NOVA SCOTIA COURT OF APPEAL
Citation: L.K.S. v. D.M.C.T., 2007 NSCA 87

Date: 20070801
Docket: CA 275471
Registry: Halifax

Between:

L.K.S.

Appellant

v.

D.M.C.T.

Respondent

Judges:	MacDonald, C.J.N.S.; Roscoe and Saunders, JJ.A.
Appeal Heard:	May 24, 2007, in Halifax, Nova Scotia
Held:	Appeal and cross-appeal dismissed without costs, per reasons for judgment of MacDonald, C.J.N.S.; Roscoe and Saunders, JJ.A. concurring.
Counsel:	William L. Ryan, Q.C. and Sara Scott, for the appellant Blaine G. Schumacher, for the respondent

Reasons for judgment:

[1] This court, for the first time, is asked to consider whether the Nova Scotia Family Court has jurisdiction to order suit costs. For the reasons that follow, I believe that it does.

BACKGROUND

[2] Although they have never lived together, the parties have a 12 year old son, J.P.T.S. ("J."). Since birth, J. has lived with his mother, D.M.C.T. (Ms. T.), although he continues to have a positive relationship with his father, L.K.S. (Mr. S.).

[3] By all accounts, Mr. S. is a wealthy man and his financial support for his son has been significant. For example, in 1998, by way of a maintenance agreement, Mr. S. agreed to contribute $5,000 per month (tax free). Recently, after initially resisting, he has agreed to also cover the costs incidental to J. attending private school.

[4] In the Fall of 2005, Ms. T. decided to apply to the Nova Scotia Family Court for an increase in child support. The first court appearance before Judge Robert Levy was in March of 2006.

[5] Ms. T.’s application to vary has brought Mr. S.'s income into sharp focus and, in turn has prompted her to seek full financial disclosure. In this regard, Ms. T. maintains that it is not enough to look at Mr. S.'s regular business income. She also seeks disclosure of all his assets, asserting that his investments also represent a significant source of income. The level of disclosure became a significant issue for the parties.

[6] To help finance this increasingly prolonged litigation, Ms. T., again before Judge Levy, made an interlocutory application for suit costs. Mr. S. resisted, maintaining that a family court judge has no jurisdiction and that any such relief is limited to divorce matters in the Nova Scotia Supreme Court. In addition to the jurisdictional issue, Mr. S. also resisted the application for suit costs on its merits, asserting that Ms. T. could and should finance her own litigation.

[7] By judgment dated October 6, 2006, Judge Levy confirmed that he did have jurisdiction to grant this relief. His detailed analysis was rooted in policy. He started with the premise that a Nova Scotia Supreme Court judge would have jurisdiction to award suit costs in a child maintenance claim ancillary to divorce. Why then, he asks, should it be any different simply because the child's parents are unmarried and the application is therefore brought in the Provincial Family Court? To Judge Levy, such a declaration would smack of injustice and perhaps even reflect a violation of the child's equality rights under s. 15 of the *Charter*. He reasoned:

> ¶25 If suit costs are available in actions relating to children under the Divorce Act and not under the Maintenance and Custody Act, that would clearly amount to discrimination against children because of the marital status of their parents. While, under the reasoning of the Supreme Court of Canada in **Walsh v. Bona** (2002) 32 R.F.L. (5th) 81 dealing with the Matrimonial Property Act it may be legitimate for laws to provide for different remedies as between married and unmarried people, there is no such justification for discriminating against children who, obviously, had no say in whether their parents were married or not. Thus, while the decision of Judge Buchan then of the Family Court in **Blagdon v. Blagdon**, 1997 CarswellNS 397, held that in the case of a claim for suit costs to pursue spousal maintenance that the Family Court could make no such order, the same need not apply to a request for suit costs when the issue is the best interests of, or appropriate maintenance for, a child.
>
> ¶26 If a just determination on these issues cannot be achieved because of a lack of resources of one party as compared to the other party, then the object of the statutes and the Family Court Rules will have been defeated. If for whatever reason the drafters of the Civil Procedure Rules meant in either or both Rules 57 or 70 to discriminate between the children of married and unmarried parties that is, I respectfully suggest, a decision they should re-visit.

