FAMILY COURT OF NOVA SCOTIA
Citation: *E.T. v. T.C.*, 2020 NSFC 10

Date: 2020-06-16
Docket: FATPSA-102926
Registry: Antigonish

Between:

E.T.

Applicant

v.

T.C.

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
Written Submissions on Costs:	Applicant – January 14, 2020 Respondent – No Submission Made
Written Decision on Costs:	June 16, 2020
Counsel:	Meghan MacGillivray Case for the Applicant, E.T. Respondent, T.C., Self Represented

Introduction

[1] This is a decision on costs following one day of hearing and an oral decision of approximately two hours on a further date.

[2] The applicant mother, E.T., requested an order that she be permitted to relocate the parties' children with her to Antigonish County from Guysborough County and reside primarily with her in a sole custody arrangement. The father would have parenting time with the children every second weekend and other times including special occasions.

[3] The respondent father, T.C., opposed this relocation request and sought an order that the children remain in Guysborough County, attending school in their district, and that the children enjoy a shared parenting arrangement, spending equal amounts of time in each parent's home and care. Implied in his application was a request for a joint custodial order requiring joint decision-making on major issues for the children.

[4] The mother sought an order for the table amount of child support and retroactive to the date of separation. She asked that the father's income be imputed at $70,000 per year and that any resulting arrears of child support be paid by the release of funds, held in trust from the sale of the family home in another province. Her calculation of arrears was $18,485.

[5] The mother also sought an order of child support as contribution to section 7's special or extraordinary expenses for the children, excluding rodeo related expenses, to be paid in proportion to the parents' incomes.

[6] The father opposed imputing his income of $70,000 per year, claiming he was receiving Worker's Compensation benefits as a result of a disability and was retraining for a different career. He asked that his income be based upon those benefits only.

[7] He agreed that any arrears in child support should be paid out of the money held in trust from the sale of the family home. He agreed that child support for section 7 special or extraordinary expenses should be paid and asked that these include rodeo related expenses.

[8] In my decision, I allow the relocation of the children with the mother to Antigonish County. I ordered she have sole custody and primary care of the

children, and the father have parenting time every second weekend and two evenings during the week. Special parenting time for occasions such as Christmas and Easter and summer school vacation were ordered as well.

[9] I imputed income to the father of $70,000 per year but left open an opportunity for him to apply to vary that portion of the order, with having to prove a material change in circumstances. He would have to provide appropriate evidence that he was unable to work in his prior profession at $70,000 per year. At the hearing of this matter, I found that his evidence of a disability or inability to return to prior employment was lacking.

[10] I ordered child support in the table amount retroactive to the date of separation and ordered the parties to contribute to special or extraordinary expenses for the children. The mother's contribution to the rodeo activity cost are limited to $1,000 per year unless she otherwise agreed. I set arrears at the amount requested by the mother and ordered that any arrears shall be paid out of the proceeds from the sale of the family home, held in trust as agreed by the parties.

[11] The order granted was largely consistent with the positions of the mother, though portions of the order were not fully in accordance with her requests, including permitting the father to apply to vary the imputation of income at a later time, including parenting time during each week and requiring the mother to contribute a set amount to rodeo activity costs.

Law on Costs

[12] 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.

[13] This authority was summarized by Levy, J.F.C. in *D.M.C.T. v. L.K.S.* 2007 NSFC 357 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.

[14] The relevant current *Civil Procedure Rule* includes *Rule* 10.09 as follows:

> 10.09 (1) A party obtains a "favourable judgment" when each of the following have occurred:
> (a) the party delivers a formal offer to settle an action, or a counterclaim, crossclaim, or third-party claim, at least one week before a trial;
> (b) the offer is not withdrawn or accepted;
> (c) a judgment is given providing the other party with a result no better than that party would have received by accepting the offer.
> (2) A judge may award costs to a party who starts or who successfully defends a proceeding and obtains a favourable judgment, in an amount based on the tariffs increased by one of the following percentages:
> (a) one hundred percent, if the offer is made less than twenty-five days after pleadings close;
> (b) seventy-five percent, if the offer is made more than twenty-five days after pleadings close and before setting down;
> (c) fifty percent, if the offer is made after setting down and before the finish date;
> (d) twenty-five percent, if the offer is made after the finish date.

[15] *Rule* 77 states in part:

> **Scope of Rule 77**
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> **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;

[16] In *Gomez v. Ahrens* 2015 NSSC 3, MacDonald J. of the Supreme Court 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.
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> 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".
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> 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.

[17] 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.

[18] 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.

[19] 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..

[20] I find that there is no difference in proceedings in the Supreme Court Family Division and the Family Court for this purpose.

Analysis

[21] 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.

[22] In this matter, I will brief. The applicant mother was successful on almost every issue before the Court including relocation, custody, primary care, parenting times, child support (both prospective and retroactive) and special and extraordinary expenses (both prospective and retroactive). The father had some success, but this was very limited.

