SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION
Citation: *LeBlanc v. LeBlanc*, 2015 NSSC 334

Date: 2015-11-19
Docket: *Halifax* No. 1201-67745
Registry: Halifax

Between:

Craig David LeBlanc

Petitioner

v.

Jennifer Amy LeBlanc

Respondent

Judge:	The Honourable Justice C. LouAnn Chiasson
Submissions Received:	August 24 & September 1, 2015, in Halifax, Nova Scotia
Counsel:	Christine Doucet for the Petitioner Jennifer Reid for the Respondent

By the Court:

[1] On August 13, 2015, I rendered an oral decision in this proceeding. The divorce trial was heard over a three day period. The primary issue at the time of the trial was the issue of parenting of the parties' two children. At the outset of the trial, the parties advised that they had resolved the issues related to the division of matrimonial property by consent. The issues of child support included claims related to: retroactive and prospective child support, as well as section 7 expenses. The child support issues were to be determined as an ancillary issue once the custodial arrangement had been established by the court.

[2] At the conclusion of the decision, counsel for Mr. LeBlanc requested to be heard on costs. I invited written submissions on the costs issue and have received submissions from both counsel.

TRIAL POSITION OF MR. LEBLANC

[3] Mr. LeBlanc's position at the commencement of the trial was that he have primary care of the children. He further requested certain restrictions on Ms. LeBlanc's parenting time, including restrictions related to her new partner and his contact with the children.

TRIAL POSITION OF MS. LEBLANC

[4] Ms. LeBlanc's position at the commencement of the trial was that the children should remain in a shared parenting arrangement as set out in the Interim Order of Justice Cormier. Ms. LeBlanc was entirely successful at the interim hearing and was awarded costs of $750 payable by Mr. LeBlanc. The parenting schedule meant that the children were in the care of Ms. LeBlanc every second weekend and every Tuesday and Wednesday overnight.

DECISION

[5] A shared parenting arrangement was ordered by the court based on Mr. LeBlanc's work schedule of four days on/ four days off. The parenting schedule pursuant to the Interim Order was adjusted such that Mr. LeBlanc has care of the children during his four days off and Ms. LeBlanc has care of the children during Mr. LeBlanc's four days of work. No restrictions were placed on Ms. LeBlanc nor her partner during her parenting time.

[6] The retroactive claim for child support made by Mr. LeBlanc was dismissed. Prospective child support was based on the set off calculation of support. Section 7 expenses which are agreed upon in advance are to be shared proportional to incomes.

COSTS SUBMISSION OF MR. LEBLANC

[7] Counsel for Mr. LeBlanc asserts that Mr. LeBlanc made an informal offer to settle on January 22, 2015, which proposed a shared parenting arrangement based on a four day on/ four day off schedule (to accord with Mr. LeBlanc's work schedule). Counsel further asserts that there was no response from the Respondent to this informal settlement proposal until April 27, 2015, when she forwarded a counter proposal. The counter proposal of the Respondent mirrored her position at the time of trial.

[8] Counsel for Mr. LeBlanc also indicated that he repeated his offer of a four day on/ four day off schedule during the trial. It is unknown as to the specific timing of this alleged offer over the three days of trial. Counsel for the Respondent, however, stated at p. 6 of her submissions that: "We also must emphasize that this proposal was not reiterated prior to **or during the trial** where Mr. LeBlanc sought primary care and was no longer open to a shared parenting arrangement." (emphasis added) Further, at page 8 of the submission of Ms. LeBlanc, counsel stated: "**Ms. LeBlanc** made a settlement offer immediately prior to the trial that is largely reflected in the result." Not only is the evidence of counsel contradictory on the issue of offers immediately prior or during trial, it is also unknown as to whether Mr. LeBlanc continued to seek the restrictions on Ms. LeBlanc's parenting time sought during the trial.

[9] At page 1 of the Applicant's submission on costs, counsel for Mr. LeBlanc stated: "In the alternative, in closing submissions, he sought a four day on, four day off shared parenting schedule that mirrored his shifts as a paramedic." The difficulty with this assertion is that it was not an alternative position offered by Mr. LeBlanc. Rather this was in response to a question posed by the court as to what schedule would be sought by Mr. LeBlanc should the court be prepared to accept a shared parenting arrangement as appropriate.

