

COURT OF APPEAL FOR ONTARIO

CITATION: Grimm v. Ontario (Children's Lawyer), 2023 ONCA 161

DATE: 20230307

DOCKET: M53994 (COA-22-CV-0439)

Roberts J.A. (Motion Judge)

BETWEEN

Shannon Marie Grimm

Applicant
(Respondent/Moving Party)

and

Office of the Children's Lawyer and David Harold Kevin Smith

Respondents
(Appellant/Responding Party)

Jeff Rechtshaffen, for the moving party

David Harold Kevin Smith, in person

Heard: February 16, 2023 by videoconference

ENDORSEMENT

Introduction

[1] The respondent's motion for security for costs arises out of an appeal from an order in a family law dispute granting summary judgment to the respondent on issues related to the parties' children, including final decision-making authority and parenting time.

[2] Ms. Grimm seeks security in the amount of \$8,000 for her costs in relation to Mr. Smith's appeal, and security for the \$10,000 costs order made by the motion judge. She submits that there is good reason to believe that the appeal is frivolous and vexatious and the Mr. Smith has insufficient assets to pay any costs that are ordered in the event his appeal is unsuccessful.

Factual Background

[3] The parties were married for almost 15 years before they finally separated on September 30, 2016. They have three children, aged 20, 17 and 14. The children reside with the moving party, Ms. Grimm. Except for a handful of unsuccessful attempts at supervised access by the responding party, Mr. Smith, the children have not had contact with their father since September 30, 2016. The children have consistently indicated through the Office of the Children's Lawyer ("OCL"), appointed to represent the children in these proceedings, that they do not wish to have any further contact with their father or members of his family.

[4] Ms. Grimm brought a motion for summary judgment for the following relief: Ms. Grimm be granted final decision-making authority in respect of the parties' children; Mr. Smith's parenting time with the children shall only occur in accordance with the children's expressed and written consent; Ms. Grimm be permitted, on a final basis, to obtain and renew the children's passports without

Mr. Smith's consent; and Ms. Grimm be permitted to travel with the children internationally with Mr. Smith's consent.

[5] The motion for summary judgment was adjourned to permit Mr. Smith and the youngest child to engage in counselling for the specific purpose of addressing issues pertaining to Mr. Smith's relationship with Ms. Grimm. The parties' retainer with the counsellor ended; the reasons for which are disputed.

[6] Ms. Grimm renewed her motion for summary judgment, supported by the OCL. Following a case conference on May 31, 2022, among other provisions, Pinto J. ordered a timetable for the parties' delivery of materials for the summary judgment motion scheduled for hearing on October 18, 2022: Ms. Grimm and the OCL had to deliver their materials by August 16, 2022; and Mr. Smith had to deliver his materials by September 26, 2022.

[7] Mr. Smith did not file his materials by the court-ordered deadline. Mr. Smith advised the motion judge that he had filed the materials. However, the motion judge could not find any record of his filing. He was satisfied that Ms. Grimm and the OCL had complied with the timelines for delivering material as ordered by Pinto J., based on affidavits of service presented at the motion, and that Mr. Smith had not. He declined to permit Mr. Smith to file his motion material late and refused to consider it.

[8] The motion judge noted in his reasons that in his oral arguments, Mr. Smith indicated “that he did not oppose the relief sought by [Ms. Grimm]”. However, Mr. Smith asked that the matter proceed to trial in order to contest some of the facts alleged by Ms. Grimm concerning Mr. Smith’s conduct leading to the separation with Ms. Grimm and the estrangement with his children. The motion judge concluded that even if some of the factual allegations were successfully made out at trial, it would not change the outcome and a trial was therefore not required.

[9] The motion judge determined that a trial would not be in the interests of justice for the reasons that I summarize as follows:

- i. Mr. Smith did not take steps to bring the protracted litigation to an end or bring a motion for parenting time.
- ii. Mr. Smith did not put his best foot forward and provide evidence to “counter the significant allegations of family violence” of physical, verbal and emotional abuse that has caused harm to Ms. Grimm and the children and which support granting the parenting orders sought by Ms. Grimm.
- iii. There was compelling evidence of the burden that this litigation has placed on the teenaged children. It was in the best interests of the children to bring the protracted litigation to an end.

[10] The motion judge therefore granted summary judgment to Ms. Grimm.

Motion for Security for Costs

(a) General principles

[11] Rule 61.06 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, governs security for costs on appeals. It provides that in an appeal, the court may order security for costs in accordance with the following criteria:

61.06 (1) In an appeal where it appears that,

(a) there is good reason to believe that the appeal is frivolous and vexatious and that the appellant has insufficient assets in Ontario to pay the costs of the appeal;

(b) an order for security for costs could be made against the appellant under rule 56.01; or

(c) for other good reason, security for costs should be ordered,

a judge of the appellate court, on motion by the respondent, may make such order for security for costs of the proceeding and of the appeal as is just.