[23] Having determined that the mother was 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. She brought her application, filings and evidence in a timely fashion, made no unreasonable claims and did not cause any unreasonable delays.

[24] I am also mindful of the fact that various settlement offers were exchanged but none constituted a formal offer to settle and therefore did not engage consideration of *Rule* 10.09. There was a judicial settlement conference in the matter which did not resolve the issues.

[25] Regarding the parties' behavior, I find there is nothing objectionable, vexatious or oppressive in the mother's behaviour throughout these proceedings.

[26] The mother says that the father's behavior was objectionable in that he requested several appearances before the court on interim matters, including seeking time with the children for rodeo events which they did not attend and changes to his parenting time when he returned to work which he did not perform. The mother also notes that her counsel made a motion to strike portions of the father's affidavits at the commencement of the hearing, all of which caused the mother to pay additional costs for her counsel to address each issue.

[27] I do not find that this history gives rise to a conclusion that the father delayed matters unreasonably. There were some delays for the reasons outlined but I find this to be typical of such matters.

[28] I also consider that, though he was unsuccessful, none of the positions taken by the father were extreme or without merit and he should not be further faulted for pursuing his positions.

[29] When considering the father's ability to pay an award of costs, I am mindful his income is not large but is imputed to be in the range of $70,000 per year. The arrears ordered should be paid from the funds held in trust and should therefore not further burden him. I also confirm that I adopt the same reasoning as set out in *A.M. v. S.F.*, 2016 NSFC 26 when I held that the burden of paying such arrears is not relevant to the question of an award of costs.

[30] In this circumstance, I find it appropriate and necessary to award costs to the mother, payable by the father, based on her 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.

[31] 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, child support and arrears as well as spousal support. 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.

[32] The determination of days of trial is discretionary as well. The hearing took one and one-half days including taking of the evidence, submissions and oral decision. I also take in account the one-half day settlement conference. I find that the total time involved to deal with the matter was two days. Applying the rule of thumb amount of $20,000 per day, the total amount involved I find to be $40,000.

[33] Applying Tariff A from the *Civil Procedure Rules* to the amount involved of $20,000, I determine the basic scale cost of $6,250. To this must be added $2,000 per day of trial for a total of $10,250.

[34] In considering this issue, I am mindful of the decision of our Court of Appeal in *Landymore v. Hardy*, [1992] N.S.J. No. 79 (NSCA) in which Saunders J. held:

> The underlying principle by which costs ought to be measured was expressed by the Statutory Costs and Fees Committee in these words:

> **(1)** "... the recovery of costs should represent a substantial contribution towards the parties' reasonable expenses in presenting or defending the proceeding, but should not amount to a complete indemnity".
>
> The court is and has always been concerned with the reasonableness of expenditures incurred in either advancing or defending a claim. The ever-increasing cost of litigation is a challenge which faces everyone touched by the adversary process, whether litigant, lawyer or witness.
> Costs are intended to reward success. Their deprivation will also penalize the unsuccessful litigant. One recognizes the link between the rising cost of litigation and the adequacy of recoverable expenses. Parties who sue one another do so at their peril. Failure carries a cost. There are good reasons for this approach. Doubtful actions may be postponed for a sober second thought. Frivolous actions should be abandoned. Settlement is encouraged. Winning counsel's fees will not be entirely reimbursed, but ordinarily the losing side will be obliged to make a sizeable contribution.

[35] I also consider the decision of the Court of Appeal in *Williamson v. Williams*, [1998] N.S.J. No. 498 (NSCA) in which the court held:

> **24** The present tariffs were adopted in 1989 to replace the antiquated Costs and Fees Act then in effect. In *Landymore v. Hardy* (1992), 112 N.S.R. (2d) 410 Saunders J. stated:
>
> > The underlying principle by which costs ought to be measured was expressed by the Statutory Costs and Fees Committee in these words: " . . . the recovery of costs should represent a substantial contribution towards the parties' reasonable expenses in presenting or defending the proceeding but should not amount to a complete indemnity."
>
> **25** In my view a reasonable interpretation of this language suggests that a "substantial contribution" not amounting to a complete indemnity must initially have been intended to mean more than fifty and less than one hundred per cent of a lawyer's reasonable bill for the services involved. A range for party and party costs between two-thirds and three-quarters of solicitor and client costs, objectively determined, might have seemed reasonable. There has been considerable slippage since 1989 because of escalating legal fees, and costs awards representing a much lower proportion of legal fees actually paid appear to have become standard and accepted practice in cases not involving misconduct or other special circumstances.

[36] But the award of costs is discretionary. While a substantial contribution is called for, I find the appropriate costs award in all the circumstances which will do justice between the parties is properly set at $8,000 payable forthwith.

[37] If the father fails to pay the costs as required, this amount will be collectable and enforceable through the Maintenance Enforcement Program as costs attributable to child support.

[38] Counsel for the mother will draw the costs order.

Daley, J.