[8] Thus to ground jurisdiction, Judge Levy gave his governing *Family Court Rules* a liberal interpretation:

> ¶27 I interpret Family Court Rule 1.04 as allowing a Family Court judge to avail himself or herself of any and all of the Civil Procedure Rules, (if there is no Family Court Rule on point), and, if a given Rule is appropriate and its use reasonable and just, to make use of that Rule to further the objects of the legislation. If, as here, one of several possible interpretations of the Rules leads to a result that is manifestly and unjustifiably discriminatory, (e.g. discrimination in

> procedures being available with respect to the children of married parents but not to those of unmarried parents), then another, non-discriminatory, interpretation is to be preferred.

[9] On this basis, the judge ordered suit costs of $6,000; albeit a far cry from the $66,000 sought.

[10] Then, in what effectively constitutes supplementary reasons, the judge found what he considered to be a simpler reasoning path upon which to ground jurisdiction. In March of 2007, while deciding a second interlocutory application for suit costs (not forming part of this appeal), he turned to the provisions of the *Maintenance and Custody Act*, R.S.N.S. 1989, c. 160 ("*MCA*") and there found a statutory basis for jurisdiction. He concluded:

> ¶3 My only additional comment respecting the court's jurisdiction to award suit costs is that I have since discovered [since issuing the decision under appeal] that I made it unnecessarily difficult on myself determining whether the Family Court had jurisdiction to award suit costs. I essentially confined myself to Family Court Rule 1.04 and what flowed from that. Having now reviewed section 22 of the Maintenance and Custody Act I conclude that this clearly and unambiguously establishes the jurisdiction. It reads:
>
> > 22. Where any matter of practice or procedure is not provided by the rules of the Family Court or the *Summary Proceedings Act*, the rules of the Supreme Court relating to matrimonial causes shall apply with any necessary modification.
>
> ¶4 Since suit money is not in fact otherwise provided for, we go directly to Civil Procedure Rule 57, entitled "Matrimonial Causes", which provides in 57.28 and .29 for an award of suit costs to be made in appropriate circumstances. I believe that settles the jurisdiction question.

[11] Mr. S. appeals this ruling, as noted, on both the jurisdictional question and on the merits. Regarding the merits, he asserts that an award for suit costs was unjustified in the circumstances of this case, essentially because he feels Ms. T. is financially self-sufficient. Ms. T. has cross-appealed on the merits, asserting that the amount ordered was too low, thus rendering it effectively impossible to continue her application to vary.

ANALYSIS

Standard of Review

[12] At the outset let me briefly address the appropriate standard upon which we should review the judge's decision. The jurisdictional issue involves a pure question of law and should be reviewed on a correctness standard. See **Housen v. Nikolaisen**, [2002] 2 S.C.R. 235 at paras. 8-9. The merits issue (involving both the appeal and cross-appeal) involves an exercise of judicial discretion. It therefore commands deference. We should interfere with this award only if it reflects a wrong principle of law or if it results in a patent injustice. See **Hill v. Hill**, 2003 NSCA 33; 213 N.S.R. (2d) 185 at para. 50 and **Eiklenboom v. Holstein Assn. Of Canada**, 2004 NSCA 103; 226 N.S.R. (2d) 235 at para. 17.

The Jurisdictional Question

The History of Suit Costs

[13] Let me begin by briefly commenting on the history and exceptional nature of suit costs. In a typical lawsuit, each party understandably is expected to finance his or her own case. In other words, the issue of costs is, for good reason, deferred until the outcome is known. However, matrimonial causes have represented an exception to this convention. This is because, historically at least, a wife very often would have neither sufficient assets nor sufficient income to finance her divorce proceeding. Thus Canadian courts have, in exceptional circumstances, ordered one spouse to finance a portion of the other spouse's case. Such orders became known as "suit costs" or "suit money".

