

IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: Casey v. Grove, 2005 NSSC 312

Date: 20051104

Docket: 1201-35828

SFH D 12182

Registry: Halifax

Between:

Joseph Charles Casey

Petitioner

v.

Deborah Jean Grove

Respondent

Judge:

The Honourable Justice Deborah Gass

Heard:

September 22, 2005, in Halifax, Nova Scotia

Counsel:

Patrick Casey, for the Petitioner
R. Ritchie Wheeler, for the Respondent for written
submissions on costs only

[1] This decision concerns an application for costs brought by the petitioner/applicant, Joseph Charles Casey, following a hearing on an application to vary a consent variation order, which was dated August 1, 2002. The hearing was with respect to the provisions relating to child support for the child, Karen Elizabeth Casey, born April 13, 1983. The issue was the determination of each parent's contribution towards the support of a child who is over the age of 19 and enrolled in university.

[2] The matter was scheduled for a one day hearing. The hearing was actually concluded in just over a half day. The court reserved and rendered an oral decision the following day.

[3] The petitioner, Mr. Casey, was represented and the respondent, Ms. Grove, represented herself.

[4] All direct evidence was to be by way of affidavits and the filing times were not strictly adhered to. It is accepted that the information contained in the petitioner's affidavits was extensive but nonetheless the respondent's affidavits and financial information were provided only one week prior to the hearing. As a

result, the petitioner was permitted to lead further direct evidence in response to the affidavit because there was no opportunity to file a reply affidavit. As well, the petitioner was successful in a preliminary motion to strike certain portions of the affidavit evidence of the respondent.

[5] The court concluded that there was a change in circumstances and ordered the respondent to contribute towards the child's living and educational expenses.

THE LAW:

[6] Civil Procedure Rule 63 governs the awarding of costs and the fixing of costs is addressed in Rule 63.04:

(1) Subject to rules 63.06 and 63.10, unless the court otherwise orders, the costs between parties shall be fixed by the court in accordance with the Tariffs and, in such cases, the "amount involved" shall be determined, for the purpose of the Tariffs, by the court.

(2) In fixing costs, the court may also consider

(a) the amount claimed;

(b) the apportionment of liability;

(c) the conduct of any party which tended to shorten or unnecessarily lengthen the duration of the proceeding;

(d) the manner in which the proceeding was conducted;

(e) any step in the proceeding which was improper, vexatious, prolix or unnecessary;

(f) any step in the proceeding which was taken through over-caution, negligence or mistake;

(g) the neglect or refusal of any party to make an admission which should have been made;

(h) whether or not two or more defendants or respondents should be allowed more than one set of costs, where they have defended the proceeding by different solicitors, or where, although they defended by the same solicitor, they separated unnecessarily in their defence;

(i) whether two or more plaintiffs, represented by the same solicitor, initiated separate actions unnecessarily; and

(j) any other matter relevant to the question of costs.

[7] Costs are in the discretion of the court. The list of considerations in exercising one's discretion to award costs is not exhaustive, and may include

issues such as the success of the parties, the conduct of the parties prior to the commencement of litigation, the conduct of the parties during litigation, the income and assets of each party, the respective means to bear their own costs and the effect of an award on the ability of a party to meet obligations imposed by the judgment (**Andrews v. Andrews** (1980) 20 R.F.L. (2d) 348 Ontario Court of Appeal.

[8] In **Wilson v. Wilson** (1978), 21 O.R. (2d) 703, Griffiths J. at page 707 states:

Notwithstanding that in matrimonial causes there is justification for the departure from the general rule that the costs should follow the cause, it is my view that there is still an obligation on the court under Rule 810 to exercise its discretion in each case and determine whether costs should be awarded in accordance with the particular circumstances of that case. It is wrong in my respectful opinion, to adopt as a settled practice that no costs should be awarded in matrimonial matters unless there were unusual circumstances dictating otherwise. Such a practice ignores the responsibilities of the court to exercise its discretion in each case.

[9] In **N.O. v. B.E.** [2005] N.S.J. No. 84. (N.S.S.C. F.D.) Williams, J. awarded costs of \$750.00 where Williams, J. concluded that the respondent's actions and positions prolonged the proceeding.

[10] In **Paquet v. Clarke**, 2005 N.S.S.F. 4, Dellapinna, J. addressed the question of costs and in doing so he referred to the Court of Appeal decision in **Kaye v. Campbell**, (1984) 65 N.S.R. (2d) at 173:

There must be a good reason not to award costs to a successful party in a matrimonial cause but such reason must be based on principle.

[11] He also stated at para. 4:

The costs of any party are in the discretion of the court. As stated by Hallett, J. (As he then was) in **Bennett v. Bennett** (1981), 45 N.S.R. (2d) 683 (T.D.):

It is normal practice that a successful party is entitled to costs and should not be deprived of the costs except for a very good reason (at paragraph 9).

and at paragraph 7:

In **Kaye v. Campbell (supra)** it was held that the impecuniosity of the parties is also a factor that can be considered.

[12] This is a situation where Mr. Casey, the petitioner, was successful in his claim. The court is also mindful of the fact that the respondent earns approximately \$5,000.00 a year more than the petitioner. While they are in

roughly similar financial circumstances, Ms. Grove now has the ongoing obligation to contribute towards the expenses of her daughter.

[13] Taking into consideration all of the facts and circumstances surrounding this proceeding, the length of the hearing, the late filing of the information, and applying the philosophy of party and party cost as set out by Justice Goodfellow in **French v. French** [1994] N.S.J. No. 502 at paragraph 7

Costs as between party and party are not imposed as a punishment on the person that must pay them. Party and party costs are given at the discretion of the court as a partial indemnity of the person entitled to them.

[14] I am ordering the respondent to pay to the petitioner costs in the amount of \$750.00 to be paid no later than March 31, 2006.

J.