IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: MacGillivary v. Ross, 2008 NSSC 376

Date: 20081209
Docket: 52187
Registry: Sydney, Nova Scotia

Between:

Rita MacGillivary

Applicant

v.

Brent Ross

Respondent

ADDENDUM ON COSTS

Judge:	The Honourable Justice Theresa M. Forgeron
Heard:	March 5th, March 31st and September 24, 2008
Oral Decision:	November 14, 2008
Written Decision:	November 18, 2008
Addendem On Costs:	December 9, 2008
Counsel:	Ms. Elaine Gibney-Conohan, counsel for Ms. MacGillivary Mr. Duncan MacEachern, counsel for Mr. Ross

By the Court:

[1] Ms. MacGillivary seeks costs as the successful litigant. Mr. Ross disputes the payment of costs because of his financial limitations and because, he submits, costs are rarely imposed in variation maintenance applications.

[2] Rule 70.03 (4) states that when a matter of procedure is not governed by rule 70, the other rules will apply with any necessary modification. Rule 57.27 states that costs in a matrimonial cause will be recovered in the same way as in an ordinary proceeding. Rule 63 provides the general framework for the calculation of costs. Costs are ordinarily to follow the event.

[3] I do not accept the law as set out in **Nichols v. Horsnell** [1986] N.S.J. No. 522 (Co. Ct.) as representative of the law of costs in the family division. Further, the case of **L.K. S. V. D.M.C.T.** [2007] N.S.J. No. 323 (C.A.) dealt with the issue of security for costs and not costs following the event.

[4] In **Bennett v. Bennett** (1981), 45 N.S.R. 683 (2d) (T.D.) Hallett, J. as he then was, stated that ordinarily a successful party is entitled to costs and should not be deprived of costs except for a very good reason. Such reasons could include

misconduct, miscarriage in the procedure, oppressive and vexatious conduct, or novel questions of law.

[5] The “amount involved” as referenced in rule 63 does not always adjust well to family proceedings: **Voiculescu v. Voiculescu** 2003, CarswellNS 564 (S.C.) and **Urquhart v. Urquhart** (1998), 169 N.S.R. (2d) 134 (S.C.)

[6] In **MacLean v. MacLean** (2002), 200 N.S.R. (2d) 34 (S.C.) Goodfellow, J stated that costs were appropriate as a sanction where there are disclosure issues.

[7] In **Grant v. Grant** (2002), 200 N.S.R. (2d) 173 (S.C.) Williams, J. confirmed that financial ability was a factor, but not a defence to the payment of costs.

[8] I have reviewed the applicable rules, case authorities, the submissions of the parties, and the evidence. I award costs of $4,000 for the following reasons:

> a) Mr. Ross did not disclose all financial materials which were required of him, and in particular he did not disclose his 2007 Income Tax Return;

b) Mr. Ross has a modest income of $24,000 and will experience difficulty if costs are set too high;

c) Mr. Ross was not successful on any of the issues brought before the court;

d) The application was heard over 3 days. The trial was unnecessarily lengthened because of disclosure issues and because of Mr. Ross' unsuccessful attempt to raise health issues to defeat his child support obligation;

e) Ms. MacGillivary was not completely successful. Although income was imputed, it was imputed to $24,000 and not the amount sought by Ms. MacGillivary either at trial or in her settlement proposal of February 28, 2008. Further the retroactive amount which was awarded at trial was less than that suggested in the settlement offer of February 28, 2008; and

f) Ms. MacGillivary has limited resources and given the results should receive costs.

[9] The award of costs should be included within the body of the variation order which Ms. Gibney-Conohan is to prepare and forward to Mr. MacEachern for his consent as to form. If there are any drafting concerns, counsel should immediately contact the court to arrange for a brief and expedited conference to determine the form of the order.

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Forgeron J.