

**DOCKET: FANMCA-045047**

**IN THE FAMILY COURT FOR THE PROVINCE OF NOVA SCOTIA**  
**[Cite as: D.M.C.T v. L.K.S. , 2007 NSFC 39]**

**BETWEEN:**

**D. M. C. T.**  
**-APPLICANT**

**AND**

**L. K. S.**  
**-RESPONDENT**

**BEFORE THE HONOURABLE JUDGE BOB LEVY**

**HEARD AT: KENTVILLE**

**DATES OF APPEARANCES: March 20/06, Sept. 15/06, Jan. 17 &30/07, Mar. 1/07, and trial dates June 12, 13 & 14/07**

**DATE OF LAST SUBMISSION: OCTOBER 9, 2007**

**DECISION DATE: OCTOBER 16, 2007**

**APPEARANCES: BLAINE SCHUMACHER FOR THE APPLICANT**  
**WILLIAM RYAN, Q.C. FOR THE RESPONDENT**  
**-and COLIN PIERCEY IN PLACE OF MR. RYAN**  
**ON JANUARY 30, 2007**

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**DECISION AS TO COSTS #2**

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By the Court:

1. In an earlier decision in respect of an application for a variation of child support, (**D.M.C.T. v. L.K.S.#3**, 2007 NSFC 22, July 5, 2007), an increase in the monthly amount and a substantial retroactive award were granted. A later decision, dated August 29, 2007, dealt with costs. It held that with the exception of certain aspects of the case where the parties should bear their own costs, the Applicant should be awarded an amount to approximate her actual costs, so long as the figure is reasonable: (**D.M.C.T. v. L.K.S.**, 2007 NSFC 35). The decision ended with a direction that counsel for the Applicant forward a detailed accounting of his fees and disbursements taking those parameters into account, and giving time to each counsel in turn to make further representations starting with Mr. Ryan, counsel for the Respondent. That accounting and those further representations have now been received.

2. The Applicant's counsel, Mr. Schumacher, submitted a detailed accounting extending over 15 pages, single spaced. He puts his total fees at \$152,175. He then discounted the fees he attributed to the three aspects of the case for which I had indicated the parties should bear their own costs, namely: costs associated with the application by Mr. S. for the return of the child to his home town, costs associated with Ms. T.'s claim for 'section 7' expenses, and any costs associated with the appeal and cross-appeal of my interim order(s). He also deducted, as he had been directed, the \$6,000 his client received for suit costs pursuant to an interim order. He totals the costs for these several items at \$24,175 leaving total fees of \$122,000 to which he adds HST of \$17,800 to amount to \$139,080. In his last submission as to costs, following Mr. Ryan's comments, he asks to add a further 4.3 hours (at \$250 per hour) to cover this further cost. This would be an extra \$1,225.50,

(\$1,075 + HST), for a total claim for fees of **\$140,305.50**.

3. He then calculates disbursements at \$17,509.47. (On reviewing the receipt he provided it appears that he has inadvertently added HST twice for the reporter for the discovery, and so the figure should be \$479.38 for the reporter HST *included*, rather than \$479.38 plus HST). He deducts the \$8,000 previously ordered and received to help with the expert's report, so the corrected net disbursement costs should be **\$9,441.77** for a **total claim of \$149,747.27**.

4. He repeated his argument that it cost his client over \$19,000 to contest the appeal and cross-appeal for suit costs in the amount of \$6,000, and he argues that that whole exercise was an abuse of process perpetrated on behalf of Mr. S., and urged, again, that he receive that sum on account of the appeal. The answer still is, as it was before, that the Family Court does not have the jurisdiction to award costs with respect to the appeal as this is within the exclusive purview of the Court of Appeal. As that Court declined to award costs, that ends the issue.

5. Mr. Ryan responded with essentially four points and a detailed critique of Mr. Schumacher's bill. He argues that, (1) the time spent is not applicable, (that his bill included things which I had not provided for), (2) the time spent is excessive, and (3) that the hourly rate (\$250) is excessive. Mr. Ryan was also adamant that he be allowed to receive copies of actual time entries and all details associated therewith, copies of all accounts rendered to his client, copies of accounting records attributed to any payment on accounts, and a copy of computer-generated information relating to services provided to his client. He also notes the number of

hours claimed for certain days and adds at one point, page 4 of his submission, “It would be extremely helpful to have all time records relating to work done for all clients on the days in question.”