[14] Orkin, in *Costs in Family Matter - Selected Issues* (2002-2003), 20 C.F.L.Q. 1-516 at pp. 389-390, explains:

> Interim costs in family law matters were originally awarded to acknowledge the imbalance in the resources of husbands and wives to fund litigation. The authority to make such awards is either found in statute, in provincial rules of court, or in the court's inherent jurisdiction to control its process, and the general discretion vested in the court when awarding costs throughout proceedings. Some of the older cases made use of the traditional common-law rule, which authorized a wife to pledge her husband's credit for the use of necessities to aid her in the conduct of matrimonial proceedings. Section 25(2)(d) of the *Divorce Act 1985*

> provides authority for a province to make rules with respect to fixing and awarding costs in divorce matters.

[15] In Nova Scotia, this common law practice is, in fact, enshrined in the Supreme Court's *Civil Procedure Rules*:

> 57.01. - *Interpretation* - In this Rule, ...
>
> > (f) "matrimonial cause" means a proceeding under the **Divorce Act**; [Amend. 6/97]
>
> . . .
>
> 57.28. - *Application for suit money* - A petitioner, after service of the petition upon the respondent, or a respondent who has been served with a petition, may apply to the court for suit money, on at least seven (7) days' notice to the other party to the matrimonial cause.
>
> 57.29. - *Suit money* - On an application under rule 57.28 the court shall ascertain what is a sufficient sum of money to be paid to cover the costs of the applicant incidental to the matrimonial cause, and may order the other party to pay such sum of money for the applicant's costs up to any stage of the proceeding, and may from time to time thereafter order the other party to pay such further sums as the court deems necessary to enable the applicant to continue the cause.
>
> . . .
>
> 70.24. (1) - *Suit money* - A petitioner or a respondent in a divorce proceeding may apply to a judge for suit money, upon seven (7) clear days notice to the other party to the proceeding.

The Family Court Statutory Regime

[16] To properly address this issue, it is important to consider all relevant aspects of the Nova Scotia Family Court statutory regime. To begin, the Nova Scotia Family Court is constituted pursuant to the *Family Court Act*, R.S.N.S. 1989, c. 159 ("*FCA*"):

> 4 There is hereby established for the Province a court of record to be known as the Family Court for the Province of Nova Scotia and the judges thereof are judges for the whole Province. R.S., c. 159, s. 4.

[17] Interestingly, the *Act* expressly cloaks the court with a broad jurisdiction to order costs:

> Awarding of costs
>
> 13 The Family Court is hereby granted the authority to award costs in any matter or proceeding in which it has jurisdiction and its authority to award costs is not limited by reason of the fact that the enactment governing the proceeding does not grant to the Court authority to award costs. R.S., c. 159, s. 13.

[18] Furthermore by way of committee, the court may make rules governing its process, including again the ability to order costs:

> Family Court Rules Committee
>
> 11 (1) The Minister may establish a Family Court Rules Committee which shall be composed of such members as are appointed by the Minister who shall designate one of the members as chairman.
>
> (2) The Family Court Rules Committee may make rules
>
> (a) regulating the pleadings, practice and procedure of the Family Court;
>
> (b) adopting rules of the Supreme Court, with such changes as are advisable, in relation to remedies in proceedings in the Family Court;
>
> (c) respecting costs in respect of proceedings in the Family Court,

[19] There are two such rules of court relevant to this appeal. The first, although not referring to suit costs *per se,* confirms a broad discretion when awarding costs generally:

> 17.01 (1) The amount of costs shall be awarded at the discretion of the court.
>
> (2) Costs may be collected in accordance with the procedure provided for collection of maintenance or in such other manner as the court directs.
>
> (3) Costs, at the discretion of the court, may be payable to the court, the party, his or her counsel or such other person as the court may direct.

[20] The second relevant rule directs that in the absence of an express provision, the Supreme Court *Rules* apply:

> 1.04 The Interpretation Act applies to these Rules and the Civil Procedure Rules apply, at the discretion of the court, when no provision under these Rules is made.

