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IN THE FAMILY COURT FOR THE PROVINCE OF NOVA SCOTIA
[Cite as: D.M.C.T. v. L.K.S., 2006 NSFC 36]

BETWEEN:

D. M. C. T.
-APPLICANT
AND
L. K. S.
-RESPONDENT

BEFORE THE HONOURABLE JUDGE BOB LEVY

HEARD AT: KENTVILLE

DATE HEARD: SEPTEMBER 15, 2006

DECISION DATE: OCTOBER 6, 2006

APPEARANCES: BLAINE G. SCHUMACHER FOR THE APPLICANT
WILLIAM RYAN, Q.C. FOR THE RESPONDENT

DECISION

HELD: (1.) The N.S. Family Court has, at least with respect to applications involving either the best interests of or maintenance for children, the authority to award suit costs in appropriate cases.

(2.) Suit costs can include legal fees, not just disbursements.

(3.) Suit costs in the amount of $6,000 ordered.

For the Court

1. This decision concerns the application by the mother of 12 year old J.P.S. for suit costs to assist her to litigate her application for a variation in the amount of child maintenance and, as of late, the matter of custody or aspects of custody. The litigation so far has focused on financial disclosure by the father, and to some extent by the mother, and the unilateral decision of the mother to move herself and the child several hundred kilometers from their home in order that he may be enrolled in a private school here in the valley. All indications to date, (some seven months into it now), are that this will be a protracted and complex case, although maybe the schooling and custody issue *per se* could possibly be resolved with the assistance of a professional assessment which is now underway.

2. The Applicant and the Respondent are not and never have been married and hence the applicable statute is the Maintenance and Custody Act.

3. Briefly stated, the matter had been before me in 1995 and I made a preliminary decision ordering full financial disclosure and disclosure of assets of the Respondent over his strenuous objections. I subsequently ordered, in the pre-Guideline days, child support in the requested amount of $3,600 monthly. The Respondent was, and is, a very wealthy man. He appealed this to the Supreme Court and Justice Saunders, then of that court, dismissed the appeal. Subsequently, in 1998, after the Guidelines came into force, the parties negotiated a separate agreement by which the Respondent would pay $5,000 monthly, (and tax free), which sum has been paid faithfully to date.

4. There is no custody order in existence with respect to the child, the parties

apparently having preferred it that way. As I have observed to the parties, the effect of this is that by operation of law the parties are deemed to have joint custody.

5. In mid to late 2005 the Applicant began thinking of the child attending a private school here in the valley. This was raised either directly with the Respondent or, at least as of December, in correspondence between counsel. It appears that neither the Respondent or his counsel offered a flat “no” to the idea until their first appearance before me in late March of 2006 when Mr. Ryan clearly stated his client’s opposition to the move. The Applicant proceeded with the enrollment and the move despite the Respondent’s lack of consent and now she and the boy live here in the valley and she drives him to and from school daily.

6. A brief interim hearing was held on September 15th, on short notice, (after they had moved, and the child had been in attendance at the new school for a week), on the Respondent’s application seeking the return of the child to his home town. Since both parents agreed that the boy seemed to have taken well to his new school, and since ultimately the move might be endorsed by the court with consent or otherwise, I did not accede at this point to the Respondent’s request. I did so grinding my teeth as there was and is no question that the Applicant knew that she neither had consent nor the unilateral right to do what she did.

7. The Respondent’s counsel argues, and he may be right, that the Applicant’s reported tightened financial straits and her request for a variation in the child maintenance are the direct result of her unilateral decision and some singularly ill-advised actions she has taken. Thus, he says, among other things, that her problems

are of her own making and are hers to resolve and that his client should not be called upon to relieve the burden.

8. All of that remains to be seen. In the meantime the Respondent, as in the previous litigation, has been in no hurry to share information as to his finances, and after a discovery there may still remain a question of disclosure of his full asset situation. (I did point out section 29A of the Maintenance and Custody Act to counsel last day with the not too subtle hint that I was likely, as I did in the previous litigation, order full disclosure not just of income but assets. Any such order would be subject to strict requirements of confidentiality). Time will tell if a further application on that front will be necessary. Even if and when the entire picture is disclosed one imagines that there will be a need to retain a professional to analyze it. I suspect there will still be room to argue about his exact income and whether, pursuant to Guideline section 4, the ‘table amount’ is “appropriate”, and whether and to what extent “section 7" expenses should be paid if the child remains in the private school.

9. For all the ink spilled and paper consumed we are still not very far into this litigation. Obviously one cannot predict the course of things with any certainty, (nor should I at this stage). Suffice it to say that I have no doubt that the Applicant’s legal fees are already high, (her counsel says $20,000 to date, she says $26,000), and headed higher. How much higher and who is to blame I don’t know.

