FAMILY COURT OF NOVA SCOTIA

Citation: *A.M. v. S.F.*, 2016 NSFC 26

Date: 2016-09-13
Docket: Pictou **No.** FPICMCA 76746
Registry: Pictou

Between:

A.M.

Applicant

v.

S.F.

Respondent

Judge:	The Honourable Judge Timothy G. Daley
Heard:	July 20, 2016 in Pictou, Nova Scotia
Decision:	October 7, 2016
Counsel:	Ellen R. Burke, for the Applicant Roseanne Skoke, for the Respondent

[1] This is a decision on costs in this matter following a hearing that took one day to complete. I then rendered a written decision in the matter.

Law on Costs

[2] The Family Court's authority to award cost was summarized by Levy, J.F.C. in *D.M.T.C. v. L.K.S.* 2007 NSFC 35 at paragraph 3 as follows:

> 3. 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.

[3] The relevant current *Civil Procedure Rule* is Rule 77 which states in part:

> **Scope of Rule 77**
>
> **77.01 (1)** The court deals with each of the following kinds of costs:
>
> (a) party and party costs, by which one party compensates another party for part of the compensated party's expenses of litigation;
>
> (b) solicitor and client costs, which may be awarded in exceptional circumstances to compensate a party fully for the expenses of litigation;
>
> (c) fees and disbursements counsel charges to a client for representing the client in a proceeding.
>
> …
>
> **General discretion (party and party costs)**
>
> **77.02 (1)** A presiding judge may, at any time, make any order about costs as the judge is satisfied will do justice between the parties.

> **(2)** Nothing in these *Rules* limits the general discretion of a judge to make any order about costs, except costs that are awarded after acceptance of a formal offer to settle under Rule 10.05, of Rule 10 - Settlement.
> …
>
> **Assessment of costs under tariff at end of proceeding**
>
> **77.06 (1)** Party and party costs of a proceeding must, unless a judge orders otherwise, be fixed by the judge in accordance with tariffs of costs and fees determined under the *Costs and Fees Act*, a copy of which is reproduced at the end of this Rule 77.
>
> **(2)** Party and party costs of an application in court must, unless the judge who hears the application orders otherwise, be assessed by the judge in accordance with Tariff A as if the hearing were a trial.
>
> **(3)** Party and party costs of a motion or application in chambers, a proceeding for judicial review, or an appeal to the Supreme Court of Nova Scotia must, unless the presiding judge orders otherwise, be assessed in accordance with Tariff C.
> **…**
>
> In these tariffs unless otherwise prescribed, the "amount involved" shall be
> …
>
> (c) where there is a substantial non-monetary issue involved and whether or not the proceeding is contested, an amount determined having regard to
>
> (i) the complexity of the proceeding, and
> (ii) the importance of the issues;

[4] In *Gomez v. Ahrens* 2015 NSSC 3, Justice Beryl MacDonald of the Family Division, summarized some of the applicable case law at paragraphs 16 and 17:

> [16] At one time it was generally considered inappropriate to grant costs in cases involving custody of or access to children. That no longer is accepted as a general rule. Costs have long been considered as a deterrent to those who would bring unmeritorious cases before the Court. Many parents want to have primary care or at the very least shared parenting of his or her children but that desire must be tempered by a realistic evaluation about whether his or her plan is in the best interest of the children. The potential for an unfavorable cost award has been suggested as a means by which those realities can be bought to bear upon the parent's circumstances. Nevertheless there will always be cases where a judge will exercise his or her discretion not to award costs.
>
> [17] Some of the more common principles that guide decision making in cost applications are found in *Landymore v. Hardy* (1992), 112 N.S.R. (2d) 410 (T.D.); *Campbell v. Jones et al.* (2001), 197 N.S.R. (2d) 212 (T.D.); *Grant v. Grant*