6. I declined Mr. Ryan’s requests for this extra information as Mr. Schumacher had complied with my earlier direction and, as I read it, Civil Procedure Rule 63.27. It certainly didn’t seem appropriate to order the turning over of records relating to other clients. I was concerned that this would simply open up a whole new area for conflict and drag this matter on even longer, adding to the already impressive costs that have accumulated. In any event, although perhaps not to his satisfaction, many of Mr. Ryan’s ostensible concerns have been dealt with in one way or another in this decision.

7. I have considered in detail the account submitted and the arguments of counsel in relation to it. Every costs entry that was presented, attacked and defended in the submissions will not necessarily be addressed in this decision, just the ones where there is a need to comment.

8. The Respondent will be ordered to pay to the Applicant costs in the amount of **\$109,054.06** forthwith, which sum includes fees, HST and disbursements. The overall reasoning is in the decision of August 29<sup>th</sup> which should be read in conjunction with this decision. The more particularized accounting and reasoning follows.

#### **MR. SCHUMACHER’S HOURLY RATE**

9. Mr. Ryan argues that Mr. Schumacher's hourly rate is excessive and above that which would be normally charged in the Valley by counsel. He offers nothing to back this up. He does not state what *his* hourly rate is. The article in *Canadian Lawyer* that he submitted as to what some lawyers charge has insufficient scientific rigour behind it to be of any particular value. Still, the \$250 does seem to be on the high end.

10. The Civil Procedure Rules, (63.16), contemplate counsel setting his/her fee taking into account a number of variables, including, (ss (f)), the "contingencies". These could include, for example, the risk that counsel is taking as to whether or not he/she will ever get paid at the end of the day. That latter consideration must surely have been present here given that the Applicant was desperately in debt, that she had no equity in any property to speak of, and that her income was almost entirely made up of child support which, I believe, Mr. Schumacher could not attach. That, and the fact that it would be a long and difficult journey before he would ever see any payment of his fees, would likely incline counsel to seek a premium, if indeed the \$250 per hour represents a premium fee for him.

### **WAS THE TIME CLAIMED BY MR. SCHUMACHER EXCESSIVE?**

11. While counsel is entitled to set his/her hourly rate, that still leaves the question whether the overall bill is reasonable and justifiable.

12. With respect to Mr. Schumacher, it appeared that at least initially he was not entirely at home in family law. I want to underline that in the end result his work

was of the highest quality. However, it was evident that his lack of intimate involvement in family law or with Family Court practice would have increased the amount of time he had to spend in preparation, and may have contributed to him contemplating or pursuing a number of steps that would prove to be unfruitful. As a consequence I believe that some of the claim is overly high, although I have no doubt that he did spend, and that he had to spend, a very large amount of time working for his client.

13. Time spent and hourly rate are two sides of a coin. If one lets a relatively high hourly rate stand, it increases the obligation to scrutinize the hours claimed to be sure that on the whole the time spent was justified. If the hourly rate was lower maybe the time spent would attract less attention. Either way the concerns of Mr. Ryan will not go unaddressed. It remains a balancing exercise: to ensure that the Applicant does not see her gains in court eroded unduly by legal fees, while at the same time attempting to ensure that the Respondent is not burdened unreasonably. Mr. Schumacher's makes a good point when he says that the main reason his bill is so high is simply because of the adversarial strategy employed by the Respondent.

#### **WHETHER THE TIME SPENT WAS FOR RECOVERABLE MATTERS**

14. Essentially, the decision on costs was that the Applicant should have her costs related to the pursuit of the monthly quantum of child support and for the issue of retroactivity, less the \$6,000 she received by way of an order for suit costs. For any other aspect of the litigation the parties are to bear their own costs. In going through the Bill of Costs I employed my own recollection of what was in

issue at each stage and made allowances accordingly although I did so not without due deference to Mr. Schumacher's judgement.

## **ANALYSIS OF THE BILL OF COSTS**

15. I make these determinations:

-November 8 and December 9, 2005 - Mr. Ryan objects to the claims as it appears matters unrelated to child support were discussed. Mr. Schumacher says that these items were dealt with summarily, taking only a few minutes, I accept that, and so these amounts will not be changed.

