financial matters to be re-instated, notwithstanding this non-compliance by the father, and for the matter to be heard on the merits at a trial, as soon as possible.

Order

33 The father's motion to re-instate his pleadings regarding the financial issues is granted.

34 The parties' family law lawyers shall send the civil litigation lawyers a copy of this endorsement and a copy of the restraining order.

35 The court shall deal with directions and the next steps to take in this case at the next court date, including determining the process for dealing with the balance of claims in the father's motion.

Motion granted.