(2000) , 200 N.S.R. (2d) 173 (T.D.); *Bennett v. Bennett* (1981), 45 N.S.R. (2d) 683 (T.D.); *Kaye v. Campbell* (1984), 65 N.S.R. (2d) 173 (T.D.); Kennedy-Dowell v. Dowell 2002 CarswellNS 487; *Urquhart v. Urquhart* (1998), 169 N.S.R. (2d) 134 (T.D.)); *Jachimowicz v. Jachimowicz* (2007), 258 N.S.R. (2d) 304 (T.D.). My summary of the principles relevant to this case are that:

1. Costs are in the discretion of the court.

2. A successful party is generally entitled to a cost award.

3. A decision not to award costs must be for a "very good reason" and be based on principle.

4. Deference to the best interests of a child, misconduct, oppressive and vexatious conduct, misuse of the court's time, unnecessarily increasing costs to a party, and failure to disclose information may justify a decision not to award costs to an otherwise successful party or to reduce a cost award.

5. The amount of a party and party cost award should "represent a substantial contribution towards the parties' reasonable expenses in presenting or defending the proceeding, but should not amount to a complete indemnity".

6. The ability of a party to pay a cost award is a factor that can be considered, but as noted by Judge Dyer in *M.C.Q. v. P.L.T.* 2005 NSFC 27:

Courts are also mindful that some litigants may consciously drag out court cases at little or no actual cost to themselves (because of public or third-party funding) but at a large expense to others who must "pay their own way". In such cases, fairness may dictate that the successful party's recovery of costs not be thwarted by later pleas of inability to pay. [See *Muir v. Lipon*, 2004 BCSC 65].

7. The Tariff of Costs and Fees is the first guide used by the Court in determining the appropriate quantum of the cost award.

8. In the first analysis the "amount involved", required for the application of the tariffs and for the general consideration of quantum, is the dollar amount awarded to the successful party at the Trial. If the Trial did not involve a money amount other factors apply. The nature of matrimonial proceedings may complicate or preclude the determination of the "amount involved".

> 9. When determining the "amount involved" proves difficult or impossible the Court may use a "rule of thumb" by equating each day of trial to an amount of $20,000.00 in order to determine the "amount involved".
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> 10. If the award determined by the tariff does not represent a substantial contribution towards the parties' reasonable expenses "it is preferable not to increase artificially the "amount involved", but rather, to award a lump sum". However, departure from the tariff should be infrequent.
>
> 11. In determining what are "reasonable expenses", the fees billed to a successful party may be considered but this is only one factor among many to be reviewed.
>
> 12. When offers to settle have been exchanged, consider the provisions of the civil procedure rules in relation to offers and also examine the reasonableness of the offer compared to the parties position at trial and the ultimate decision of the Court.

[5] In the decision of *Moore v. Moore*, 2013 NSSC 281 Justice Jollimore provided helpful comments on the consideration of the complexity of the proceeding and the importance of the issues when she wrote

> [16] The proceeding was not complex. Determining where a child spends her time, where she attends school, where she spends her holidays and her parents' attendance at her extra-curricular activities are common and uncomplicated applications. So, too, are motions for a child's wish report or a custody and access assessment. The requests for a review order and for the appointment of a child advocate are less common, but virtually no time was spent on these requests and they were addressed barely, if at all, by Mr. Moore's evidence and submissions.
>
> [17] It is difficult to say that any parenting application is not important. There are, however, degrees of importance. For example, an application to terminate a child's access to a parent is of utmost importance. An application to relocate a child's primary residence to a distant country where access would be restricted is of considerable, but lesser importance. Here, Ms. Moore's requests for relief are not of utmost importance in the range of parenting decisions we are asked to make, but they are clearly important.

