FAMILY COURT OF NOVA SCOTIA
Citation: *M.K. v. E.M.*, 2016 NSFC 32

Date:20161229
Docket: Antigonish **No.** 101298
Registry: Antigonish

Between:

M.K.

Applicant

v.

E.M.

Respondent

Editorial Note: Identifying Information has been removed from this electronic version of the judgment

Judge:	The Honourable Judge Timothy G. Daley
Heard:	August 23, 2016 in Antigonish, Nova Scotia
Decision:	December 29, 2016
Counsel:	Tammy MacKenzie, for the Applicant Adam Rodgers, for the Respondent

[1] This is a decision on costs following a hearing that took one day to complete. I then rendered a written decision in the matter. In that decision, I made findings of fact and credibility which were favorable to the position of the applicant and unfavourable to the position of the respondent. I ultimately found in favour of the position of the applicant.

Law on Costs

[2] The Family Court's authority to award costs 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 ariffs 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, MacDonald J. 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".
>
> 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 Jollimore J. 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.

[6] It is also important to note that though proceedings in Family Court are generally considered applications, I adopt the reasoning of Jollimore, J. in *Moore* supra at paragraph 14 when she addressed the applicability of Tariffs C or A to applications in the Family Division:

> [14] Initial guidance in determining costs is the tariff of costs and fees. The proceeding before me was a variation application. Formally, Tariff C applies to

> applications. As I said in MacLean v. Boylan, 2011 NSSC 406 at paragraph 30, applications in the Family Division are, in practice, trials. Rule 77's Tariffs have not changed from the Tariffs of Rule 63 of the Nova Scotia Civil Procedure Rules (1972). Despite the distinction between an action and application created in our current Rules, the Tariffs have not been revised. My view has not changed since I decided MacLean v. Boylan, 2011 NSSC 406: I don't intend to give effect to the current Rules and their incorporation of the pre-existing Tariffs where this routinely results in lesser awards of costs for the majority of proceedings in the Family Division, such as corollary relief applications, variation applications and applications under the Maintenance and Custody Act or the Matrimonial Property Act. In these situations I intend to apply Tariff A as has been done by others in the Family Division: Justice Gass' decision in Hopkie, 2010 NSSC 345 and Justice MacDonald in Kozma, 2013 NSSC 20.

[7] Fichaud, J. on behalf of our Court of Appeal in *Armoyan v. Armoyan*, 2013 NSCA 136 also noted and adopted the following:

> [20] Justices of the Family Division have stated that trial-like hearings in matrimonial matters are more appropriate for Tariff A than Tariff C: Hopkie v. Hopkie, 2010 NSSC 345, para 7, per Gass, J.; MacLean v. Boylan, 2011 NSSC 406, paras 29-30, per Jollimore, J.; Kozma v. Kozma, 2013 NSSC 20, para 2, per MacDonald, J.; Robinson v. Robinson, 2009 NSSC 409, para 10, per Campbell, J..

[8] I find that there is no difference in proceedings in the Supreme Court Family Division and the Family Court and I will apply Tariff A to such proceedings.

Analysis

[9] 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 including custody, access, child support and spousal support. 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 in 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.

[10] In this matter, E.M. maintained that she should be permitted to permanently relocate J.K. to Prince Edward Island with her and that she should, therefore, have primary care of him. It was her position that J.K. would benefit from regular contact and access time with M.K. every second weekend.

[11] It was the primary position of M.K. that J.K. would be best served by a shared parenting arrangement whereby he would spend alternating weeks with M.K. and E.M. throughout the year. He acknowledged through counsel that this would require a review when J.K. was old enough to attend school and the shared parenting arrangement became unworkable.

[12] M.K. took the secondary position that if shared parenting was not in J.K.'s best interest, he should have primary care of J.K. in Nova Scotia and E.M. should have access with him in Prince Edward Island.

[13] In my decision, I found that it was in J.K.'s best interest that he enjoy a shared parenting arrangement, spending alternating weeks with M.K. and E.M. This arrangement will be in place when the ferry between Prince Edward Island and Nova Scotia is operating. When the ferry is not operating, J.K. will spend two weeks with E.M. and one week with M.K. to ensure that J.K. is not subjected to excessive travel.

[14] With respect to the basis for each position, E.M. argued that M.K. was not an involved parent and would only become involved in J.K.'s care when M.K.'s own needs had been met. M.K. disagreed and maintained he was fully involved when he was home and he continues to be committed to J.K.'s care.

[15] In my decision, I found that M.K. was a loving and capable parent and, though he may have deferred to E.M. on parenting issues when they were together and relied upon her, he was capable of parenting now and in to the future.

[16] Respecting the interim relocation of J.K. to Prince Edward Island with E.M., she maintained that M.K. acquiesced and was fully aware of the relocation. M.K. denied this. In my decision, I found that M.K. was aware of the relocation but did not acquiesce to it. In doing so, I noted that the exchange of emails evidencing the relocation discussion also demonstrated a pattern of unhealthy communication in which E.M. used her circumstance of having care of J.K. and the physical distance between the parties to leverage terms of access that were unreasonable. This caused me concern regarding her ability to cooperate in parenting in the future.

[17] I also found as part of that evidence that E.M. did not abide fully by the terms of the interim order respecting the exchange of J.K. for interim access.

[18] Most significantly, I found E.M. to be lacking credibility in her evidence based on my finding that she misled the court at the interim stage of the matter when she represented that she was breastfeeding J.K. each day. This was contrary to the evidence which I accepted at the hearing that J.K. was away from her for several days at a time and no breastfeeding of J.K. took place during that time.

[19] I also found that E.M. lacked credibility with respect to her evidence that she was unaware that her mother was present at court for the hearing to provide evidence. I accepted the evidence that E.M. had confronted her parents prior to giving evidence and had called the RCMP claiming harassment. As a result of these findings, where E.M.'s evidence contradicted that of M.K., I accepted the evidence of M.K.

[20] Further, both parties gave evidence of family violence which I carefully considered in my decision. I will not review that evidence except to say that I found that where the evidence of M.K. differed from that of E.M., on the issue of family violence, I accepted the evidence of M.K.

[21] On review of the evidence before me, I conclude that M.K. was the successful party. Having determined this, costs will be awarded to M.K. payable by E.M. as I find there is no good reason for such costs to be denied.

[22] I further find that there is nothing in the position of behaviour of either party that would suggest the cost 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.

[23] M.K. seeks party and party cost. 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 J.K., determining the amount involved is difficult notwithstanding the awards of child maintenance made.

[24] I therefore begin with the "rule of thumb" identified by MacDonald J. 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 maintenance are 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.

[25] Taking all of this into account, I award the full amount of costs contemplated in tariff A based on the rule of thumb amount involved of $20,000. I will apply scale 2 (basic) and award $4,000. To this must be added an additional $2,000 based on the length of trial which I determine to be one day. Thus, the total award of costs payable by E.M. to M.K. shall be $6,000. This amount is payable forthwith.

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Daley, J.