IN THE FAMILY COURT OF NOVA SCOTIA
Citation: D.M. v. S.A., 2009 NSFC 5

Date: 20090205
Docket: FLBMCA-015429
Registry: Bridgewater

Between:

D.M.

Applicant

v.

S.A.

Respondent

Decision on Costs

Judge: The Honourable Judge William J. Dyer

Counsel: A. Franceen Romney, for the Applicant
David R. Hirtle, for the Respondent

By the Court:

Background

[1] S.A. seeks court costs from D.M..

[2] At the conclusion of a written decision [2008 NFC 15] regarding child support, I directed that if the parties were unable to agree on costs, written submissions would be accepted.

[3] Approval of an order was delayed because D.M.'s counsel was unable to obtain instructions to consent to the form. And when it became apparent to S.A.'s counsel that there was not going to be any agreement on costs either, a written submission was filed and served as directed. More delay resulted from uncertainty as to whether there would any reply submissions on D.M.'s behalf; there were not. And, there was no formal application by his lawyer to withdraw as counsel of record. So, the file languished for many weeks.

[4] In the intervening time, I was aware that another Family Court decision was winding its way through appeals: **D.M.C.T v. L.K.S.** 2007 NFC 22. Although the factual and legal issues in that case were far more complex than the present one, I knew that court costs had received considerable attention and were under challenge.

[5] The appeals have now come to the end of the road. In the absence of any submissions on D.M.' s behalf, the issue of costs should be finalized in the present case.

Discussion / Decision

[6] To recap the present case, in late 2002 D.M. agreed to pay child support of $708 monthly along with contributions to other agreed expenses. At the time, D.M. was employed in the fishing industry with a substantial income; S.A. was employed with a very modest income. Both parents were represented by counsel. A consent order was approved.

[7] In mid-July 2007, D.M. applied for a review of his financial situation with the goal of retroactively decreasing his support obligations effective as of January, 2004. He later engaged legal counsel and amended his application to include requests for suspension of current child support and for court costs against S.A. S.A. was not represented by a lawyer at the outset, but decided at the end of January, 2008 that this would be prudent.

[8] Delays from July until mid-December, 2007 were attributable as much to S.A. as D.M. The parties apparently made some (unsuccessful) settlement efforts in the intervening months; and she did not retain counsel until December. She then countered with her own application for retroactive review and adjustment of child support.

[9] By January, 2008 counsel had agreed to exchange financial information without formal court orders. I reminded them that discovery processes were available, and that disclosure motions could be made if counsel were not satisfied with what they were getting or if they otherwise thought their respective cases needed the court's pre-hearing attention. A hearing date was set.

[10] S.A. subsequently issued and served a wide barrage of Interrogatories on various corporate officials in the local area. The goal was to get to the bottom of D.M.' s employment circumstances. To their credit, those in receipt of the Interrogatories ultimately provided the disclosure necessary for S.A. to complete hearing preparations. As it happens, some of the

Interrogatories and their answers found their way into evidence, by consent.

[11] I observe that D.M.' s income tax summaries, notices of assessment, etc. for the relevant years were not filed and served until late February along with a supplemental affidavit and final financial statements. The hearing was conducted shortly after D.M.'s final disclosures. It consumed one day. Legal memoranda were submitted on behalf of both parties.

[12] The main issues to be decided were D.M.'s income and what should be done with the competing applications for retroactive review and adjustment, if warranted. Determination of D.M.'s income was complicated by the fact that he had not filed personal income tax returns for several years and, when he did, his reported income was lower than before. This was countered with submissions on behalf of S.A. that higher than reported incomes should be attributed. This was against the background of self-induced occupation changes by D.M.

[13] The final result was a ruling that D.M. was underemployed for several years and incomes higher than reported were imputed (albeit reduced from that previously enjoyed).

[14] I necessarily considered **D.B.S. v. S.R.G.; L.J.W. *v.* T.A.R.; Henry *v.* Henry; Hiemstra *v.* Hiemstra** 2006 SCC 37 in which the Supreme Court of Canada had dealt with upward variation. By contrast, the present case involved retroactive downward variation. To that extent, the analysis was novel.

[15] D.M.' s application was dismissed along with request that he receive credit for overpayment. D.M.'s income for current support purposes was also set and a moratorium on enforcement (which had been in place pending the decision by agreement) was lifted. S.A.

was substantially successful.

