SUPREME COURT OF NOVA SCOTIA
Citation: S.S. v. S.O., 2010 NSSC 352

Date: 20100922
Docket: 1204-002832
Registry: Kentville

Between:

S. S.

Applicant

v.

S. O.

Respondent

Judge:	The Honourable Justice Patrick J. Duncan
Final Written Submissions:	August 12, 2010 (as to Costs)
Decision Re Costs:	September 22, 2010
Counsel:	Lynn Connors, for the applicant, S. S. Don Urquhart, for the respondent, S. O.

By the Court:

Introduction

[1] This matter originated in the southwestern judicial district as an application brought by Mr. S. to vary an existing **Divorce Act** order as to custody, and to resolve related questions of child support payable by the parties. It was presented under **Nova Scotia Civil Procedure Rule (1972) 57.30** and heard in Chambers. The parties have not been able to resolve costs payable following on the result and have filed written submissions setting out their respective positions. The hearing decision is reported at 2010 NSSC 269 and I incorporate my findings therein to the extent necessary to the resolution of the costs determination.

Applicable Rules of Civil Procedure

[2] The evidence was concluded and written submissions filed prior to June 30, 2010. The decision was rendered on July 5. All steps taken by the parties, excepting the issue of costs, were therefore concluded prior to the implementation of the **Nova Scotia Civil Procedure Rules**. Those Rules only applied to District family law matters as at July 1, 2010. *see*, **Nova Scotia Civil Procedure Rule**

92.02(2)(b) and Part 21. Therefore, the relevant provisions of **Nova Scotia Civil Procedure Rules (1972)** apply to the determination of costs payable in this matter. Further references in this decision to the provisions of the **Civil Procedure Rules** relate to the **1972 Rules**.

Background

[3] The parties adopted a common position as to variation of the existing corollary relief judgement provisions for their daughter, W..

[4] The hearing occupied a half day on May 18, a full day on June 16 and a half day on June 22, 2010. The contested issues were:

1. Whether there had been a change of circumstances justifying a variation that placed C. A. S. in the primary care of her father, or whether she was subject to a shared parenting arrangement as contemplated by section 9 of the **Federal Child Support Guidelines;**

2. Whether income should be imputed to Mrs. O. as provided for under section 19 of the **Guidelines**;

3. The impact of these two determinations on retroactive and prospective child support payable for C..

[5] In the end result, Mr. O. was successful in his application to have C. adjudged to be in his primary care. This resulted in an order for the repayment to him of amounts paid as support after the effective date on which he assumed primary care. It also resulted in Mrs. O. being ordered to pay child support to Mr. S. on behalf of C., both retroactively and prospectively.

[6] Mrs. O. successfully defended against the application to impute income to her.

Position of the Applicant

[7] The applicant argues that he is entitled to costs in accordance with **Tariff A** made pursuant to **Rule 63**, involving an amount less than $25,000. He seeks an

award based on Scale 3 amounting to $5,000 plus $4,000 representing an amount of $2,000 for each of two trial days. This totals $9,000.

[8] The applicant further submits that as a result of the respondent's refusal of offers to settle made by him pursuant to **Rule 41A.09** he is entitled to a further $8,000 representing double party and party costs for the two days of court time.

[9] In summary, the applicant seeks costs totaling $13,000. He also seeks payment of his disbursements in the amount of $586.72 plus HST of $66.99 for a total of $652.71. The overall total claimed then is $13,652.71.

Position of the Respondent

[10] The respondent submits that offers to settle made by the applicant failed to comply with **Rule 41A.09(1).**

[11] The respondent says that the Tariff should not apply and instead that the court should resolve the costs issue by way of lump sum award pursuant to **Rule 63.02.** Counsel submits that the effective value of the court's order is

approximately $7,000 and that any costs award should not be disproportionate to the value of the amount of support ordered.

[12] Alternatively, the respondent argues for a reduced amount to be paid under the Tariff.

[13] In support of her position the respondent says that at least one day of hearing time was occupied unnecessarily by the applicant adducing evidence of a Mr. H., and also by his failed application to have the court interview W.. I am pointed to the mixed success of the parties, in that she successfully defended an application to impute income to her.

[14] In summary, the respondent says each party should bear their own costs, or alternatively that costs should not exceed $1,000.

