SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: M.M. v. R.M., 2011 NSSC 224

Date: 20110607
Docket: 1201-062319, SFHD-056429
Registry: Halifax

Between:

M. M.

Petitioner

v.

R. M.

Respondent

Editorial Notice

Identifying information has been removed from this electronic version of the judgment.

Judge: The Honourable Justice Beryl MacDonald

Heard: February 16, 17, 18, 2011, and March 11, 2011, in Halifax, Nova Scotia

Counsel: Michael Owen, counsel for M. M.
LouAnn Chiasson, counsel for R. M.

By the Court:

[1] I provided, on April 7, 2011, a written decision that invited the parties to make written submissions on the issue of costs. I now have those submissions.

[2] Costs are in the discretion of the court and generally follow the result:

> 77.02 (1) A presiding judge may, at any time, make any order about costs as the judge is satisfied will do justice between the parties.
>
> (2) Nothing in these Rules limits the general discretion of a judge to make any order about costs, except costs that are awarded after acceptance of a formal offer to settle under Rule 10.05, of Rule 10 - Settlement.
>
> 77.03 (3) Costs of a proceeding follow the result, unless a judge orders or a Rule provides otherwise.

[3] Costs usually are to be determined by the tariffs of costs and fees:

> 77.06 (1) Party and party costs of a proceeding must, unless a judge orders otherwise, be fixed by the judge in accordance with tariffs of costs and fees determined under the *Costs and Fees Act*, a copy of which is reproduced at the end of this Rule 77.

[4] However, and in keeping with the discretionary nature of costs awards:

> 77.07 (1) A judge who fixes costs may add an amount to, or subtract an amount from, tariff costs.
>
> 77.08 A judge may award lump sum costs instead of tariff costs.

[5] Factors the court is to take into consideration in determining whether to increase or decrease costs are:

77.07 (2)...

(a) the amount claimed in relation to the amount recovered;

(b) a written offer of settlement, whether made formally under Rule 10 - Settlement or otherwise, that is not accepted;

(c) an offer of contribution;

(d) a payment into court;

(e) conduct of a party affecting the speed or expense of the proceeding;

(f) a step in the proceeding that is taken improperly, abusively, through excessive caution, by neglect or mistake, or unnecessarily;

(g) a step in the proceeding a party was required to take because the other party unreasonably withheld consent;

(h) a failure to admit something that should have been admitted.

These provisions do not permit the introduction of offers made during Settlement conferences - Rule 77.07 (3).

[6] An award of party and party costs includes necessary and reasonable disbursements - Rule 77.10.

[7] I have reviewed these 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.).

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

1. Costs are in the discretion of the Court.

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

5. The amount of a party and party cost 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 cost 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 cost 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.

[9] The primary issues involved in this proceeding relate to the parenting plan and so there is no amount involved that can easily be teased out of the results at trial.

[10] It has been argued there was no successful party in this proceeding. Both plans supported by these parents were similar and my decision merely "tweaked" the ultimate result. I disagree. The wife's plan was more in keeping with the children's best interest. It provided each parent with appropriate parenting time although it did need to be modified somewhat. The Father could have recognized this and a settlement may have resulted. Instead he chose to task the court with an examination of the Mother's "deficiencies" none of which was accepted as a reason to implement his plan. I consider the Mother to be the successful party at trial.

[11] In this proceeding both parties initially wanted to be declared the primary care parent of their two young children. Initially there were concerns about the Mother's mental health but there were several factors that should have resolved that issue before trial without the necessity for intrusive disclosure requests for information from her personal therapist. The Mother's hospitalization was short. Her recovery to return to the tasks of daily living was equally speedy. She maintained a relationship with a therapist. She returned to her previous employment. She had significant child care responsibilities under the Interim Order and the Father's plan would not diminish those responsibilities. The Father's plan presented at trial would have placed the children in the Mother's care often enough to consider his plan to be a shared parenting arrangement. The

Mother would have looked after the children the four days the Father was not working. However, his pick up and return times for the children were unrealistic and not in the children's best interest. This was a concern raised by the Mother to which he made no reasonable response. He considered his arrangements, which required others to care for the children at times when the Mother was available, to be a superior plan. I am not satisfied that under these circumstances his concern about the Mother's mental health was a genuine issue.

[12] It has been argued because the Father's position at trial arose from his genuine belief that his plan was in the children's best interest and because a cost award would negatively impact on his ability to support his family, costs should not be awarded against him. This statement can be made in most family law proceedings. I am not satisfied that either justifies his exclusion from a cost award.

[13] The proceedings were longer than necessary because of the confusion, emanating from both counsel about the evidence to be given by the Mother's therapist. Her role was never clearly defined, nor does it appear that counsel provided detailed instructions about the information required of her. This did contribute to the cost of this hearing which required three days to complete.

[14] I have decided to award costs based on the tariff for two days of trial. That amount is $4,000.00. I will apply the additional $2,000.00 per day of trial as is suggested by the tariff. In addition, I do include the disbursements which include costs related to the attendance of the Mother's therapist. The disbursement costs are $1,480.00. The total cost award is $9,480.00.

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Beryl MacDonald, J.