FAMILY COURT OF NOVA SCOTIA
Citation: *J.D. v. G.S.*, 2017 NSFC 33

Date: 2017-08-09
Docket: FATMCA-065620
Registry: Antigonish

Between:

J.D.

Applicant

v.

G.S.

Respondent

DECISION ON COSTS

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

Judge:	The Honourable Judge Timothy G. Daley
Heard:	July 11 and 18, 2017, in Antigonish, Nova Scotia
Oral Decision:	July 18, 2017
Written Submissions on Costs:	August 1, 2017
Written Decision on Costs:	August 9, 2017
Counsel:	Mallory Arnott for the Applicant, J.D. Respondent Self Representing

Introduction

[1] This is a decision on costs following approximately one and one-half days of hearing. The applicant father sought a variation of an existing order which granted the mother sole custody and primary care of their children, parenting time for the father every second weekend and other parenting time. There were transitionary provisions concerning gradual increases in parenting time and other related provisions that were no longer effective.

[2] The father sought an order of joint custody and a switch in his parenting time to weekends to accommodate time with his new partner's children. He also sought increases and changes in special parenting times such as Christmas and vacation time.

[3] The mother sought a continuation of sole custody, that the weekend parenting times remain the same and that no additional parenting time be granted. She wanted to include a provision that the older child not have to visit with her father if she chose not to.

[4] The mother is now seeking costs without specifying an amount and the father says no cost should be awarded.

Law on Costs

[5] The Family Court's authority to award costs is found in the Family Court Rules, N.S. Reg 20/93 and specifically rule 21.01 which reads:

> a. The amount of costs is awarded at the discretion of the judge.
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> b. Costs may be collected in accordance with the procedure provided for collection of support or in any other manner that the court directs.
>
> c. Costs, at the discretion of the court, may be payable to the court, the party, the party's counsel or any other person that the court directs.
>
> d. Costs, at the discretion of the judge, may be payable to the court, the party, the party's counsel or any other person that the judge directs.

[6] This authority was summarized by Levy, J.F.C. in *D.M.T.C. v. L.K.S.* 2007 NSFC 35 at paragraph 3 (where he was referring to the prior provisions of the rules) 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...". … 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) *(now Rule 21.01)* 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.

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

Scope of Rule 77

77.011) 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.
> …
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> 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;

[8] 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.

[9] 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.

[10] 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.

[11] 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..

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

Analysis

[13] 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.

[14] In this matter, the major issues were the form of custody and the switching of weekend parenting times. On both issues, the mother was successful.

[15] The father was successful in arguing for additional special parenting times for Christmas, summer vacation and similar occasions.

[16] I find that the mother was more successful than the father with respect to the various issues, particularly the key issues before the court.

[17] Having determined that the mother was largely the successful party, I further find that there is nothing in the behaviour of the mother that would suggest the costs should be denied or reduced with one exception. Her affidavit evidence was reviewed in detail by counsel for the father at the commencement of proceedings to deal with motions to strike various paragraphs. This took over one hour and the father was largely successful on these motions. Had the affidavit evidence been better prepared, this time would not have been lost and the preparation time for the father's counsel would not have been necessary. While I find that this issue arose due to the mother being self-representing, this fact does not diminish the impact of that lost time and increased cost.

[18] I am also mindful of the fact that the father attempted settlement discussions with the mother which were refused and which may have resulted in at least some issues, such as additional special parenting time, being resolved prior to the hearing. I also find that other issues, such as the primary matters of custody and weekend parenting times, would not have been amenable to resolution prior to the hearing.

[19] In this circumstance, I find it appropriate and necessary to award costs to the mother, payable by the father, based on her greater level of success on the issues before the court and I can find no "very good reason" to not award such costs based on any principled basis.

[20] The mother seeks party and party costs. I find it necessary to refer to the tariff of costs and fees contained within the *Civil Procedure Rules* and in doing so I must determine the "amount involved". I find that determining the amount involved is difficult in this case given the nature of the issues at play, including custody and parenting time. I therefore find it reasonable and necessary to apply the "rule of thumb" identified by MacDonald J. in *Gomez* supra of $20,000 for each day of trial.

[21] The determination of days of trial is discretionary as well. The hearing took one and one half days including the motions to strike, taking of the evidence and submissions. I find that the total time involved to deal with the matter was one day. I do so discounting the lost time due to the motions to strike. Applying the rule of thumb amount of $20,000 per day, the total amount involved I find to be $20,000.

[22] Applying Tariff A from the Civil Procedure Rules to the amount involved of $20,000, I determine the basic scale cost of $4,000. To this must be added $2,000 per day of trial for a total of $6,000.

[23] I also consider that, while the mother was more successful, the father had success as well. I consider the issue of the motions to strike, which were dealt with in part by reducing the time of trial, and the lack of engagement in settlement discussions by the mother. Considering all of this, I award costs payable by the father to the mother in the amount of $3,500. These costs are payable forthwith. If the father fails to pay the costs as required, this amount will be collectable and enforceable through the Maintenance Enforcement Program.

[24] Counsel for the father will draw the costs order.

Daley, J.