

IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Grady v. Grady, 2010 NSSC 144

Date: 20100414

Docket: 1201-060920

Registry: Halifax

Between:

Nicolas Grady

Applicant

and

Daiga Grady

Respondent

Judge: Justice Lawrence I. O’Neil

Heard: October 13 and November 2, 2009, in Halifax, Nova Scotia

Counsel: Terrance Sheppard, for the Applicant
Timothy Gabriel, Q.C., for the Respondent

By the Court:

Introduction

[1] This is a decision on costs following the court’s decision reported as *Grady v. Grady*, [2009] N.S.J. No. 593; 2009 NSSC 364, filed December 10, 2009. The last of the written submissions on the issue of costs was received February 15, 2010.

[2] The Petition for Divorce was filed August 2, 2006. The parties entered a separation agreement dated October 22, 2008. The principal issue at trial was whether the child and spousal support obligations, forming part of the separation agreement, should be incorporated into the Corollary Relief Judgment.

[3] A divorce hearing was held October 13 and November 2, 2009. The court ruled that the support obligations would be incorporated in the Corollary Relief Judgment.

Position of the Parties

[4] Mr. Gabriel, on behalf of Ms. Grady, seeks costs. He argues in particular that costs should be paid by Mr. Grady on a solicitor-client basis. Those costs are set at \$15,993.04 by Mr. Gabriel.

[5] Mr. Gabriel argues that the parties concluded a contract and within six (6) months; Mr. Grady disregarded the negotiated obligations he assumed and then pursued litigation to avoid those obligations.

[6] In the alternative, he argues that should solicitor-client costs not be awarded, Ms. Grady should receive substantial indemnity of the costs she incurred. Mr. Gabriel observes that his client has no ability to bear these costs.

[7] Mr. Sheppard, counsel for Mr. Grady argues that Mr. Grady was forced by the unprecedented economic downturn in 2009 to seek relief from obligations he could not meet. He argued that the financial responsibilities pursuant to the terms of the parties' separation agreement are among them. Mr. Sheppard asserts that his doing so was reasonable.

[8] He argues further that Mr. Grady made concessions to shorten the length of the trial and that Mr. Grady also incurred substantial legal costs.

General Principles Governing Costs

[9] Rule 92.02(2) of the New Rules of Court provides that the 1972 Nova Scotia Civil Procedure Rules continue to apply to the Family Division of the Supreme Court.

[10] Rule 70.03(4) of the 1972 Rules provides:

70.03(4) Where any matter of 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.

[11] An award of costs following or during a proceeding is provided for in the 1972 Rules of Court. Rule 57.27, Rule 63.02 and Rule 63.04(1) and (2) provide as follows:

Party and party costs fixed by court

57.27(1) Where the proceeding is for a divorce or matrimonial cause, the court may from time to time make such order as it thinks fit against a party for payment or security for the costs of the other of such parties.

(2) The costs of a matrimonial cause shall be recovered in the same way as in an ordinary proceeding.

.....

63.02(1) Notwithstanding the provisions of rules 63.03 to 63.15, the costs to any party, the amount thereof, the party by whom, or the fund or estate or portion of an estate out of which they are to be paid, are in the discretion of the court, and the court may ...

.....

63.04(1) 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.

(2) In fixing costs, the court may also consider:

- (a) the amount claimed;
- (b) the apportionment of liability;
- (c) the conduct of any party which tended to shorten or unnecessarily lengthen the duration of the proceeding;
- (d) the manner in which the proceeding was conducted;
- (e) any step in the proceeding which was improper, vexatious, prolix or unnecessary;
- (f) any step in the proceeding which was taken through over-caution, negligence or mistake;
- (g) the neglect or refusal of any party to make an admission which should have been made;

- (h) whether or not two or more defendants or respondents should be allowed more than one set of costs, where they have defended the proceeding by different solicitors, or where, although they defended by the same solicitor, they separated unnecessarily in their defence;
- (i) whether two or more plaintiffs, represented by the same solicitor, initiated separate actions unnecessarily; and
- (j) any other matter relevant to the question of costs.

The Tariffs are regulatory, adopted pursuant to Rule 63.01(b) and the *Costs and Fees Act*, R.S.N.S. 1989 c.104. The subject proceeding is one that would most appropriately fall within Tariff A, if the Tariff structure was to be strictly applied.

[12] The court considered the decision of Justice Legere-Sers in *Shurson, 2007 NSSC 101*, and the decision of Justice MacDonald in *Conrad v. Bremner, 2006 NSSC 99*. The court has also considered the decisions of Justice Goodfellow in *Gardiner v. Gardiner, 2007 NSSC 282* and Justice Williams in *Grant v. Grant [2002] N.S.J. No. 14*.

[13] It is settled that costs can be granted in matrimonial matters. Justice Williams in *Grant* at paragraph 3 reviews the Rules and the considerations for the court when considering an award of costs. In particular, he references the factors outlined in Rule 63.04(1) and (2).