[10] Mr. LeBlanc's counsel requests costs of $35,169.14 based upon his informal offer made in January 22, 2015. This figure is premised upon 80% of Mr. LeBlanc's legal fees (of $36,605.50) plus disbursements and HST.

COSTS SUBMISSION OF MS. LEBLANC

[11] Counsel for Ms. LeBlanc is also seeking costs payable by Mr. LeBlanc. Ms. LeBlanc asserts that she was the successful party and the only difference between her position and the court's decision was the specific parenting schedule. Ms. LeBlanc is seeking $12,000 in costs.

[12] Ms. LeBlanc's counsel indicated that the submissions of Mr. LeBlanc on costs ignored the fact that there had been a formal written offer. His formal written offer was made on April 20, 2015 and requested primary care of the children (consistent with his position at trial). The counter proposal of Ms. LeBlanc (dated April 22, 2015) was therefore in response to the formal settlement offer of April 20, 2015, and was not the response to the informal offer of January 22, 2015.

LAW & DISCUSSION

[13] Orkin's Law of Costs (1968), in the following paragraphs. At p. 12:

> "A successful litigant has by law no right to costs. Although he may have a reasonable expectation of receiving them, this is subject to the court's absolute and unfettered discretion to award or withhold costs. This discretion, which is absolute, is a judicial one to be exercised according to the circumstances of each particular case and based upon material before the court. It is the discretion of the trial judge and its exercise is not to be referred to delegated; nor can it be fettered by any consent of the parties, even though great weight should be given to such consent; nor should it be interfered with on appeal."

[14] At p. 16 on Orkin's Law of Costs, it states:

> "As a rule costs should follow the result. That is to say, it is well settled that where a plaintiff is wholly successful in his action and there is no misconduct on his part, he is entitled to costs on the ground that there is no material on which a court can exercise a discretion to deprive him of costs."

[15] As noted by MacDonald J. in *J.E.S. v. A.J. M.*, 2008 NSSC 366 at paragraph 2:

> "Costs are in the discretion of the Court but they generally are awarded to the successful party. The awarding of costs in family proceedings is complicated because it is often difficult to determine who is the successful party. In these cases there is often divided success. In addition, many of the issues arising in family proceedings are not "capable of being quantified in money". (*Kennedy-Dowell v. Dowell,* 2002 NSSF 50 (CanLII However a party should not be

> deprived of his or her costs in a case when a determination about "success" can be made except for "a very good reason". (*Bennett v. Bennett* (1981), 49 N.S.R. (2d) 683 (NSTD).

[16] Civil Procedure Rule 77 provides three different approaches to costs awards:

> (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.
>
> (2) Costs may be ordered, the amount of costs may be assessed, and counsel's fees and disbursements may be charged, in accordance with this Rule.

[17] The discretionary nature of the relief in any award of costs is expressly preserved in Civil Procedure Rule 77.02 which states that a judge may "make any order about costs as the Judge is satisfied will do justice between the parties".

[18] The Nova Scotia Court of Appeal dealt with the issue of costs in *Armoyan v. Armoyan*, 2013 NSCA 136. The court held at paragraph 13:

> "By Rule 77.07(1), the court has discretion to raise or lower the tariff costs, applying factors such as those listed in Rule 77.07(2). These factors include an unaccepted written settlement offer, **whether or not the offer was made formally under Rule 10**, and the parties' conduct that affected the speed or expense of the proceeding." (emphasis added)

[19] The starting point in any consideration of costs is the tariff. Where the primary issue relates to the issues of parenting, the typical "rule of thumb" approach utilizes the sum of $20,000 per day of trial in determining the amount involved. This rule of thumb has been referenced in a number of cases: *Jachimowicz v. Jachimowicz* 2007 NSSC 303 (NSSC), *Fermin v. Yang*, 2009 NSSC 222, *Gagnon v. Gagnon*, 2012 NSSC 137 (NSSC). Pursuant to tariff A, costs in this matter would be $7,250 plus $2,000 per day of trial for a total of $13,250 (plus disbursements).

[20] Counsel for the Applicant, however, suggest that a lump sum award of costs is more appropriate in this matter and have requested the sum of $35,169.14 as a substantial contribution towards Mr. LeBlanc's costs.