[16] In the **D.M.C.T.** case, Levy, J.F.C. canvassed the issue of costs in two decisions: [2007 NFC 35; 2007 NFC 39]. In the first, he wrote,

> The **Family Court Act**, section 13, grants authority to the court to award costs "...in any matter or proceeding in which it has jurisdiction...". **Family Court Rule** 17.01 (1) states simply: "... The amount of costs shall be in the discretion of the court". While **Family Court Rule** 1.04 provides that recourse can be had to both the **Interpretation Act** and the **Civil Procedure Rules**, at the discretion of the court, this recourse is limited to situations where "no provision" is made in the **Family Court Rules** for the point in issue. In this case the discretion to grant or refuse costs and to determine the amount of any costs is fully, if succinctly, covered in **Rule** 17.01 (1) and therefore **Family Court Rule** 1.04 does not apply in these respects. That said, a court's discretion is to be exercised judicially and the best way to do so is to take one's guidance from **Civil Procedure Rule** 63 and related case law.
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> Selected sections of Rule 63:
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> 63.03. (1) Unless the court otherwise orders, the costs of a proceeding or of any issue of fact or law therein, shall follow the event.
>
> 63.02. (1) Notwithstanding the provisions of rules 63.03 to 63.15, the costs of any party, the amount thereof, the party by whom, or the fund or estate or portion of estate out of which they are to be paid, are in the discretion of the court, and the court may,
> (a) award a gross sum in lieu of, or in addition to any taxed costs;
> (b) allow a percentage of the taxed costs, or allow taxed costs from or up to a specific stage of a proceeding;
> (c) direct whether or not any costs are to be set off.
>
> (2) The court in exercising its discretion as to costs may take into account,
> (a) any payment into court and the amount of the payment;
> (b) any offer of contribution.
>
> 63.04. (1) Subject to rules 63.06 and 63.10, unless the court otherwise orders, the costs between parties shall be fixed by the court in accordance with the Tariffs and, in such cases, the "amount involved" shall be determined, for the purpose of the Tariffs, by the court.
>
> (2) In fixing costs, the court may also consider
> (a) the amount claimed;
> (b) the apportionment of liability;
> (c) the conduct of any party which tended to shorten or unnecessarily lengthen the duration of the proceeding;
> (d) the manner in which the proceeding was conducted;
> (e) any step in the proceeding which was improper, vexatious, prolix or unnecessary;

> (f) any step in the proceeding which was taken through over-caution, negligence or mistake;
> (g) the neglect or refusal of any party to make an admission which should have been made;
> (h) n/a
> (I) n/a
> (j) any other matter relevant to the question of costs.
>
> 63.08. The costs of an appeal and of the proceeding in the court below shall be as directed by the judgment of the Nova Scotia Court of Appeal, or in default of direction shall be in accordance with the applicable provisions of the Tariffs.
>
> 63.10A Unless the court otherwise orders, a party entitled to costs or a proportion of that party's costs is entitled on the same basis to that party's disbursements determined by a taxing officer in accordance with the applicable provisions of the Tariffs.
>
> 63.16 (1) A solicitor is entitled to such compensation from a client, who is a party, as is reasonable for the services performed, having regard to
> (a) the nature, importance and urgency of the matters involved,
> (b) the circumstances and interest of the person by whom the costs are payable,
> (c) the fund out of which they are payable,
> (d) the general conduct and costs of the proceeding,
> (e) the skill, labour and responsibility involved, and
> (f) all other circumstances, including, to the extent hereinafter authorized, the contingencies involved.

[17] Judge Levy noted that the primary issue in his case had been establishing the quantum of child support that should be payable, prospectively and retroactively, integral to which was the necessity of establishing the father's income for the purposes of the **Child Maintenance Guidelines** which, in turn, generated the issue of full disclosure by the father. Although the amount of money in the present case pales in comparison, there was some similarity in the issues to be decided. In his case, disclosure issues dominated lengthy and difficult pre-trial procedures to the extent that one counsel said they attracted the bulk of his fees. The same cannot be said about the present case.

[18] On appeal to the Nova Scotia Court of Appeal, Judge Levy's rulings on the merits and on costs were upheld: 2008 NSCA 81. A Bulletin released on January 23, 2009 informed that an application for leave to appeal to the Supreme Court of Canada by the appellant (father) was dismissed with costs. The Supreme Court of Canada made no comment on the

substantive issue of costs which had been twice addressed by Judge Levy and affirmed by the Nova Scotia Court of Appeal.

[19] I adopt Judge Levy's analysis.