[21] Also significant to this appeal is the fact that the Family Court's jurisdiction is not limited to that which is bestowed in the *FCA*. Jurisdiction can also be derived from other provincial legislation. Thus, the *FCA* provides:

> Family Court jurisdiction
>
> 6. The Family Court has jurisdiction over matters *conferred on it pursuant* to this Act *or any enactment*. R.S., c. 159, s. 6. [Emphasis added.]

[22] This provision is particularly relevant because, as noted, the judge was involved in an application under the *MCA* thereby engaging any jurisdiction bestowed by that *Act*. Thus s. 22 of the *MCA* comes into play. Section 22, by default, incorporates the provisions of the Supreme Court *Rules*:

> Practice and procedure
>
> 22. Where any matter of practice or procedure is not provided by the rules of the Family Court or the *Summary Proceedings Act*, the rules of the Supreme Court relating to matrimonial causes shall apply with any necessary modification. R.S., c. 160, s. 22.

The Parties' Positions

[23] Ms. T. urges us to accept the judge’s reasoning that because the Family Court processes are silent vis-a-vis suit costs, the Supreme Court *Rules* apply by virtue of this default mechanism established by s. 22, *supra*. Ms. T., in her factum, explains:

> ¶30 It is respectfully submitted that the jurisdiction of the Learned Family Court Judge to award suit money is definitively contained in Rule 22 of the *Maintenance and Custody Act* wherein it is stated:

> 22. Where any matter of practice or procedure is not provided by the rules of the Family Court or the *Summary Proceedings Act*, the rules of the Supreme Court relating to matrimonial causes shall apply with any necessary modification.
>
> *Maintenance and Custody Act, Section 22, Book of Authorities of the Respondent, Tab 2, para 22*

and further as stated by the Learned Family Court Judge in Decision #2 dated March 9th, 2007 at para. 3:

> 3. My only additional comment respecting the court's jurisdiction to award suit costs is that I have since discovered that I made it unnecessarily difficult on myself determining whether the Family Court had jurisdiction to award suit costs. I essentially confined myself to Family Court Rule 1.04 and what flowed from that. Having now reviewed section 22 of the *Maintenance and Custody Act* I conclude that this clearly and unambiguously establishes the jurisdiction.
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> *Decision #2 dated March 9th, 2007, para. 3, Book of Authorities of the Respondent, Tab 11.*

[24] For his part, Mr. S. urges that s. 22 of the *MCA* has no application because there is no gap or void that would trigger a default to the Supreme Court suit costs provisions. In other words, the Family Court regime addresses the ability to award costs generally and thus by necessary implication excludes the ability to award suit costs. If the legislature wanted to vest Family Court judges with this authority, Mr. S. says, it could have easily done so. Thus, in his factum, he submits:

> ¶40 The Appellant respectfully submits that the *Family Court Rules* have addressed the issue of costs in Rule 17 and the provisions specifically omit any mention of suit costs. The Appellant respectfully acknowledges the discretion given in the *Family Court Rules* in awarding costs, but submits to this Honourable Court that the award of suit costs was never intended in an application similar to the one presently before this Honourable Court.
>
> ¶41 The Appellant respectfully submits that this Honourable Court view the restricted wording in the Nova Scotia Civil Procedure Rules as reflective of the intent of the Courts in determining when suit money should be granted. It is the respectful submission of the Appellant that the restrictions placed on the granting of suit costs in matrimonial proceedings under Civil Procedure Rule 57 were

> conscious decisions and the intent of the Rule cannot be stretched to award suit money in the circumstances presently before this Honourable Court.
>
> ¶42 It is the respectful position of the Appellant that the purpose of suit costs was to recognize the historical requirement for financial support by women that was often necessary in order to achieve a divorce. This historic requirement was a result of the restrictive legislation on women owning property and the financial dependence of many women on their husbands.
>
> ¶43 The Appellant respectfully submits that divorce proceedings are unlike other types of civil litigation, where settlement is not possible. Judicial intervention is necessary for a party to obtain a divorce.
>
> ¶44 The Appellant respectfully submits that an application for variation in child support is substantially different than a divorce proceeding. While a party cannot negotiate out of a marriage and obtain a divorce, a settlement agreement can be reached in an application for child support.
>
> ¶45 The Appellant respectfully submits that no judicial intervention is necessary to achieve an agreement for child support and, as such, the historic basis on which suit costs were granted does not exist in an application for variation of child support.

