

IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: Urquhart v. LeBlanc, 2009 NSSC 324

Date: 2009 11 03

Docket: 1201-57505 (SFHD-22893)

Registry: Halifax

Between:

Lena Urquhart (LeBlanc)

Applicant

v.

Glen LeBlanc

Respondent

Judge:

The Honourable Justice Leslie J. Dellapinna

Heard:

July 13,14,15,16,17, 2009 in Halifax, Nova Scotia

Counsel:

L. Reiersen, Q.C. counsel for Lena Urquhart (LeBlanc)

K. Johnson, counsel for Glen LeBlanc

By the Court:

[1] Ms. Lena Urquhart applied to vary the custody and access provisions of the corollary relief judgement granted subsequent to her divorce from the Respondent, Glen LeBlanc. I heard that application over five days the week of July 13, 2009 after which I provided a written decision released on July 24, 2009. At the conclusion of my decision I said that unless the parties were able to agree I was prepared to hear further submissions on the issue of costs. That is the subject matter of this decision.

[2] I received written submissions from counsel for both parties. Both agree that the Honourable Justice Beryl MacDonald of this Court accurately summarized the law on costs in matrimonial proceedings in her decision *Arab v. Izsac 2009 NSSC 275*. Justice MacDonald referred to a number of other cases on the same issue all of which I have reviewed.

[3] In addition to the five days of trial that resulted from the application, there were also three pre-trial conferences (two by phone) as well as the hearing of an interlocutory application brought by Mr. LeBlanc in which he was successful in obtaining an order requiring a custody assessment. The parties also agreed to take part in a settlement conference but regrettably were unsuccessful in their negotiation efforts.

[4] As statement by MacDonald J. in *Arab (supra)* costs are in the discretion of the Court but costs are generally awarded to the successful party and are only denied for good reason.

[5] Although not entirely successful in his application before the Court Mr. LeBlanc was by far the more successful of the two parties and clearly was successful on the key issue which was whether the children's primary residence could be moved to Cape Breton.

[6] To the extend that Ms. Urquhart was successful that degree of success is not sufficient in my view for her to escape all liability for costs.

[7] I'm satisfied that Mr. LeBlanc is entitled to costs. The only real issue is the amount of those costs.

[8] Civil Procedure Rule 70 governing “Family Proceedings” has no specific rule relating to costs but rule 70.03(4) states:

“Where any matter or practice or procedure is not governed by statute or by this Rule, the other rules and forms relating to civil proceedings shall apply with any necessary modification.”

[9] The general rule for the calculation of costs is found in Civil Procedure Rule 63.04 (1) which says:

“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.”

[10] Rule 63.04(2) lists a number of factors which the court may consider in fixing costs including the amount claimed, the apportionment of liability, the conduct of the parties which tended to shorten or unnecessarily lengthen the proceeding, the manner in which the proceeding was conducted, any step in the proceeding which was improper, vexatious, prolix or unnecessary and any step in the proceeding which was taken through overcaution, negligence or a mistake.

[11] The application of the Tariffs require a dollar amount to be determined. The provisions governing the application of the Tariffs state that the “amount involved” shall be:

(a) where the main issue is in monetary claim which is allowed in whole or in part, an amount determined having regard to

- (i) the amount involved,
- (ii) the complexity of the proceeding, and
- (iii) the importance of the issues;

...

(c) where there is a substantial non-monetary issue involved and whether or not the proceeding is contested, an amount determined having regard to

- (i) the complexity of the proceeding, and

(ii) the importance of the issues.

[12] This case involved a non-monetary issue i.e. the relocation of the children. In *Urquhart v. Urquhart (1998)*, 169 N.S.R. (2d) 134 (S.C.N.S.) Goodfellow J. suggested that in cases such as this when determining “the amount involved” proved difficult or impossible one could turn to a “rule of thumb” by equating each day of trial to the sum of \$15,000.00 in order to determine the amount involved (para. 79). Justice Lynch of this Court in *Jachimowicz v. Jachimowicz (2007)*, 258 N.S.R. (2d) 304 considered it appropriate to raise the daily rate to \$20,000.00 to reflect the increased cost of litigation since the *Urquhart* decision (para. 26). That approach results in a cost figure ranging from \$9,188.00 under Scale 1 up to \$15,313.00 under Scale 3 before considering any other factors.

[13] Rule 63.10A provides:

“Unless the court otherwise orders, a party entitled to costs or a proportion of the party’s costs is entitled on the same basis to that party’s disbursements determined by a taxing officer in according with the applicable provisions of the Tariffs.”

[14] Mr. LeBlanc incurred fees, disbursements and taxes of approximately \$81,000.00 as a result of this application. That includes the cost of the custody assessment report prepared by Ms. Latham. Counsel on his behalf proposed a cost figure of \$60,000.00 because he was almost entirely successful in his application, that the preparation time for the trial was more than would often be the case for a five day trial because of the significant amount of work that went into responding to Ms. LeBlanc’s witnesses’ affidavits prior to trial and because “the length of the trial, as well as pre-trial procedures, was unnecessarily lengthened having to address “concerns” raised by Ms. Urquhart in her initial affidavit, the majority of which were intended only to discredit Mr. LeBlanc as a person and as a parent, and most of which pre-dated the parties’ separation agreement and were entirely irrelevant to the issue of changed circumstances.” The Applicant’s evidence included twenty affidavits including lengthy affidavits from the Applicant herself which in turn included facts relating to circumstances that pre-dated the Corollary Relief Judgment.

[15] On behalf of Ms. Urquhart it was suggested that no costs should be awarded for a number of reasons including that Mr. LeBlanc was not entirely successful,

that in Ms. Urquhart's opinion Mr. LeBlanc was not candid with his evidence, that the cost of Ms. Latham's report included her pursuit of what Ms. Reiersen described as "irrelevant gossip", and because, in the Applicant's view, a cost order would be counter to the interests of the children.

[16] Costs are not intended to fully indemnify a party for the legal fees and disbursements incurred. Rather, they are intended to be a substantial contribution to those expenses.

[17] I accept that Mr. LeBlanc and his counsel were put to more pre-trial preparation than is usually the case in applications of this kind. Mr. LeBlanc and his witnesses had to respond to many affidavits, some of which added little to the outcome of the case and he felt compelled to respond to evidence presented by Ms. Urquhart concerning facts which pre-dated the previous order and were largely irrelevant to the issues before the Court.

[18] I've considered all the arguments put forward by counsel as well as the factors listed in Rule 63.04(2), the complexity of the proceedings and the importance of the issues. I've also taken into account the efforts that were made by both counsel to reduce the number of witnesses that were required for cross-examination purposes. Consequently, I order that Ms. Urquhart pay to Mr. LeBlanc costs in the sum of \$30,000.00. In arriving at that figure I have adopted the Basic (Scale 2) Tariff amount of \$12,250.00 to which I have added a further \$2,000.00 for each day of trial which additional sum is permitted under Tariff A (i.e. a further \$10,000.00) as well as Mr. LeBlanc's disbursements totalling \$8,768.28 which includes the cost of the custody and access assessment report. That results in total costs and disbursements (including H.S.T.) of \$31,018.28 which I have rounded down to \$30,000.00 because of the limited weight which I gave to some of the recommendations contained in the custody assessment report.

[19] I do not accept that a cost award is contrary to the best interest of the children in the circumstances of this case. Given the amount of savings Ms. Urquhart testified that she is able to set aside each month this award will not impede her ability to provide for the children.

[20] The costs payable shall be paid by Ms. Urquhart to Mr. LeBlanc within 30 days of this decision.

J.