**SUPREME COURT OF NOVA SCOTIA**
**(FAMILY DIVISION)**

**Citation:** *Maxwell v. Garner*, 2015 NSSC 337

**Date:** 20151124
**Docket:** 1201-065026
**Registry:** Halifax

**Between:**

Scott Alexander Maxwell

Applicant

v.

Jody Cyretha Garner

Respondent

**Judge:** The Honourable Justice Beryl A. MacDonald

**Heard:** Written Submission by counsel

**Counsel:** Angela A. Walker, counsel for the Applicant;
Julia E. Cornish, Q. C. for the Respondent

**By the Court:**

[1] On August 7, 2015 I delivered an oral decision in a variation proceeding between these parties. The only issue was the school their child was to attend commencing September 2015. My decision supported the Father's choice. He now requests a cost award.

[2] I have frequently commented upon the factors the court is to consider when asked to award party and party costs. Most recently I did so in *Smith v Smith* 2015 NSSC 73. I do not intend to repeat that analysis.

[3] The Father was the successful party but the Mother argues there are principled reasons why each party should bear his and her own costs. Those reasons, adapted from such cases as *Nemorin v Foote* 2009 NSSC 23, *Goodrick v Goodrick* 2009 NSSC 119, *Kaye v Campbell* (1984) 65 N.S.R. (2d) 173 (N.S.C.A.), *Connolly v Connolly* 2005 NSSC 203 and *Lockerby v Lockerby* 2011 NSSC 103, are:

- She raised a genuine issue for trial
- She presented a reasonable position motivated by the child's best interest
- She explored settlement offers in good faith
- To award costs would deter parents from pursuing matters that are relevant to children's best interests

- She has significant access costs and a cost award would impose financial hardship

**Background**

[4] On October 9, 2008 the parties signed a separation agreement providing that they would have joint custody of their child in a week on/week off parenting plan. They were to share what are referred to as section 7 expenses pursuant to the Federal Child Support Guidelines without either party paying the other any table guideline child support. They agreed to this arrangement even though at the time the Mother's gross annual income was $50,000.00 and the Father's was $38,000.00.

[5] When the parties divorced the Corollary Relief Order dated March 3, 2011 attached the separation agreement and the noted incomes were not substantially different from those disclosed in 2008.

[6] Although the exact date was never disclosed, the parties agreed, subsequent to signing the separation agreement, to change parenting from a week on/week off arrangement to a plan that would have the child and each parent's home on a two week rotating schedule.

[7] At some point the Father moved to Dutch Settlement from Enfield where both parties had been living. Later the Mother moved to Musquodoboit Harbor where her husband had his home. This resulted in a conversation about where the child should attend school. The Father wanted the child to attend the Dutch Settlement School. Although initially the Mother did not agree she relented because she says the issue was becoming too contentious. She alleges the Father knew her consent was based upon an understanding the child's needs could be met in that school. The Father has his own interpretation about what happened at the time and neither of the parents' assertions were tested by cross examination.

[8] The change in the child's school resulted in the child being parented by the Father during the school week and by the Mother three of every four weekends, during the school March break and, she alleges, most of the summer and in-service days. While there may be contention about the reasons for a further change, the parties eventually reverted to the alternating two week parenting arrangement they had previously implemented. Shortly after this occurred the Father, who suggests he did not consent to the imposition of this arrangement, filed his application on June 18, 2014 requesting a variation providing him primary care and table guideline child support.

[9] At this time the Mother had also started to explore opportunities to have the child attend a school near her residence. A review of the events that occurred from the filing of the Father's application until the matter came before me leave little doubt that the distance between the parents' residences posed significant problems in respect to the choice of school if the shared parenting arrangement was to continue. Nevertheless, when the matter came before me the parents indicated I was only to adjudicate upon the choice of school. The parents had decided the shared parenting arrangement was in their son's best interest and they would make the necessary transportation adjustments to ensure the child's attendance at the school I chose as appropriate. This result was not achieved without considerable court time in respect to settlement conferences, pre-hearing conferences and organizational pre-trials. All of these procedures increased legal costs because, although the trial was focused upon a seemingly narrow issue, the proceeding originally had a much larger context. The Father's total legal bill including disbursements and HST are $32,988.00. He requests a cost award of 80% of that total which is $26,390.00.

[10] No submissions have been made to suggest the account submitted by the Father's counsel is exorbitant or that it is outside the usual hourly rate charged by counsel with similar seniority and skill. However, although the actual cost of legal

representation may be considered, this is only one factor among many to be reviewed.

**Costs as a Deterrent**

[11] I will start with an exploration of this argument because, if taken to its logical conclusion, it would generally result in a denial of costs to a successful party when the issue is custody, incidents of custody, the appropriate parenting plan or child support. Costs might then only be awarded if the unsuccessful party had no reasonable likelihood of success at trial or if the successful or unsuccessful party engaged in egregious behavior. This is not the law in respect to costs as I understand it and if the decisions I have mentioned above stand for that proposition then I reject that conclusion.

[12] The potential for an adverse cost award is a reality that is expected to encourage parents to be more objective about their child's needs. They are to separate their own needs from those of the child. Sometimes this may require a parent to recognize the child can be adequately parented by the other parent and his or her desire for, as an example shared parenting, is not practical or desirable for the child. Often it is in the child's best interest for parents not to litigate. Anger,

pride, a desire to win, jealousy, resentment, or dislike of the other parent may prevent a parent from objectively viewing the child's situation.