10. It is in this context then that the Applicant seeks suit costs. The application is opposed for a number of reasons starting with the question, the very good question,

of whether this court has jurisdiction to order suit costs. I believe it does.

JURISDICTION IN THE FAMILY COURT TO AWARD SUIT COSTS

11. The Family Court Act, section 13 reads:

> 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.

12. The Maintenance and Custody Act, section 21 (2) reads:

> 21 (2) Costs may be ordered in the discretion of the court hearing a proceeding pursuant to this Act and the amount shall be determined in accordance with the rules of the Family Court.

13. Section 17.01 (1), the Family Court Rule dealing with the granting of costs, provides simply:

> 17 (1) The amount of costs shall be awarded at the discretion of the court.
> (2) ...
> (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.

14. Neither Act provides expressly that the court may order <u>suit</u> costs as opposed to costs that follow the event. Neither Act says that the Family Court <u>cannot</u> order suit costs. The Maintenance and Custody Act leaves the ordering of costs entirely up to the court with no restrictions as to when or at what stage. The

Family Court Rules do not derogate, at least not expressly, from the general power conferred by the statutes.

15. It could be argued as well that the Family Court Rules, by providing in Rule 1.04 for the availability of the Civil Procedure Rules when no provision is made under the Family Court Rules, either do or do not allow for an award of suit costs by the Family Court under the Maintenance and Custody Act. I will elaborate.

16. Family Court Rule 1.04 reads:

> 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.

17. Assuming that there is no other provision made for suit costs, the Family Court can avail itself of the Civil Procedure Rules. Civil Procedure Rules 57.28 and .29 read:

> 57.28 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 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.

18. If this Rule is imported into the Family Court, it would seem to grant the authority to the court to award suit costs. However Rule 57 applies to "Matrimonial

Causes" and Rule 57.01 (f) defines "matrimonial cause" as "a proceeding under the Divorce Act".

19. Civil Procedure Rule 70, governing proceedings in the Family Division of the Supreme Court, covers the Divorce Act and certain other statutes including the Maintenance and Custody Act. Rule 70.24 would limit the availability of suit costs in the Family Division just to divorce proceedings and to expressly exclude their availability under any other type of proceeding. The Rule reads:

> 70.24 (1) A petitioner or a respondent **in a divorce proceeding** may apply to a judge for suit money, upon seven clear days' notice to the other party to the proceeding.
> 70.24 (2) Upon application for suit money, the judge may order the other party to pay to the applicant such sum of money sufficient to cover the applicant's costs up to any stage in the proceeding and may from time to time thereafter order the other party to pay such further sums as the judge deems necessary to enable the applicant to continue the proceeding.
> (Emphasis added)

20. (Note the absence of the words "<u>incidental</u> to the matrimonial cause" in Rule 70.24 (2), which words are present in Rule 57.29. This difference may be of some consequence, although one cannot imagine why that would have been intended.)

21. "Divorce proceedings" would include custody and access and child and spousal support applications pursuant to the Divorce Act and variation applications relating to such orders. Thus, arguably, if a Family Court refers itself to the Civil

Procedure Rules it has to accept that suit money applications, according to those Rules, are available only in divorce actions.

22. The Family Court Rule 1.04 also incorporates the Interpretation Act, section 9 (5) of which reads:

> 9 (5) Every enactment shall be deemed remedial and interpreted to ensure the attainment of its objects by considering among other matters
> (a) the occasion and necessity for the enactment;
> (b) the circumstances existing at the time it was passed;
> (c) the mischief to be remedied;
> (d) the object to be attained;
> (e) the former law, including other enactments upon the same or similar subjects;
> (f) the consequences of a particular interpretation;
> (g) the history of legislation on the subject.

23. Referencing sub-section (d) above, I refer to Family Court Rule 1.03 which reads:

> 1.03 The object of these Rules is to secure the just, speedy and inexpensive determination of every proceeding.

24. If a party does not have the means to pursue a legitimate claim, particularly a claim in relation to a child in his or her charge in a situation where there is a large discrepancy in the financial position and therefore litigation capacity of the parties, that is *a priori* unjust. There is nothing in any legislation or in the Family Court Rules that signals an intent to discriminate against parties or their children on the basis of income and assets. Thus, any interpretation of either the Family Court Rules or Civil Procedure Rules that would have the effect of erecting or maintaining those unjust barriers is to be resisted.

25. If suit costs are available in actions relation 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.

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.