[12] The overarching consideration on this motion is whether “the justness of the case demands it”: *Yaiguaje v. Chevron Corporation*, 2017 ONCA 827, 418 D.L.R. (4th) 679, at para. 23. In addition to the criteria listed above, in determining whether an order for security for costs should be made, the court must step back and consider “the justness of the order holistically, examining all the circumstances of the case and guided by the overriding interests of justice to determine whether it is just that the order be made”: *Yaiguaje*, at para. 25. Even if I conclude that

Ms. Grimm has satisfied all of the criteria under the rules, I may still exercise my discretion not to award security for costs if it is in the interests of justice.

[13] With those general principles in mind, I turn to consider the particular circumstances of this case.

(i) Is there good reason to believe Mr. Smith's appeal is frivolous and vexatious?

[14] With respect to this criterion, this court observed in *Schmidt v. Toronto-Dominion Bank* (1995), 24 O.R. (3d) 1 (C.A.), at para. 16:

A judge hearing a motion for security for costs may reach the tentative conclusion that an appeal appears to be so devoid of merit as to give "good reason to believe that the appeal is frivolous and vexatious" without being satisfied that the appeal is actually totally devoid of merit.

[15] Mr. Smith's lack of objection to Ms. Grimm's relief on the summary judgment motion seems fatal to his appeal. I do not accept his argument that the motion judge erred in noting any lack of objection on his part. Mr. Smith has not provided any evidence to counter the clear statement in the motion judge's reasons that Mr. Smith indicated in his oral submissions that he had no objection to the relief sought by Ms. Grimm. There is nothing in his affidavit filed in support of this motion nor has he raised this as a ground of appeal in his notice of appeal. This alone is sufficient to provide good reason to believe that his appeal is devoid of merit.

[16] In any event, I have considered Mr. Smith's main grounds of appeal. They seem to be focussed on the issue of parenting time with the children. None of them have any real prospect of success.

[17] Mr. Smith's principal grounds of appeal relate to the motion judge's refusal to accept and consider Mr. Smith's responding materials and the evidence that he says negated Ms. Grimm's evidence including the alleged "Poisoning and Alienation of the children by [Ms. Grimm]" and "running the clock out" with respect to the children's ages.

[18] However, Mr. Smith identifies no reversible error in the motion judge's exercise of his discretion in light of his factual conclusion that Mr. Smith failed to abide by the court-ordered deadline for the delivery of his materials. This factual conclusion is supported by Mr. Smith's affidavit on this motion in which he admits that he failed to file his responding materials by the deadline and did not even attempt to file his materials until October 14, 2022, which failed¹. He then sent his materials by email to the court office on October 15, 2022 but they were not accepted for filing and he decided to bring the materials to the hearing of the motion.

¹ I do not accept Mr. Smith's assertion that he filed his materials late because he did not receive Ms. Grimm's materials until October 10. This is contrary to the motion judge's finding that Ms. Grimm and the OCL delivered their materials by the court-ordered deadline. In any event, Mr. Smith still filed past the court-ordered deadlines, as set out above in para. 6.

[19] In the circumstances of this case, including the protracted nature of these proceedings and the admitted failure of Mr. Smith to abide by deadlines imposed, it was open to the motion judge to refuse Mr. Smith's materials on the day of the hearing of the motion. Mr. Smith has not provided any evidence as to what those materials contained. Based on the motion judge's analysis of Mr. Smith's submissions and in light of his lack of objection to the relief sought by Ms. Grimm, it is reasonable to conclude, as the motion judge did, that the materials would not have made any difference to the outcome.

[20] As a result, Ms. Grimm's evidence was uncontested. The motion judge was entitled to rely on that evidence, along with the evidence submitted by the OCL concerning the children's views, to make his decision to grant summary judgment to Ms. Grimm. I do not see any basis for appellate intervention.

[21] Another ground of appeal is that the motion judge erred by failing to consider unspecified orders of other judges presiding on the matter relating to Mr. Smith's reintegration of the children. The motion judge was aware of the previous orders that allowed for counselling and other steps to rehabilitate Mr. Smith's relationship with the children. As the motion judge (and Pinto J.) noted, those steps were unsuccessful, and the children's clearly expressed view was that they did not want to see Mr. Smith. The motion judge was not required to order further reintegrative steps. I see no merit to this ground of appeal.