Conclusion on this Issue

[25] Having carefully considered the opposing submissions on this issue, I agree with the respondent (and the judge in his supplemental reasons) that s. 22 of the *MCA* does indeed apply so that, as a matter of practice, the Family Court may award suit costs in appropriate *MCA* applications. I say this for the following reasons.

[26] Let me begin by repeating s. 22 for ease of reference:

> 22. Where any matter of practice or procedure is not provided by the rules of the Family Court or the *Summary Proceedings Act*, the rules of the Supreme Court relating to matrimonial causes shall apply with any necessary modification. R.S., c. 160, s. 22.

[27] It is significant that this provision is limited to matters of practice or procedure. This prompts an initial question. Do the Supreme Court *Rules* governing suit costs involve matters of practice or procedure? As part of the Nova

Scotia *Civil Procedure Rules*, one would assume that they do. However, the answer may not be so obvious. I say this because, questions involving a court's ability to award costs have generally been considered to be matters of substantive law. Jurisdiction in this regard therefore must be expressly grounded in statute. See *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)* 2005 NSCA 70.

[28] However, the issue in this case does not involve a family court judge's overall jurisdiction to award costs. As earlier noted, by virtue of s.13 of the *FCA* (and the corresponding Family Court *Rules*), Nova Scotia Family Court judges enjoy a broad statute-based authority in this regard. The issue instead is whether this broad discretion can be exercised so as to include the issuance of suit costs. That to me involves a question of practice or procedure. See *Re Christianson*, [1951] 3 W.W.R. 133 (B.C.S.C.). With the *FCA* and the corresponding Family Court *Rules* silent on this issue, I believe that s. 22 is therefore triggered to fill this void.

[29] Furthermore, the fact that the Supreme Court provisions are restricted to divorce matters is no reason to deny the Family Court jurisdiction. Section 22 envisages that the Supreme Court *Rules* would apply "with any necessary modification". Because the Family Court does not deal with divorces, removing that prerequisite to me represents such an anticipated "necessary modification".

[30] In light of this conclusion, it is not necessary for me to address the potential s. 15 *Charter* issue raised by the judge.

The Merits of the Award

[31] As noted, by their very nature all awards for interim or advance costs would be considered exceptional. In *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue*), 2007 SCC 2, the Supreme Court of Canada recently considered the issue of advanced costs, albeit in the context of public interest litigation. There, Bastarache and LeBel, JJ., for the majority, highlighted the exceptional nature of such awards:

> [36] *Okanagan* was a step forward in the jurisprudence on advance costs - restricted until then to family, corporate and trust matters - as it made it possible, in a public law case, to secure an advance costs order in special circumstances

> related to the public importance of the issues of the case (*Okanagan*, at para. 38). In other words, though now permissible, public interest advance costs orders are to remain special and, as a result, exceptional.

[32] Returning to the family law context, Orkin, *supra,* at p. 391, explains the traditional two-fold test:

> The usual test for determining whether or not to award interim costs is two-fold:
>
> 1. Is there a likelihood of success in the claim?
>
> 2. *But for* the award of interim costs, would the claimant be able to prosecute her claim?