[14] In *Grant*, Justice Williams was considering costs flowing from a proceeding that included numerous applications and interlocutory notices over four years. There was also a trial and a pre-trial. He found that the conduct of the wife had unnecessarily lengthened the matter and that the proceedings contained many unproven allegations and untrue assertions. These were significant factors Justice Williams considered when he awarded costs of \$12,000 and \$2,250 for disbursements. I agree with Justice Williams in *Grant*, who stated at paragraph 42 that an “amount involved” analysis has limited applicability in complex, multi-issue matrimonial proceedings.

[15] As stated at paragraph 13 in *Grant*, Justice Williams observes that divorce and family law proceeding “often involve a multitude of separate and inter-related problems”. The result is that determination of success is also more complex.

[16] In *Shurson*, Justice Legere-Sers was considering costs in the context of an offer to settle. The case report does not detail the particulars of the outcome. She ordered \$10,000 in costs.

[17] In *Conrad*, Justice MacDonald was dealing with costs following a trial and once again the case involved an offer to settle as provided by Rule 41.09(a). The case also involved discoveries, pre-trial court appearances and a two day hearing. Justice MacDonald awarded party and party costs of \$5,000.00. Justice MacDonald in *Conrad, supra*, at paragraph 11, has a helpful discussion of principles emerging from the Rules and the Case Law.

[18] Justice Goodfellow in *Gardiner*, declined to order costs. Justice Goodfellow conducted an interim hearing that lasted one half day, other proceedings occurred over the following year. Citing Mr. Gardiner's financial difficulties as a partial reason for the delay in having matters concluded and the mixed success of the parties, he directed that each party bear their own costs.

[19] Justice Gass in *Pelrine v. Pelrine, 2007 NSSC 123*, a decision of this court dated April 18, 2007, considered the issue of costs claimed by both parties, following a divorce proceeding which was heard over four days. Post trial submissions were filed. The Petitioner sought approximately \$11,000 in costs including HST and disbursements and the Respondent sought approximately \$9,000 plus disbursements of approximately \$3,600. Justice Gass reviewed Rule 63.04; the decision of Justice Campbell in *Kennedy-Dowell 209 N.S.R. (2d) 392* and the decision of Justice Goodfellow in *MacLean 200 N.S.R. (2d) 34*.

[20] Of particular interest is that Justice Gass found a failure to timely disclose on the part of the Petitioner. She also assessed the relative "success" of the parties and the presence or absence of offers to settle. Justice Gass ordered costs to the Respondent in the amount of \$3,031.00 plus \$2,000 towards disbursements.

[21] In *Hanakowski v. Hanakowski [2002] N.S.J. No. 272* Justice Dellapinna awarded costs of \$2, 500 to the husband where the wife's failure to provide full financial disclosure added to the husband's legal costs and hampered the settlement process.

[22] In *Guillena v. Guillena* [2003] N.S.J. No. 76 Justice Dellapina ordered costs of \$4,000 in a case where the matrimonial assets were divided equally. The Respondent had failed to comply with disclosure obligations. The Respondent failed to comply with orders to disclose dated March 15, 2001; May 14, 2001; April 4, 2002; September 4, 2007 and December 10, 2002. The Respondent husband did not attend trial in *Guillena*, nor did he consent to any of the corollary relief.

[23] Justice Coady in *Ghosn* [2006] N.S.J. No. 272 assessed costs against the husband after finding that his non-disclosure and obstruction increased the wife's legal costs. He found that the tariffs were not drafted with family law in mind. He awarded a lump sum of \$10,000 plus 75% of the wife's disbursements. Ms. Ghosn's conduct was found to be aimed at frustrating Mr. Ghosn's application to vary. He was found to have misled both Ms. Ghosn and the Court. Ms. Ghosn was found to have pursued 15 avenues to obtain financial information Mr. Ghosn refused to provide. In addition, Ms. Ghosn made two offers to settle.

Conclusion

[24] As stated, the divorce hearing was held October 13, 2009 and concluded November 2, 2009. One and one half (1 ½) days of court time were used. Pre-trials were held August 17th, September 2nd and September 29th, 2009.

[25] The assessment of costs on a solicitor-client basis is not warranted. Mr. Grady's litigation was not frivolous nor motivated by a desire to be difficult. I agree that he was in a difficult financial bind. Ultimately, I rejected the solution he offered to the court and Ms. Grady's legal argument did prevail.

[26] However, at paragraph 70 of my decision, I also invited the parties to renegotiate or vary the implementation of the separation agreement to reflect the financial reality of Mr. Grady. Ms. Grady insisted on enforcement of her full legal rights. This she was entitled to do, but I believe she showed insufficient flexibility. I am satisfied that this intransigence was a factor that lengthened the litigation process.

[27] An award of costs on a party and party basis is warranted. It is to be determined after considering Tariff A. I set costs at \$5,500 inclusive of disbursements and H.S.T. Mr. Grady will have until the end of December 2010 to pay one third of this amount and until the end of December 2011 to pay the remainder. As a minimum and until costs are paid in full, he shall pay \$150 per month on the costs liability commencing June 1st, 2010.

J.