[22] Mr. Smith asserts in his notice of appeal that the motion judge failed to consider the children's ages as a determining factor "in access and custody" and appears to reference *R. v. R.* (2002), 58 O.R. (3d) 656 (C.A.), and *A.G.L. v. K.B.D.* (2009), 93 O.R. (3d) 409 (S.C.) (but has provided no citations). First, children's ages are but one factor in the court's determination of parenting issues; they are not determinative. Second, if these are the cases cited to by Mr. Smith, they do not support his arguments. This ground has no merit.

[23] Finally, Mr. Smith challenges the motion judge's \$10,000 costs order in favour of Ms. Grimm. Mr. Smith requires leave to appeal costs in accordance with s. 133(b) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. This court reiterated the high test for leave to appeal costs in *Barresi v. Jones Lang Lasalle Real Estate Services Inc.*, 2019 ONCA 884, 58 C.P.C. (8th) 318, at para. 14, as follows:

The test for leave to appeal costs is high: there must be "strong grounds upon which the appellate court could find that the judge erred in exercising his [or her] discretion": *McNaughton Automotive Limited v. Co-Operators General Insurance Company* (2008), 95 O.R. (3d) 365 (C.A.), at para. 24, citing *Brad-Jay Investments Ltd. v. Szijarto*, 218 O.A.C. 315 (2006) (C.A.), at para. 21. A costs award should be set aside on appeal "only if the trial judge has made an error in principle or if the costs award is plainly wrong": *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9, [2004] 1 S.C.R. 303, at para. 27.

[24] Mr. Smith has identified no error in the motion judge's discretionary costs order. As the successful party, Ms. Grimm was entitled to costs. The amount

awarded appears fair, reasonable and proportionate. Given that leave is unlikely to be granted, this ground has no chance of success.

[25] Having considered the merits of Mr. Smith's appeal, I am of the view that Ms. Grimm has satisfied this criterion. There is good reason to believe that his appeal is frivolous and vexatious.

(ii) Is there good reason to believe Mr. Smith has insufficient assets to pay the costs of the appeal if he is unsuccessful?

[26] Ms. Grimm proffers Mr. Smith's last financial statement, dated June 20, 2017, sworn and filed in the family law proceedings. Mr. Smith declares no income and financial assets totalling \$200. However, Mr. Smith's alleged inability to find remunerative employment was questioned by Faieta J. in his July 18, 2017 endorsement as follows: "I do not accept his bold assertion that he cannot find work – any work whatsoever. In my view, [Mr. Smith] has the ability to work...and should find work." Faieta J. also stated that "I have little confidence that [Mr. Smith] will pay child support voluntarily in the future".

[27] Mr. Smith argues that Ms. Grimm's evidence is dated and that he has more than sufficient assets to satisfy a costs order if he is unsuccessful. I am not prepared to accept Mr. Smith's arguments without evidence to support them. Despite his argument on oral submissions that he possessed evidence that could refute Ms. Grimm's evidence, Mr. Smith has provided no evidence to counter his

own sworn financial statement. There is no evidence of his financial circumstances in his affidavit filed in response to this motion. If he disagreed with his own sworn 2017 statement, it was incumbent on Mr. Smith to provide current evidence of his financial circumstances. He failed to do so.

[28] Based on the evidence before me, I am satisfied that there is good reason to believe that Mr. Smith has insufficient assets available to pay a costs order if he is unsuccessful on this appeal.

(iii) Should security for costs be ordered?

[29] Stepping back and looking holistically at all the relevant circumstances of this case, I am satisfied that it is in the interests of justice to order the requested security for costs.

[30] Ms. Grimm and her children have been mired in protracted litigation with Mr. Smith for almost seven years. There is good reason to believe that the appeal lacks any merit. The continued expense and stress of responding to this appeal are very prejudicial to Ms. Grimm and contrary to the best interests of the children. Based on the evidence before me, there is good reason to believe that Mr. Smith has insufficient assets available to satisfy a costs order and that, given the past history of these proceedings, Ms. Grimm will have difficulty collecting them from him.

(iv) What amount of security should be ordered?

[31] The respondent seeks security for the costs ordered by the motion judge, as well as for her estimated appeal costs, if she is successful on the appeal. These costs total \$18,000. Mr. Smith challenged the necessity for security but did not submit that the amount Ms. Grimm sought would prevent him from continuing with his appeal. I am persuaded that the requested amount is reasonable.

Disposition:

[32] I therefore order Mr. Smith to pay security for costs into court in the amount of \$18,000 within 30 days of the date of this order, failing which a judge of this court may dismiss the appeal on motion with notice to Mr. Smith.

[33] As the successful party on this motion, Ms. Grimm is entitled to her partial indemnity costs from Mr. Smith in the amount of \$2,000, inclusive of all amounts. Mr. Smith must pay these costs within 30 days.

[34] Mr. Smith's appeal is stayed until he pays the ordered security and the costs of the appeal.