

SUPREME COURT OF NOVA SCOTIA

Citation: Lamarche v. Lamarche, 2011 NSSC 133

Date: 20110401

Docket: SFHMCA-035030

Registry: Halifax

Between:

Shawn Lamarche

Applicant

v.

Kimberly Lamarche

Respondent

Judge:

The Honourable Justice Beryl MacDonald

Heard:

February 2, 2011, in Halifax, Nova Scotia

Written Decision on Costs and

Corrections on Written Decision from February 23, 2011: April 1, 2011

Counsel:

Sarah Harris, counsel for the Applicant

Terrance Sheppard, counsel for the Respondent

By the Court:

[1] On February 23, 2011, I delivered a written decision in this proceeding in which I retained jurisdiction to correct any mathematical errors and requested the parties to provide written submissions if costs were requested. This decision corrects the mathematical error that did occur in my previous decision and it addresses the issue of costs.

[2] As I indicated in my previous decision the evidence was unclear whether Mr. Lamarche paid child support for the period from January 1, 2010, until June 1, 2010. My calculations were based on the understanding that he had done so. He had not and, therefore, the amount owing by each party for child support must be recalculated. For the period from January 1, 2010, until June 1, 2010, Ms. Lamarche owed Mr. Lamarche \$1,704.00. For the period from July 1, 2010 until February 1, 2011, Mr. Lamarche owed Ms. Lamarche the sum of \$1,288.00. Setting the sums off against each other now requires Ms. Lamarche to pay Mr. Lamarche \$416.00. This shall be paid in the amount of \$46.00 per month for eight months with the final required payment to be \$48.00 on the ninth month. These amounts may be deducted by Mr. Lamarche from his regular child-support payment until the amount owed by Ms. Lamarche is paid in full.

Costs

[3] Ms. Lamarche is requesting an award of costs in this proceeding. The submissions filed on behalf of Ms. Lamarche make reference to *the Civil Procedure Rules* that came into effect on June 1, 2010. The submissions on behalf of Mr. Lamarche argue that the previous *Civil Procedure Rules* are to apply because this application was commenced in February 2010. I agree the previous *Civil Procedure Rules* do govern costs in this matter but the provisions in respect to costs, and in particular Tariff A, are the same in both rules. (previous Rule 63, present Rule 77). The Tariff A provided by counsel for Mr. Lamarche is Tariff A as it appears on the Office of the Legislative Counsel website under the *Costs and Fees Act* regulations. That Tariff has not been in force for some time and it would appear that those regulations have not been updated on the website.

[4] 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.)

[5] Several principles emerge from the Rules and the case law:

- I. Costs are in the discretion of the Court.

2. A successful party is generally entitled to a costs 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 costs award.

5. The amount of a party and party costs 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 costs 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 costs 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 \$20,000.00 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.

[6] This proceeding was originally commenced because Mr. Lamarche wanted Ms. Lamarche to pay child support for his son who was then in his care. Ms. Lamarche's failure to do so did put Mr. Lamarche to an expense that might otherwise have been avoided. However, by the time the matter did come to trial much had changed between the parties. Additionally, Mr. Lamarche recognized, because his son was once again living with Ms. Lamarche, his request for a variation based on his son's previous change of residence would not be a triable issue. Very shortly before the trial that was scheduled to hear issues relating to child support only, he changed his mind and attempted to put forward a case requiring the return of the child to his care. He suggested he did so because he was acting in what he considered to be his son's best interest. I do not accept his submission in this regard. I find he was acting from self-interest in an attempt to be relieved from the obligation to pay child support to Ms. Lamarche. As a result

he put Ms. Lamarche to additional expense. At trial I consider Ms. Lamarche to have been the successful party.

[7] Mr. Lamarche suggests he has limited means from which to pay a costs award and that any order against him would impede his ability to pay his child support. Because of my findings against him in respect to his submissions that he had no income and given that a costs award may form the basis of a judgment which may be recorded against property owned by him for eventual payment, I am not prepared to relieve him of a costs award on this basis.

[8] I have carefully reviewed the amount requested by counsel on behalf of Ms. Lamarche. It is very close to a full indemnity for her legal costs. No statement confirming the disbursements was provided. A settlement offer was made on January 4, 2011, and I have taken it into account in making my decision. It was very similar to the decision I have made but it was not made in compliance with *Civil Procedure Rule 41A.09* so as to entitle an award of double party and party costs.

In this proceeding I will award costs. I have considered Tariff A, Scale 1, and in doing so set the amount involved at \$20,000.00. This proceeding required a one day hearing. Costs are awarded to Ms. Lamarche in the amount of \$5,000.00.

Beryl MacDonald, J.