IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: Harrington v. Coombs, 2011 NSSC 141

Date: 2011 04 11
Docket: SFHPA-071113
Registry: Halifax

Between:

Bradley F. Harrington

Applicant

v.

Laurie A. Coombs

Respondent

Judge:	The Honourable Justice Leslie J. Dellapinna
Heard:	January 14, 2011 in Halifax, Nova Scotia
Counsel:	C. Robinson counsel for the Applicant J. Beeler, Q.C. counsel for the Respondent

By the Court:

[1] On January 28, 2011 I released a written decision which followed a hearing on January 14, 2011. The Applicant applied pursuant to the ***Partition Act,*** R.S.N.S. 1989, c. 333 for an order requiring the sale of the property jointly owned by the parties and he also sought an order for the distribution of the proceeds from that sale between the parties. The Respondent applied pursuant to the ***Maintenance and Custody Act,*** R.S.N.S. 1989, c. 160 for an order relating to the care of the parties' two children, child maintenance, spousal maintenance and exclusive occupation of the family residence. She also requested a division of the Applicant's pension with the Canadian Forces and a division of their property based on equitable principles of unjust enrichment.

[2] At the commencement of the hearing on January 14 the Court was told that the parties had reached an agreement regarding the care and financial support of their children so the only issues to be addressed by the Court were those affecting the division of their assets and debts.

[3] In my decision following the trial (reported at 2011 NSSC 34) I upheld the parties' cohabitation agreement and ordered the sale of their home pursuant to the ***Partition Act***. If the property is to be sold (and now it appears that it will) the net equity after the payment of disposition costs and any remaining balance of the existing mortgage will be divided equally between the parties. I gave the Respondent the opportunity to buy out the Applicant's interest by paying him $24,611.25 and assuming responsibility for the balance of the mortgage.

[4] I also ordered that the Applicant would retain his pension with the Canadian Forces without any portion of it being shared with the Respondent and denied the Respondent's claim for spousal maintenance.

[5] The Applicant now seeks costs pursuant to Civil Procedure Rule 77. On his behalf it is argued that the Applicant was entirely successful and is therefore entitled to costs. It was further submitted that I should conclude that the "amount involved" as contemplated by tariff A (which is reproduced at the end of Rule 77) was between $86,000.00 and $91,000.00. $91,000.00 was the Applicant's calculation of the amount of his pension sought by the Respondent plus the $24,611.25 that I referred to earlier as being his share of the house equity.

$86,000.00 is the same calculation less one half of the mortgage payout penalty which the parties will incur if the house is to be sold.

[6] If I was to accept his calculation for the "amount involved" then according to tariff A costs of somewhere between $9,750.00 and $12,250.00 could be ordered (using Scale 2) plus a further $2,000.00 as the trial took one full day.

[7] It was further argued on behalf of the Respondent that the Court has the discretion to add a further 25% to that amount because of the provisions of Civil Procedure Rule 10.09 (2) which says:

> "A judge may award costs to a party who starts or who successfully defends a proceeding and obtains a favourable judgment, in an amount based on the tariffs increased by one of the following percentages:
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> ...
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> (d) twenty-five percent, if the offer is made after the finish date.

[8] It would appear that the Applicant sent the Respondent, through their counsel, a formal offer to settle on December 10, 2010 the terms of which are very similar to that which I ordered in my decision and based on which it would be fair to conclude that the Applicant obtained a "favourable judgement" as that term is used in Rule 10.09. If I was to agree with all of the Applicant's submissions costs could to be awarded in the range of $14,687.50 and $17,812.50.

[9] On behalf of the Respondent the Court is asked not to award any costs. Her counsel's brief puts into context the position of the parties at trial and how close they were prior to the trial. At one point in time they disagreed on the parenting arrangements as well as child maintenance. By the time the trial date arrived they had agreed on those issues.

[10] The Respondent's position regarding the assets appears to have been based in large part on what she could afford to finance. She has a limited income and as a result of the parties' parenting agreement would have primary responsibility for the parties' two children.

[11] An offer to settle was made on behalf of the Respondent by which she was prepared to forego her claim for a division of the Applicant's pension as well as her claim for spousal maintenance provided the Respondent would agree to convey

the family residence to her without any equalization payment being paid to him in return. In effect the parties were apart by $24,611.00 or less depending on how one wanted to view the division of their debts. The Respondent's counsel urged the Court to accept $20,000.00 as the real "amount involved" but further urged the Court not to order any costs in light of the Respondent's financial situation and her responsibility to the children.