[33] In this case, the judge conducted a careful analysis on the merits of this application. He weighed all the relevant factors:

> ¶36 The Applicant reports assets and liabilities totalling $260,000 each. The assets consist of a house in her home town valued at $230,000, a car at $15,000 and personal assets of $15,000. The liabilities include: mortgage of the house of $188,000, car loan $14,000, Visa $12,000, Mastercard $6,000 and legal fees $26,000. She reports a monthly income of the $5,000 child support, $500 rent from the house, and $300 child tax credit for a total of $5,800. She reports monthly expenses of $7,280 including $1,411 mortgage on the house, $200 for insurance and house repairs, rent at her current residence $750, living expenses of $1,500, car payment $469, Visa minimum $1,000, Mastercard minimum $600, and outstanding tuition costs calculated monthly at $1350, (she paid $7,400 of the $12,900 owing for tuition). She paid $500 for school uniforms and school supplies, and, she testified, $1,200 for a drum set for the boy. She testified that she paid some $4,000 to move to the valley. She says that she has financed a lot of these costs on her credit cards.
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> ¶37 While the exact extent of his wealth has yet to be determined, Mr. S. reports holdings worth between ten and eleven million dollars and a monthly income of $54,355.97 ($652,271.64 per year), as against monthly expenses of $19,158.91, for a ‘surplus' of $35,197.91 per month.
>
> ¶38 The Respondent's counsel argues that:
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> (a) she has a substantial income equal to almost $100,000 taxable income per year, (again the amount isn't exact, but it is substantial);

(b) she has chosen not to pursue employment long after the child entered school and has thus foregone, of her own free will, a financial capacity independent of the Respondent;

(c) the financial difficulties she faces are the direct result of enrolling the child in a private school, a decision for which she had neither consent nor legal authority;

(d) the only reason she has brought this action for a variation in child support in the first place is because of the need to pay the costs associated with the child attending the private school;

(e) she has made some very bad decisions, not least renting out her house for $500 monthly when her mortgage payment alone on that house is over $1,400 monthly.

[34] Then applying the appropriate two-step test, the judge concluded:

¶39 There is, as is obvious, a huge gap in the financial positions of the parties and a huge gap in their respective capacities to finance litigation. *The Applicant, financing her considerable monthly shortfall on credit cards and already owing over twenty thousand dollars in legal fees, is seriously compromised in her ability to prosecute this litigation.* She has no liquid assets. It may be true that her difficulties may be of her own making, the result of decisions she has made. *That said, the issue of "appropriate" child support is a legitimate issue for her to pursue on behalf of the child and she will need at least some help to enable her to do so.* [Emphasis added.]

[35] The judge then set what he felt to be an appropriate amount:

¶40 Counsel for the Applicant projects all manner of things that may happen in the course of this litigation and seeks suit costs in the multiple tens of thousands of dollars to cover these various possibilities. To this Mr. Ryan responds, correctly, that the usual manner of these things is that more than one approach can be made to the court if and when new expenses are incurred. Rule 57 and Rule 70 both refer to applications of this nature being made "from time to time". It is imprudent, unfair and unnecessary to pre-suppose the worst and to order a transfer of funds to cover every possible scenario.

¶41 I recognize expenses to date (including two appearances and a day long discovery) and anticipate further and imminent expenses in the matter of financial disclosure or analysis of material provided. Without in any way seeking to fully

> cover fees or intending to state or imply what is reasonable, or to preclude or prejudice a proper award of costs down the road, (at which point adjustments can be made one way or another if necessary), I will order the payment to the Applicant of $6,000 in suit money. The sum is payable forthwith.

[36] Harkening back to our standard of judicial review, I see nothing in this analysis that suggests the judge applied a wrong principle of law or that the result represents a patent injustice. Certainly, in the circumstances of this case, his award was modest. Yet, it is interesting that Mr. S. feels the award is too high but Ms. T. has cross-appealed asserting it is too low. To me this award is the product of a careful analysis and represents a legitimate exercise of judicial discretion. It ought not be disturbed either on appeal or on cross-appeal.

DISPOSITION

[37] I would dismiss both the appeal and cross-appeal but in the circumstances without costs.

MacDonald, C.J.N.S.

Concurred in:

Roscoe, J.A.

Saunders, J.A.