-March 27, 2006 - two items dealing with matters other than child support will be deducted - deduct \$275

-June 28, 2006 - two items not related to child support - deduct \$150

-August 29 & 30, 2006 - three items respectively of \$125, \$125 and \$250 not related to child support - deduct \$500

-September 2, 2006 - credit for half only of research claim as "mobility" issue is one where parties would bear their own costs - deduct \$162.50

-September 12 - 15, 2006 - credit for half only of claim, as preparation and to some extent trial time on the 15<sup>th</sup> dealt both with an application for suit costs as well as the "mobility" issue in equal or almost equal measure - deduct \$4,375

-October 11, 2006 - Mr. Schumacher deducts \$150 in error regarding review of my written decision. However the decision in question dealt with suit costs and is thus a legitimate claim - **add** \$150

-December 14, 2006 - correspondence to opposing counsel regarding several items, including 'section 7' expenses in relation to which parties are to bear their

own costs - reduce claim by one-third - deduct \$200

-January 2, 2007 - two items dealing with appeal of suits costs order - deduct \$1,875

-January 10, 2007 - three items of \$375, \$450 and \$625 respectfully dealing with appeal of suit costs order - deduct \$1,450

-June 4 - 12, 2007 - preparation for trial - various items claimed specifically or in all likelihood include work done in relation to 'section 7' items. These various claims are: \$2,500, \$2,150, \$1,050, \$1,150, \$1,250, \$875, \$1,125, \$950, \$600, \$300, \$1,200, and \$550. As a 'rule of thumb' I am attributing the issue of 'section 7' expenses as occupying one-quarter of Mr. Schumacher's time and this percentage of the total of \$13,700 will be deducted - deduct \$3,425

-June 12 - 14, 2007 - trial dates, claims for \$1,250, \$1,250 and \$1,500 respectfully, totalling \$4,000, as above, reduce by one-quarter - deduct \$1,000

-June 14, 2007 - for reviewing notes re: possible appeal. Premature as decision was reserved and thus unknown - deduct \$250

-July 3, 2007 - two items referable to a miscalculation I made. This cannot be attributed to the Respondent - deduct \$750

July 10, 2007 - present - remainder of work cited relates to the question of costs. Total claim, including Mr. Schumacher's response to Mr. Ryan's submissions as to costs, is \$14,875. That seems extraordinarily high. I will allow \$3,000 - deduct \$11,875.

16. The above changes amount to **\$26,137.50**. This amount will be deducted from the claim for total fees of \$123,225.50. That leaves **\$97,088**.



17. As stated, Mr. Schumacher's apparent initial lack of familiarity with family law and its practise seems to have caused him to take longer or to pursue more unproductive leads than more experienced family law practitioners might have. Given that his hourly rate of \$250 is high, the \$97,088 will be discounted by a further ten per cent; \$9,708.80 from \$97,088 leaves **\$87,379.20**. (I have not lost sight of the significant discounting already made with respect to the claim regarding the costs issue.)

18. To the fees figure of \$87,379.20 has to be added an amount for the HST. That would be **\$12,233.09** and the total figure for fees would then be **\$99,612.29**.

19. To this figure would be added the disbursements. I accept the claim as made with the one exception with respect to the discovery reporter's fee. Disbursements should be \$17,441.77, not \$17,509.47. From this, as Mr. Schumacher has done, would be deducted the \$8,000 already paid towards the expert. The net disbursement amount therefore is **\$9,441.77**. The total payable therefore is \$99,612.29 plus \$9,441.77.

20. The Respondent shall forthwith pay to the Applicant's counsel total costs for fees, HST and disbursements the sum of **\$109,054.06**.

21. Many of the calculations, although giving the appearance of precision, are of course only estimates and there is no pretense that they were the product of exact science. However, in general terms, although some may be open to argument here and there, the overall sum is appropriate and reasonable under the circumstances,

representing almost two full years of arduous and ultimately successful effort.

22. I would ask Mr. Schumacher to prepare the order as to costs, and, as the substantive order on the merits of the case has not yet been prepared, to prepare that order as well. The two might as well be included in one order.

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Bob Levy, J.F.C.