Analysis

[6] As with all decisions regarding costs, the necessary first step in the analysis is to determine whether there has been a successful party and, if so, which party

that is. Determining success in any civil litigation matter is often a nuanced exercise. In family law cases, parties often contest various issues in including custody, access, child support and spousal support and within each of those issues the parties will take various positions. For example in a custody dispute one party may seek sole custody with supervised access. That party may be successful on the sole custody claim but unsuccessful on the supervised access claim. Thus, overall success or failure of a party for purposes of determining costs usually and necessarily involves an analysis of all of the issues at play at the hearing and the relative level of success or failure of each party, both on individual issues and in the overall context of the matters before the court.

[7] In this matter, S.F. maintained that O.F. should reside primarily with him and have access with his mother or, in the alternative, they should have a shared parenting arrangement. He took this position for several reasons, including his concerns regarding the mother's alleged use of marijuana, her changing living arrangements, poor lifestyle choices she has made, her mental health and emotional state, and her denial of access for him.

[8] A.M. maintained that O.F. should primarily reside with her and should have access with his father for several reasons, including her having been O.F.'s primary caregiver since birth and since the separation, her now being in a stable relationship with a new partner in a suitable home, O.F. doing well in her care, and her being best equipped to care for him. She denied using marijuana now or in the past and denied any other substance abuse problem. She said S.F. has a temper, they have communication problems and he has refused to return O.F. to her care on at least one occasion.

[9] The only order in place at the time of the hearing was an interim order of December 23, 2015 which granted the parties joint custody of O.F, placed him in the primary care of A.M. and granted S.F. scheduled access with him.

[10] In my decision I found that O.F.'s best interests were met by placing him in the primary care of his mother, A.M., in a joint custodial arrangement. I set out a detailed order of parenting time with S.F. having access on a scheduled basis. Without detailing my reasons again, it is sufficient to say that I found that S.F. failed to prove his allegations against A.M. and that I accepted A.M.'s position respecting the best parenting arrangement for O.M.

[11] Further, I awarded child support be paid by S.F. to A.M. retroactive to the date of separation, therefore commencing in July of 2015.

[12] Thus A.M. was the successful party. Having determined the successful party, costs will be awarded to A.M. payable by S.F. as there is no good reason for such costs to be denied.

[13] I further find that there is nothing in the position or behavior of either party that would suggest that costs should be denied or reduced. Each was timely in disclosure and filing obligations throughout and there is no evidence before me to suggest that either party unnecessarily increased costs.

[14] A.M. seeks party and party costs. As a result, I must refer to the Tariff of Costs and Fees contained within the *Civil Procedure Rules* and in doing so must determine the "amount involved". Given that the primary issue before me was the best parenting arrangements for the child, determining the amount involved is difficult notwithstanding the awards of on-going and retroactive child support made.

[15] I therefore begin with the "rule of thumb" identified by Justice McDonald in *Gomez* (supra) of $20,000 for each day of trial. I must also consider the complexity and importance of the matter. As noted in *Moores* supra, all family matters are important to some degree but matters involving custody and parenting arrangements as well as child support common. I find there was nothing particularly complex about this matter and, though it was important to the parties, it was not of such importance that it warrants a substantial award of costs for that reason.

[16] I also consider the submissions of counsel for A.M. that there were settlement offers made by her which were substantially the same as the decision of this court respecting custody and access arrangements and would have waived retroactive child support.

[17] I further consider the submission of counsel for S.F. that he is not working now as a result of a serious accident and will be off work for 3 months. The further issues raised, that S.F. must pay child support, arrears of child support and his legal fees, are not persuasive nor relevant to this analysis. His legal fees are the result of his pursuit of his position in the litigation and cannot be held out as reasons to reduce or waive costs. His legal obligation to pay child support,

particularly in light of the evidence that he failed to pay any such support since separation, is likewise no justification to reduce or waive costs.

[18] Taking all of this into account, I decline to award the full amount of costs contemplated in Tariff C based on the rule of thumb amount involved of $20,000. I will exercise my discretion, taking into account the complexity and importance of the matter, and the submissions of counsel and award costs in the amount of $3,000. Given S.F.'s current circumstances, he shall pay this award of costs to A.M. or before February 28, 2017.

Daley, J.