[20] I am aware that **Civil Procedure Rule** 63 and its companions have been supplanted by new **Civil Procedure Rule** 77 and its companions, effective January 1st, 2009. The present case was concluded several months before the changeover so the old **Rule** still pertains. Subject to judicial discretion, party and party costs in the Supreme Court will normally continue to be fixed in accordance with tariffs of costs and fees. There have been changes to the tariffs which may result in higher awards than before.

[21] Applying tariffs calls for a determination of the "amount" in dispute. D.M.'s child support overpayment-calculations would put the amount in the range of $19,000, as compared to my $9,800 figure - exclusive of the amounts of ongoing support and section 7 expenses. Under the old tariffs, "basic" costs would be in the $1,650 to $2,625 range. Under the new **Rule** and tariffs, costs could climb to $4,000 (basic) plus another $2,000 for a full-day hearing.

[22] Arguably, slavish application of tariffs is unnecessary. They are a helpful reference, however. In looking at the entire case, I recognize the challenges faced in reconstructing D.M.' s circumstances (which was not helped by his failure to file income tax returns for several years) , that there was some uncertainty surrounding the law on downward variations, and the obvious importance to the child and her family of a potentially adverse award reaching back about four years. I should add that no settlement offers were disclosed; and no money was paid into court.

[23] Mr. Hirtle invites the court to consider the delay by D.M. in seeking relief, the late-filing of his tax returns and his general conduct by which, it was argued, the proceeding was complicated or lengthened. It was posited that D.M. had refused or failed to make admissions which could have shortened the case. As a consequence, it was submitted, extensive pre-hearing discovery was required. This was accomplished by way of Interrogatories (11 sets) directed to D.M. and several previous employers. Presumably this was less time-consuming and costly than full-blown Discovery Examinations. All the respondents answered. So, this approach was reasonable in the circumstances.

[24] As between counsel, there certainly was no “siege mentality” or “war of attrition” as was encountered by Judge Levy. Nor can I say that D.M. was deliberately or excessively adversarial. He was entitled to his day in court. It was not a “cooky cutter” case with a predictable result.

[25] On the other hand, there were no interlocutory applications and no hearing adjournments. Indeed, counsel candidly stated on the record that court orders were unnecessary to achieve needed financial and related disclosures. The hearing proceeded on schedule and did not consume a great deal of court time. Allowing that S.A.’s counsel had his work cut out for him, the case fell short of being extraordinary.

[26] Party and party costs are not intended to provide full indemnification in the vast majority of cases. In exceptional cases, all, or a substantial portion of, actual expenses may be sought.

[27] In the present case, a copy of the solicitor’s full account for fees was not submitted;

and the total amount of fees plus HST was not otherwise disclosed. In my experience, when arguments are made for increased costs under the tariffs, or more broadly for “higher than usual” costs, lawyers commonly disclose their bills. The **D.M.C.T.** case is a convenient example.

[28] Without disclosure of the legal bill, there is no way to assess what was actually done or how much time was consumed; nor is there is a yardstick against which to measure the impact of any award on actual expenses. This is not fatal; but, in the present case, it find it is one factor tending to push the result closer to the norm.

[29] Looking at the entire situation, I exercise my discretion and award party and party costs of $3,000, to be paid forthwith by D.M. to S.A.

[30] There was a submission that a successful award of party and party costs can and should be grossed up to include or capture HST which will normally be attracted to the lawyer’s underlying fees. In this regard, 13 percent was the proposed rate. Cited in support of this proposition was **Conrad v. Bremner** (2006), 242 N.S.R. (2d) 330. The case is not binding on the Family Court and, with respect, I find it has not enjoyed widespread application in other cases. Moreover, I have been unable to find any case by the Nova Scotia Court of Appeal which endorses such an approach, in principle. In reviewing cases in which the latter court has awarded costs to successful parties, I have found none in which taxes were added to the stated cost award, explicitly or by implication.

[31] While I may judicially notice that S.A.’s legal bill for professional fees would attract HST and therefore have an impact on her net recovery, it is but one factor to keep in mind when exercising judicial discretion. I did so when setting the award. Accordingly, I decline to

add, or to order D.M. to pay, 13 per cent on top of the foregoing award.

[32] Included in Mr. Hirtle's memorandum was a Bill of Costs for Disbursements which, inclusive of HST, is approximately $557. Taxes in this context pose no problems because they were paid on the client's behalf. The itemized disbursements are reasonable in the circumstances. They too are due and payable immediately.

[33] An order should be submitted. The approval of D.M.'s counsel as to form is unnecessary.

Dyer, J.F. C.