SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: Arab v. Izsak, 2009 NSSC 275

Date: [20090915]
Docket: SFHDVRO-064432

Registry: Halifax

Between:

Martha Angela Arab

Applicant

v.

Tracy Edward Izsak

Respondent

Judge:	The Honourable Justice Beryl A. MacDonald
Heard:	July 17, 2009, in Halifax, Nova Scotia
Written Decision On Costs:	September 15, 2009
Counsel:	Janice Beaton, counsel for the Applicant Peter D. Planetta, counsel for the Respondent

By the Court:

[1] This request for a cost award arises from an application brought by Ms. Arab in which she was seeking a variation to the parenting arrangement contained in a consent parenting agreement entered into between herself and Mr. Izsak. She asked in her affidavit, sworn May 29, 2009, that Mr. Izsaks' access with the children be "supervised or suspended pending the outcome of a psychiatric examination and counselling of the Respondent" whether as "ordered by the court, or until the Respondent obtains same of his own volition." She requested this relief because she was concerned about the children's physical and psychological safety while in his care. I granted her request for supervised access after a hearing that lasted the better part of one day.

[2] At the hearing, Mr. Izsak did not deny that at the time the parties separated there was a parental capacity assessment report or a custody access report, as it may be called in Ontario, which informed the parties in reaching their consent arrangement. Although Mr. Izsak did not agree with all of the conclusions of the assessor, nevertheless he could not deny that the assessor said in his report the following when speaking about Mr. Izsak:

> "..the overall data from this assessment indicate that broader personality difficulties, associated with emotional constriction, emotional dependency, concrete and rigid thinking, poor insight into himself, a weak ability to manage stress, and a chronic social discomfort if not withdrawal, better explain the father's functioning at this time than would the imposition of a specific diagnostic label."

[3] The label discussed was "paranoid personality disorder". The assessor found it difficult to impute parenting deficiencies directly to Mr. Izsak because of the question relating to his mental health and social anxieties. He did remark that his chronic anxiety and perhaps depression would not bode well for the psychological health of a child under his care. The assessor did recommend that Mr. Izsak seek out counselling to attempt to overcome the identified concerns. Mr. Izsak did not accept the assessor's analysis. He did not seek out counselling. Given that the assessor found Mr. Izsak to lack insight, this may not be unexpected.

[4] Notwithstanding the assessor's concerns, they were not of such significance in their manifestations in the father's behaviour at the time of the assessment so as to lead to a suggestion that his parenting of the children required supervision. Mr. Izak's recent behaviours suggest a different conclusion. I decided his access with the children must be supervised and that he must participate in a mental health assessment. To reach this result, Ms. Arab has incurred significant legal expense. I do not intend any taxation of her solicitor's account because the amount of that account is only one factor to be considered in awarding costs.

[5] I have reviewed the Civil Procedure Rules and several decisions commenting on costs, including *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.).

[6] Several principles emerge from the Rules and the case law.

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 a 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.
>
> 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 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".
>
> 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 in order to determine the "amount involved" .
>
> 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.

[7] The issues involved in this proceeding related to the parenting plan and there is therefore no "amount involved". Application of the tariff using an amount involved of $20,000 suggests: Scale 1- $3,000; Scale 2 (basic) $4,000; Scale 3: $5,000. Counsel for Ms. Arab requests costs at the basic scale and $500.00 towards disbursements.

[8] Mr. Izsak resists a cost award. His suggestion that Ms. Arab was not successful, overlooked the fact that her request was for either supervision or suspension. Her request was not limited to suspension. Mr. Izsak does have limited income, the bulk of which is derived from spousal support paid by Ms. Arab. However, he did receive a significant sum upon the division of their assets

and I am satisfied he does have ability to pay a cost award. He has failed to take advice given to him by professionals. He has failed to appreciate how his behaviors have, understandably, caused others to fear for their safety. There appears to be nothing “normal” about his behavior. A trial was necessary and I find no principled reason upon which to base a denial of costs.

[9] Costs are awarded to Ms. Arab in the amount of $4,500.00.

Beryl MacDonald, J.