FAMILY COURT OF NOVA SCOTIA
Citation: *J.O. v. C.K.*, 2017 NSFC 7

Date: 2017-02-07
Docket: FATMCA-074093
Registry: Antigonish

Between:

J.O.

Applicant/Respondent

v.

C. K.

Respondent/Applicant

Judge:	The Honourable Judge Timothy G. Daley
Heard	February 7, 2017, in Antigonish, Nova Scotia
Final Written Submissions:	March 23, 2017 and March 27, 2017
Counsel:	Peter Crowther, for the Applicant Daniel MacIsaac, for the Respondent

Introduction

[1] This is a decision on cost following a hearing on an application brought by the father seeking an order that there be a neurological consult for the parties' child. The application was opposed by the mother.

[2] The hearing took one day to complete. I then rendered an oral decision on that day. In that decision, I found in favour of the father.

[3] This hearing, which was the final step in a lengthy process involving the parties, arose in part because there were competing expert opinions respecting the necessity and appropriateness of a further neurological consult for the parties' child. The father had a recommendation from one expert in support of the referral and the mother had a report from another expert which recommended against the referral. As noted in my own decision, I found that both parties were reasonable in bringing forward their positions on this application, though I did find in favour of the father's position in my decision.

[4] This matter began with the father's variation application in July of 2015 in which he sought, among other relief, a change in the primary care of the child from the mother's home to the father's home.

[5] This portion of his application was pursued throughout the matter until, in the telephone pretrial of August 22, 2016 the father's counsel indicated the father was considering withdrawing his application for primary care and only pursuing the issue of the consult to the neurologist. This position was confirmed in a subsequent telephone conference call of August 30, 2016 at which time the portion of the father's application concerning change of primary care was formally withdrawn.

[6] It is also noteworthy that the mother filed her own application seeking a review of child maintenance and an order authorizing administrative recalculation. That application was filed on October 27, 2015.

[7] The parties, or their counsel, attended or took part in eight appearances between the filing of the first application and the withdrawal of the portion of the father's application seeking a change in primary care. These eight appearances took place over an approximate year and dealt with many matters. Among these was the disclosure of income information of the father with respect to child support; the determination of the necessity of a child needs assessment, which was completed; adjustments to the interim access schedule; and other ancillary matters.

[8] The father is now seeking costs against the mother based on the father's success in the contested hearing regarding the neurological referral. The father seeks cost of $7000.

[9] The mother opposes the award of costs to the father.

Law on Costs

[10] 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.

[11] 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;

[12] 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.

[13] 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.

[14] 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 Tariff 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.

[15] Fichaud, J.A., 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..

[16] I find that there is no difference in proceedings in the Supreme Court Family Division and the Family Court.

Analysis

[17] 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 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.

[18] In this matter, the father was successful in the contested hearing regarding the consult to a neurologist. That said, and as noted earlier in this decision, I find each party was reasonable in bringing forward their position, as they had opposing

expert opinions. I find that neither was unreasonable in bringing their case before the court in that circumstance.

[19] As well, I have already noted that the father had begun this entire process in 2015 with an application seeking change in primary care of the child from the mother's home to his home. It was his application that drove the bulk of this litigation. The mother opposed the father's application throughout. The father did not withdraw that portion of his application until August 30, 2016. Therefore, the bulk of the work, the contents of the many affidavits of the parties, the many appearances and pretrial conferences were necessary, largely, to address that portion of the father's application until withdrawn.

[20] In review of all the evidence and the record before me, I conclude that each party was successful. The father was clearly successful on his application regarding the neurological consultation. The mother was clearly successful in her position on change in primary care of the child, as the father withdrew that portion of his application.

[21] I also find that there is no good reason to deny costs to any party who, at times during the matter, was self representing. In this circumstance the mother was representing herself through much of the proceedings. This does not, I find, disqualify her for consideration of costs.

[22] I further find that there is nothing in the positions or behaviour of either party that would suggest that costs should be denied or reduced. There is no evidence before me to suggest that either party unnecessarily increased costs.

[23] I also find that this was not a particularly complex matter. That said, the issues raised, particularly the change in primary care and the neurological consultation, were important to this child and to the parties.

[24] As a result, I decline to award costs to either party in this matter.

Daley, J.P.C.