Analysis

[15] The beginning premise is that costs follow the event. *see*, **Rule 63.03.** Generally costs are set in accordance with the Tariffs. *see*, **Rule 63.04 (1)**. The court may consider a number of factors set out in **Rule 63.04(2)** which reads:

> (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.

[16] Ultimately, costs are within the discretion of the court. **Rule 63.02** says:

> 63.02.
>
> (1) Notwithstanding the provisions of rules 63.03 to 63.15, the costs of 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,
>
> (a) award a gross sum in lieu of, or in addition to any taxed costs;
>
> (b) allow a percentage of the taxed costs, or allow taxed costs from or up to a specific stage of a proceeding; [E. 62/9(4)]

[17] Keeping these principles in mind I make the following comments.

[18] The applicant made an offer to settle on May 31, some 13 days after the hearing commenced. In a letter of June 14, counsel for the applicant stated that "... our formal Offer to settle is withdrawn", and then continues "... Here is our

current formal Offer to Settle." Neither offer was accepted by the respondent and the hearing resumed on June 16. I agree with the applicant that the terms of the judgment were less favorable than the terms included in the offers to settle.

[19] **Rule 41A.03** expressly denies the applicability of the cost consequences of a formal Offer to Settle that is made less than seven days before hearing. Both of these offers, having been made after the commencement of the hearing, fail to satisfy this pre condition and so I reject applicant's submission that any award of costs is subject to the consequences set out in **Rule 41A.09.**

[20] I take no issue with the manner in which the applicant prosecuted the matter. The determination of C.'s "home base" for the purposes of assessing the parenting time was very much contested by Mrs. O.. The respondent was not prepared to concede that C. had effectively moved to her father's home. She sought to minimize the degree of, and the consequences for C., of Mr. O.'s assault on C.. In view of that position it was open to the applicant to call Mr. H. to speak to the assault and of C.'s views in consequence thereof.

[21] It was not inappropriate to seek to have W., who is a young adult living in *, and who was a witness to the assault, relate her observations in an interview and without the necessity of making her a witness. It was a legitimate litigation strategy. Costs should not rise and fall on the outcome of individual evidentiary rulings unless the point in issue occupied inordinate time for a frivolous purpose.

[22] Mr. O. was a witness for the respondent. He presented a cogent and honest assessment of C.'s living arrangements and of the need for her to assume residency with her father. I was impressed with his honesty. Had the respondent been prepared to similarly recognize this reality the hearing would not have been necessary, or at least may have been substantially shortened.

[23] While the offers to settle are not capable of impacting the cost consequence under **Rule 41A,** their contents demonstrate that Mr. S. was not interested in pursuing Mrs. O. for support, only that she recognize the *de facto* living arrangements of C. in a formal order. It would, of course, terminate his child support payments to Mrs. O., - something she did not want to concede.

[24] I agree that results were mixed in that one part of the application, seeking to impute income to Mrs. O., failed. The law casts a duty on the primary care parent to ensure that the supporting parent be required to meet their obligations for payment under the **Guidelines.** Mr. S. was so obligated. In view of Mrs. O.'s pattern of income, and in particular that it dropped from $93,251 to $39,978 in one year, and as a result of unforced changes in her career and personal life choices, it was not unreasonable that Mr. S. make application for an imputation of income. It was an application that had some merit, even though unsuccessful.

[25] The matter was not complex and I am mindful that the costs award should not be disproportionate to the amounts involved. It would be counterproductive to Mrs. O.'s ability to meet her child support obligations to impose an inordinately damaging costs award.

[26] It is also important to recognize the principle that the applicant, as the substantially successful party, is entitled to a measure of contribution to his costs. The value of the judgement to him, if his application was unsuccessful, was substantially more than the value affixed to Mrs. O.'s support payment. It should be remembered as well that no monetary value is attached to an award of primary

care and that child support is only incidental to that decision and to the income of the payor parent - so this type of case differs from a claim for liquidated damages.

Conclusion

[27] Having weighed these factors, I direct that the respondent pay to the applicant costs in the amount of $3,750 plus disbursements in the amount of $586.72 and any HST payable thereon.

[28] Dated at Halifax, Nova Scotia, this 22nd day of September 2010.

Duncan J.