[12] Generally speaking costs of a proceeding follow the result - in other words, the successful party can generally expect to receive an award of costs. (See Rule 77.03) However, nothing in the Rules limits the general discretion of a judge to make any order for costs and any order that is made about costs should satisfy the trial judge that it will do justice between the parties (see Rule 77.02).

[13] Subject to the discretion of the judge party and party costs are fixed in accordance with the tariffs of costs and fees determined under the ***Costs and Fees Act***, R.S.N.S. 1989, c. 104**.**

[14] A judge who fixes costs in accordance with the tariffs may add an amount to or subtract an amount from the tariff costs (See Rule 77.07). Rule 77.07 (2) provides examples of factors which may be relevant in determining whether costs should be increased or decreased from the tariff amount. Those examples include written offers of settlement whether made formally under Rule 10 or otherwise and the conduct of a party affecting the speed or expense of a proceeding, but the examples provided are not intended to be an exhaustive list.

[15] In order to use the tariffs the Court must first calculate "the amount involved". Rule 77.18 provides that where the main issue is a monetary claim which is allowed in whole or in part the amount involved is an amount determined having regard to:

i the amount allowed,
ii the complexity of the proceeding, and
iii the importance of the issues.

[16] Rule 77.18 (b) provides where the main issue is a monetary issue which is dismissed , the amount involved is determined having regard to:

i the amount of damages provisionally assessed by the court, if any,
ii the amount claimed, if any,
iii the complexity of the proceeding, and

iv the importance of the issues.

[17] In matrimonial cases it is frequently difficult to quantify the "amount involved" as those words are contemplated by the Civil Procedure Rules. For that reason Goodfellow, J. suggested that the Court use a "rule of thumb" for the determination of the "amount involved" by equating each day of trial to an amount of $15,000.00. (See *Urquhart v. Urquhart* (1998), 169 N.S.R. (2d) 134 N.S.S.C.)). That "rule of thumb" has been accepted by the Court in numerous cases. In *Jachimowicz v. Jachimowicz* (2007) NSSC 303 Lynch, J. considered it appropriate to raise the daily amount figure to $20,000.00 to reflect the increased cost of litigation since *Urquhart (supra)* was decided. While *Urquhart* and *Jachimowicz* apply a "rule of thumb" that is not found in the Civil Procedure Rules there nevertheless is an attraction to the consistent use of a method in family proceedings that can be relied upon by counsel and parties.

[18] The general rule for costs in matrimonial proceedings was stated by Hallett, J. (as he then was) in June of 1981 in *Bennett v. Bennett* (1981), 45 NSR (2d) 683 (T.D.) where beginning at paragraph 9 Justice Hallett stated:

> "Costs are a discretionary matter. It is normal practice that a successful party is entitled to costs and should not be deprived of the costs except for a very good reason."

[19] Also in paragraph 14, Justice Hallett stated:

> "As a rule costs should follow the result. That is to say, it is well settled that where a plaintiff is wholly successful in his action and there is no misconduct on his part, he is entitled to costs on the ground that there is no material on which a court can exercise a discretion to deprive him of costs.
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> ...
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> The rule that a successful party is entitled to his costs is of long standing, and should not be departed from except for very good reasons."

[20] Although *Bennett (supra)* was decided in 1981 the same general rule applies today. However, in family proceedings it is recognized that there are circumstances that may cause the Court to order an amount different from that which might ordinarily be ordered in other civil proceedings. For example,

because of the possible effect on children a cost award might be tempered. Gass, J. stated in *Connelly v. Connelly* (2005) Carswell NS 320 in paragraph 9:

> "Any order of costs should not have an adverse impact on the children's emotional or material well being. Access with their father is important for their emotional well being and the child support obligations are critical to their material well being."

[21] In *Connelly (supra)* the father lived in Newfoundland and the mother in Nova Scotia. For the father to exercise access he had to travel to Nova Scotia before returning with the children to his home province. At the time of trial he owed arrears of child support. After a two day trial the wife sought $3,000.00 in costs. Justice Gass ordered the husband to pay $500.00 and gave him a year to pay. It was her way of balancing the successful wife's entitlement to costs against the children's need to spend time with their father and without impeding his ability to pay child support.