[21] Mr. LeBlanc bases his claim for an entitlement to costs on his informal offer of January 22, 2015. This is premised upon the offer of January 22, 2015, being clear, unequivocal and open for acceptance by Ms. LeBlanc at any time. It would appear as though the offer relating to the parenting schedule was clear, unequivocal and was substantially in accordance with the decision reached. As directed in *Armoyan*, supra, the court is entitled to consider informal offers to settle in addition to formal written settlement offers.

[22] Informal offers to settle are frequent in family law. To include informal offers to settle in a consideration of costs reinforces the principle that the parties are encouraged to reach their own agreement without resorting to litigation. The principle of reaching a resolution between the parties themselves is exceedingly important in the family law context where litigation should be a matter of last resort.

[23] Having determined that there was an informal offer to settle made by one party, however, is not the end of the inquiry. One must examine the circumstances subsequent to the informal offer. It is clear that written formal offers to settle are subject to Civil Procedure Rule 10.06. Revocation of a formal offer to settle must be in writing and delivered to the other party.

[24] Are the requirements of written revocation and delivery necessary when dealing with informal offers to settle? In this case there is no evidence that Mr. LeBlanc in writing delivered a revocation of his informal offer to settle between January 22, 2015 and his formal written offer of April 20, 2015, as contemplated in Civil Procedure Rule 10.06. This does not mean, however that his offer remained open for acceptance during the entirety of that period.

[25] On the facts of the present case, it is clear that Mr. LeBlanc's informal offer to settle of January 2015 was not open for acceptance for the entire period from January 22, 2015 up to and including April 20, 2015. The incidents and the conduct of the parties shortly after the informal offer was made clearly indicate that the offer of shared parenting was not open for Ms. LeBlanc to accept. Shortly after the informal offer, Ms. LeBlanc did not have any parenting time with one of the children for an extended period. I will outline the circumstances which give rise to the implicit revocation of Mr. LeBlanc's informal offer.

[26] On February 5, 2015 an incident occurred whereby Mr. LeBlanc alleged inappropriate and threatening behaviour on the part of Ms. LeBlanc's partner. This allegation resulted in Mr. LeBlanc becoming suspicious of Ms. LeBlanc's partner

and he began to make inquiries into the background of Ms. LeBlanc's partner. A further incident was alleged to have occurred on the weekend of February 14, 2015, again involving allegations of inappropriate conduct on the part of Ms. LeBlanc's partner.

[27] These incidents culminated in a cessation of contact between Ms. LeBlanc and one of the children for a period of time commencing in March 2015. It also resulted in both children entering into further counselling. Although there is no indication that Mr. LeBlanc expressly withdrew the informal offer, the circumstances clearly indicate that the offer had been withdrawn by implication. Had Ms. LeBlanc attempted to accept the offer of shared parenting following the incidents of February, 2015, (as noted herein) there is little doubt that Mr. LeBlanc would have disputed the finality of the settlement.

[28] Family situations are fluid and the ground is often shifting. One of the difficulties in adjudicating family proceedings is that the court is tasked with an examination of the shifting realities of the family at a certain point in time. The changing dynamics of this family resulted in the informal offer of Mr. LeBlanc (for shared parenting) being revoked. Mr. LeBlanc could not and would not have accepted a shared parenting arrangement following the incidents of February 2015.

[29] Further, even if the informal offer of January 22, 2015 had not been revoked by implication, the informal offer was revoked by the formal written offer of April 20, 2015, with Mr. LeBlanc requesting primary care of the children. Even if I were to accept that there was an informal offer made open for acceptance until revoked by the formal offer of April 20, 2015, the legal fees during that period of time were $11,629.25 (exclusive of disbursements and HST). The majority of the Applicant's legal costs were incurred subsequent to his formal offer of April 20, 2015 ($24,976.25 exclusive of disbursements and HST). The formal offer to settle of April 20, 2015, provided that Mr. LeBlanc would have primary care of the children. The request of Mr. LeBlanc for primary care was rejected by the court. Mr. LeBlanc is not entitled to costs of these proceedings.

[30] Ms. LeBlanc was successful in confirming the shared parenting arrangement. Further, the court did not impose any conditions on Ms. LeBlanc's parenting time as requested by Mr. LeBlanc. She did not, however, succeed in her schedule of parenting time. In taking all factors into account, I am prepared to award $2,000 in costs payable by Mr. LeBlanc to Ms. LeBlanc.

Chiasson, J.