28. I hold therefore that at least when dealing with either questions of custody of or access to children or with questions as to child support, that for the reasons stated the Family Court may in its discretion award suit costs in appropriate situations.

THE MERITS OF THE APPLICATION

29. Chief Justice MacKeigan in **Wilson v. Wilson** (1985), 70 N.S.R. (2d) 371 pointed out the unique nature of Nova Scotia's Rule permitting the granting of suit money, writing, at page 374:

> In cases where a spouse, usually the wife, has not sufficient independent means to pay her lawyer, an application for suit money may be made under Rules 57.28 and 57.29, rules which are unique, unlike those in other provinces and in England where surety for costs may be obtained from the other spouse in advance of trial but not direct advance payment of estimated costs, as in Nova Scotia.

30. The decision of Justice Goodfellow in **O'Brien v. O'Brien** (1997), 28 R.F.L. (4th) 384 is regarded as a leading case on the issue of an application for suit money. The annotation after Rule 57.29 in Butterworth's Nova Scotia Civil Procedure Rules capture his Lordship's analysis, although he was at pains to point

out, in paragraph 10, that there is no "exhaustive recital of all the factors that should to be taken (sic) in an application for suit costs". The Annotation reads that in these applications the court should consider:

> (1) full financial disclosure is required of the applicant;
> (2) the asset position of the applicant, especially any liquid assets, should be examined;
> (3) the income and employment capacity of the applicant;
> (4) the financial capacity of the other spouse;
> (5) the purpose of suit costs, i.e. to permit and to continue the prosecution of the matrimonial cause, not an advance of full costs, but primarily for disbursements;
> (6) r. 67.06 if suit costs are awarded, that should be subject to consideration and possible adjustment by the trial judge....

31. There would appear to be some inconsistency or uncertainty as to exactly what costs are to be considered in awarding suit costs. Is it "primarily" for disbursements per Justice Goodfellow (and Justice Haliburton in **Sampson v. Sampson**, 1997 CarswellNS 350, para 29)? One might find the genesis of that proposition in the words "incidental to the matrimonial cause" in CPR 57.29, words, which, as noted, are not found in CPR 70.24 (2). If , as Justice Goodfellow postulates a family law practitioner might be expected to forego either an adequate retainer or timely payment, (see **O'Brien v. O'Brien** para. 21), that that fact along with the use of the word "incidental" warrants the limited focus of suit costs. (I'm not sure that there are too many law practices, certainly small rural practices, that can reasonably be expected to carry an extensive receivable on the books for too long with no relief.)

32. In **Poirier v. Poirier** (1989), 93 N.S.R. (2d) 33 Justice Macdonald for the Appeal Division of the Supreme Court said, paragraph 5:

> In our opinion, there was ample evidence before the chambers judge that Mrs. Poirier does not have sufficient independent money **to pay her lawyer** with respect to the divorce action. That being so, her application for suit money, in our opinion should have been granted.
> (Emphasis added)

To like effect the quote from MacKeigan, C.J.N.S. in **Wilson v. Wilson** (above) referring to the need for money for a spouse to "pay her lawyer".

33. It is interesting that the words "incidental to the matrimonial cause" were jettisoned in Rule 70. That suggests, but does not prove, that there was a recognition that the words were not seen as appropriate. If so, I would agree. This case, as noted, is remarkable for its litigiousness to date and it wouldn't be surprising if it continued that way. I believe that to some extent, however carefully and modestly, one has to have regard to the matter of legal fees in a situation such as this. That is not to say that it would be prudent or fair to prejudge to any significant degree the cause of the problem or who is being reasonable and who isn't. That type of analysis, if it has a place at all, is in the sphere of the ultimate cost award which can respond to just these kind of findings, making adjustments on account of any suit cost award if necessary.

34. All of this is predicated of course on the prerequisites having been established. Subject to the divergence with Justice Goodfellow as to the scope for an award for suit money, I propose in a general way to utilize the six point approach he articulated in **O'Brien**.

35. The Applicant is approximately fifty years of age. She has not been

employed outside the home since before the birth of this child. When she was employed she earned a maximum, one year, of about $35,000. There is no indication that she intends to seek employment. Probably her employment skills have atrophied over the years. There is no indication that her health is in any way impaired. Apart from the rent she receives from her house she receives the $5,000 per month in child support, tax free, and receives the child tax credit of approximately $289 per month ($3,468 per year). No one has done the calculations for me, at least in any precise manner, but I would take her resulting tax free income of $63,468 to be the equivalent of a taxable income of over $90,000 per year.

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.

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:
(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.

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.

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.

42. Mr. Schumacher will please prepare the order.

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Bob Levy, J.F.C.