[13] When one parent's plan for a child is as appropriate as the other parent's plan, and neither will relent, costs may be the reality check that will cause one or the other to accede. If not, why should a parent with an adequate plan who is successful at trial not receive a cost award? Why should every parent in such circumstances, who cannot agree with the other parent about parenting issues, bring his or her issue into a court and expect to be relieved from an obligation to compensate the successful parent? You take your chance, you pay the price.

[14] Courts are often required to adjudicate between two reasonable plans, either of which may have suited the child's best interest. Judges then have to struggle to find a reason to prefer one over another because someone has to decide. Not to award costs may only encourage more parents to fail to make decisions that they should make for their children.

[15] As is frequently stated a successful party is generally entitled to a cost award. A decision not to award costs must be for a very good reason and be based on principle. A review of cost awards in Nova Scotia in cases involving custody and parenting would not suggest any regular denial of costs because of the

deterrent effect. Judges who have used this as a reason to deny costs may have made an assumption about the motivation of parents in general or possibly about the parent before them. That is not clear from the decisions quoted above and I am not prepared to share an assumption that potential cost awards will prevent parents from commencing or responding to court applications involving their children.

[16] I do acknowledge that a parent may "give into" the other parent when that parent is a perpetrator of domestic violence, has significantly greater financial resources, or has a propensity to negatively influence the children against the parent. The threat of a cost award may impede such a parent from pursuing court remedies. However such a parent may likely become the "successful party" if he or she proceeded to trial. If the parent is unsuccessful, evidence of these circumstances may suggest there should be no cost award or a reduced award even though that parent was unable to convince a court he or she had a parenting plan that was in the child's best interest.

**[17]** In this case I am not prepared to deny a cost award because of the deterrent effect.

**Genuine Issue, Reasonable Position and Good Faith**

[18] It is rare for a parenting dispute to involve issues that are not "genuine issues for trial". Most parents attempt to bargain in good faith and few put forward unreasonable positions. Most parents genuinely believe what they want is in their child's best interest. If a cost award is only to be granted when these factors are not present there would be few cost awards to successful parents after a hearing involving custody, incidents of custody, access, parenting plans and child support.

[19] In this case this child could have attended either school proposed by his parents. They could not agree. This created a problem that raised a genuine issue for trial.

[20] Each parent's plan for the child's care was reasonable. Although each parent's choice of school may have been motivated by the proximity of the school to his or her residence both recognized, by seeking a court ordered solution, they would be required to accept whatever transportation arrangement I ordered if they could not resolve this issue once my decision was known.

[21] These parties were able to resolve many of their issues by consent and I detect no "bad faith" bargaining in respect to the school issue.

I am not prepared to deny costs because the Mother raised a genuine issue for trial, believed she was acting in the child's best interest and bargained in good faith.

**Financial Hardship, Best Interest of the Child**

[22] Financial Hardship has been recognized as a reason to reduce or deny costs. It has a direct relationship to the "best interest of the child" argument. The two may be one. Financial hardship of a parent who will have a continuing relationship with a child can limit the resources available to maintain an appropriate residence, provide nutritious meals, exercise access and pay child support.

[23] The Mother alleges she has significant access costs and, even without those, that a cost award would impose financial hardship upon her.

[24] In 2012/2013 the Mother's income changed. The reason for this change is unclear because there was no testing of the evidence provided in the parents' affidavits. What is known is that by 2013 the Mother's income had changed from employment earning her $60,000.00 a year to employment earning her $24,600.00 per year. The evidence suggests this change may have been voluntary because she left previous employment to pursue an entrepreneurial endeavor which was unsuccessful. What little evidence there is about her economic circumstances suggests the contract work she is now pursuing provides her with flexibility in

respect to her work hours but does not provide her with income approaching what she earned prior to 2013.

[25] The Mother is living with her husband who is employed and this reduces her living costs. She does not pay or receive table guideline child support but that is as a result of decisions she made in the course of this proceeding. She does contribute to section 7 expenses but I have no calculation to confirm the amount for which she is responsible. I have no calculation about the monthly gas expenditure in respect to the transportation required to continue the shared parenting arrangement. In short I have nothing upon which to objectively conclude financial hardship. She has limited income but perhaps she can earn more? Perhaps she can obtain financing? I am not prepared to reject a cost request because of alleged financial hardship.

**Effect of Exchanged Settlement Offers**

[26] I have reviewed information provided by both parties about exchanged settlement offers. None of the offers I have reviewed would have changed the decision I have made.

**Quantum of Award**

[27] The Father suggests the tariff of costs and fees does not provide a significant contribution toward his legal costs.

[28] Given the difficulty in determining the "amount involved" in family matters it is recognized that, if the tariff is used, the court is to apply the "rule of thumb" approach and consider the "amount involved" to be $20,000.00 per day. The Father argues this approach is not appropriate because the proceeding originally had a much larger context that must be taken into account when awarding costs. I disagree. The parties settled all issues outstanding between them except for the choice of school. There was no "successful" party in respect to settled issues and I consider it inappropriate to include legal costs that may be assigned to that part of the proceeding. The tariff is often considered to include compensation for procedures that lead to trial as well as the trial itself. It provides a proxy means by which to determine costs associated with the issue that went to trial.

[29] There were 1 ½ days of trial. The parties did return for an additional 1/1/2 hours to provide submissions and for approximately 40 minutes to hear my decision. This suggests something closer to 2 days placing the amount involved between $30,000.00 and $40,000.00. I consider Scale 1, ($4,688.00), the

appropriate scale to use given this dollar amount involved. The tariff suggests an additional $2,000.00 be added for each day of trial. This provides an additional $3,000.00.

[30] The cost award is $7,688.00 inclusive of disbursements.

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Beryl A. MacDonald, J.