[22] In *Paquet v. Clarke* (2005) NSSF 4 a mother unsuccessfully applied under section 37 of the ***Maintenance and Custody Act*** to vary custody in order to relocate the parties' children from Dartmouth, Nova Scotia to Sherbrooke, Quebec. The father asked for costs in the sum of $1,881.25 using the *Urquhart (supra)* formula. I ordered costs in the sum of $750.00, inclusive of disbursements because it was my conclusion that the amount of costs sought by the husband would have negatively impacted on the mother's ability to provide for the children.

[23] Impecuniosity has also been held to be a reason for reducing an award of costs. In *Kaye v. Campbell* (1984), 65 N.S.R. (2d) 173 (A.D.) Macdonald, J.A. said at paragraph 8:

> "I believe the law is clear that, if the awarding of costs would create an undue financial hardship, it would be a proper exercise of the judicial discretion to refuse to grant them...."

Richard, J. had earlier declined to award costs to the Appellant (a successful Petitioner in a divorce action) on the ground that the Appellant/wife had a superior income to that of the Respondent and that the Respondent had to pay child maintenance to the Appellant in the sum of $200.00 per month.

[24] In this case, the Respondent, at the time of trial, had a gross employment income of approximately $36,000.00 per year although she hoped by year end to have a full-time position earning approximately $49,500.00 per year.

[25] As part of the parties' agreement the children will be residing with her the majority of the time.

[26] It appears that the family residence that was shared by the parties prior to their separation will be sold and it is likely that both parties will realize from its sale $24,000.00 or less.

[27] The Respondent has a considerable number of debts excluding her own legal fees and if she was to use her share of the house proceeds to pay down those debts it is unlikely she will have any surplus funds after those debts are paid. She has no other savings of any consequence. It is more likely that she will have residual debts yet to pay.

[28] The Applicant also has a considerable debt load which surpasses what he is likely to receive from the proceeds of the sale of the family residence, however, he has an anticipated income of $74,280.00 out of which he pays the table amount of child maintenance in the sum of $1,036.00 per month.

[29] I find that the Applicant was the successful party and as such is entitled to costs.

[30] Both parties made genuine efforts to try to resolve this matter prior to trial. The Applicant's formal offer to settle more closely resembled the Court's decision than did the Respondent's offer.

[31] I choose, however, to apply the "rule of thumb" found in *Urquhart* (*supra*) and *Jachimowicz* (*supra*) and find the "amount involved" to be $20,000.00 (i.e. one day of trial).

[32] The case involved issues of average complexity which, using scale two (the basic scale), would result in a cost figure of $4,000.00.

[33] Under tariff A I have the discretion to add a further $2,000.00 to that figure for each day of trial which would result in a total cost figure of $6,000.00.

[34] I was given no evidence of disbursements. I assume that there were some. In consideration of the Respondent's modest income and her other financial circumstances and in consideration of the fact that she is primarily responsible for the care of the children whose needs should not be compromised as a result of a cost award, I am prepared to order costs in the total sum of $6,000.00, inclusive of disbursements. Such costs will be paid by the Respondent to the Applicant within three months of the date of this decision or on the date of the closing of the sale of the former family residence, whichever date is the later.

[35] Counsel for the Applicant urged me to increase the cost amount by a further twenty-five percent because of the similarities between his offer to settle and the Court's final decision. Counsel referred to Rule 10.09 (2). Rule 10.09 does not apply to family proceedings by virtue of Rule 59.39 (7). Nevertheless it is within the Court's discretion to consider offers made by both parties, whether formal or not. While generally speaking I would be inclined increase the amount of the cost award because of the favourable judgement received by the Applicant relative to his offer to settle I am not prepared to do so in the circumstances of this case. The Respondent will be pressed to pay down her debts while still meeting her regular monthly expenses. An obligation to pay costs in the range suggested by the Applicant may, and probably would, impact on the Respondent's ability to pay for the needs of the children.

[36] Had I calculated the "amount involved" as suggested by the Applicant then, pursuant to Rule 77.07, I would have reduced the amount of costs payable to $6,000.00 for the reasons stated above.

[37] I ask that counsel for the Applicant prepare the order.

J.