SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: MacLean v. Boylan, 2011 NSSC 406

Date: 20111108
Docket: SFHMCA-032826
Registry: Halifax

Between:

Lauchlin Hector MacLean

Applicant

v.

Michelle Leigh Boylan

Respondent

Judge: The Honourable Justice Elizabeth Jollimore

Submissions: August 26, 2011 and October 25, 2011 for Ms. Boylan
September 21, 2011 for Mr. MacLean

Counsel: Terrance G. Sheppard, on behalf of Lauchlin MacLean
Julia E. Cornish, Q.C., on behalf of Michelle Boylan

By the Court:

Introduction

[1] Following applications in February and May 2011, Michelle Boylan seeks costs of $10,500.00. Mr. MacLean asks that each party be ordered to pay its own costs.

[2] In May, I heard Lauchlin MacLean's application for an order permitting his daughter, Skyler, to make her first communion at his church. Mr. MacLean also sought to modify the terms of Skyler's summer access with him and he wanted a custody and access assessment (which would include psychological testing) to be ordered. I rendered an oral decision at the conclusion of the hearing which was later reported at *MacLean v. Boylan*, 2011 NSSC 314. All of Mr. MacLean's applications were dismissed. An earlier application by Mr. MacLean before Justice Dellapinna was also dismissed.

[3] Counsel agreed that they would discuss the matter of costs between themselves and return to me if they were unable to resolve it. I received submissions from the parties between August 26 and October 25, 2011.

The proceedings

[4] The proceedings before me were part of a larger variation application.

[5] On January 28, 2011 Mr. MacLean filed an application to vary the provisions of two earlier orders which dealt with access during the winter school break and access during the summer vacation. He asked that his application be heard within two weeks so it would be resolved before the winter school break began. Civil Procedure Rule 5.06(2) requires that documents in support of an application at an appointed time must be filed twenty-five days before the hearing. All applications in the Family Division in Halifax are heard at appointed times. Mr. MacLean's request that his application be heard within two weeks was inconsistent with the filing deadline in Rule 5.06(2). To meet the requirement of Rule 5.06(2), Mr. MacLean should have filed his documents twenty-five days before the earliest hearing date he sought.

[6] To schedule the matter as quickly as Mr. MacLean wanted, it was necessary for a court officer to obtain a judge's approval for the application to proceed with abbreviated notice to Ms. Boylan. This approval was obtained and the application was scheduled for a one hour hearing on February 8, 2011. The originating documents were returned to Mr. MacLean's counsel on February 1 for service Ms. Boylan. Her documents were due February 7.

[7] Ms. Boylan asked for an adjournment. Mr. MacLean opposed her request because any delay would make his request to vary the winter school break schedule moot. He proposed that the February 8 hearing be used to deal with access during the winter school break and that access

during the summer be addressed at a later hearing. Ms. Boylan was allowed to offer her testimony orally, rather than by way of an affidavit. The hearing wasn't adjourned and it was heard by Justice Dellapinna on February 8.

[8] Justice Dellapinna dismissed the application to vary the winter school break schedule. Ms. Boylan sought costs of $750.00 at the end of the hearing. His Lordship said that costs would be determined at the conclusion of the application.

[9] A two and one-half hour hearing was scheduled for May 4, 2011 to deal with Mr. MacLean's application to vary summer access.

[10] On March 16, 2011 Mr. MacLean filed two variation applications and one motion. One variation application related to decision-making and parenting, and the second variation application related to "custody (religious upbringing)". The motion was for an order compelling a custody and access report.

[11] The "custody (religious upbringing)" application was about whether Skyler would participate in the sacrament of the Eucharist at Mr. MacLean's church. Mr. MacLean asked that this application be scheduled for two hours no later than the end of April so it would be decided in time for the church ceremony which was scheduled for May 8. This hearing would be in addition to the hearing already scheduled for May 4 to address summer access.

[12] Civil Procedure Rule 59.40(4) provides that after an application has been scheduled for hearing, no party may initiate a motion, unless a judge permits otherwise. When advised of this, Mr. MacLean amended his variation application on March 17, 2011 to apply for leave to initiate his motion for a custody and access report.

[13] I was assigned to hear the summer access application on May 4, so the court officer who received the new applications and motions brought them to me. I decided there should be a one hour conference to discuss organizing the applications and motions. At the conference on March 31, the May 4 hearing was lengthened, the issues to be addressed were identified and deadlines for filing affidavits were fixed. As well, Ms. Boylan was given a deadline by which to advise Mr. MacLean whether she required Father Cosgrove to be made available for cross-examination.

[14] I am told that Ms. Boylan did not meet the deadline for giving notice about Father Cosgrove's cross-examination and that it was necessary to issue *sub peonas* for Father Cosgrove and another potential witness. No witness testified other than the parties.

[15] On May 4, 2011 I heard Mr. MacLean's applications and his motion. All were dismissed.

[16] When Mr. MacLean filed his costs submissions, he also filed a Notice of Discontinuance with regard to his variation application.

Should Ms. Boylan be awarded costs?

[17] Ms. Boylan says that she should be awarded a substantial contribution to her legal fees because she is the successful party and there is no principled reason to deny her costs.

[18] Mr. MacLean describes his applications and motions as "reasonable" and "genuine and sincere". In *Nemorin v. Foote*, 2009 NSSC 23 at paragraph 8, Justice Gass denied a claim for costs because Ms. Nemorin's "application, her reasons, and her conduct were genuine and, in balancing all of the factors, it was a decision that could have gone either way." While costs may be awarded on a solicitor and client basis in the rare and exceptional circumstances where a party has behaved in a way that's highhanded, arbitrary and reprehensible, the absence of such conduct doesn't disentitle a successful party to costs.

[19] One principled reason to deny a successful party costs is that a parent should not be deterred from litigating a *bona fide* parenting claim by the prospect of a costs award. As Justice Gass said at paragraph 5 of *Nemorin v. Foote*, 2009 NSSC 19: "It appears therefore that in custody, and especially in mobility cases, where there is a justiciable issue addressing the best interests of the child, the risk of costs could deter litigants from pursuing a legitimate *bona fide* claim that should be heard and determined." Reviewing the jurisprudence, a parent has been shielded from a costs order where the litigation was of central significance to the child's parenting: in *Nemorin v. Foote*, 2009 NSSC 19 the issue was relocating a child to another province and in *Lockerby*, 2010 NSSC 282 the issue was whether the parenting arrangement would be one of primary care or shared parenting. In each of these cases, no costs were awarded with regard to the parenting claim: *Nemorin v. Foote*, 2009 NSSC 23 and *Lockerby*, 2011 NSSC 103. Conversely in *Goodrick*, 2009 NSSC 64, Ms. Goodrick did not prove that there was a material change in circumstances, so her variation application failed. This was found not to be a *bona fide* parenting claim and she was ordered to pay costs in *Goodrick*, 2009 NSSC 119.

[20] Ms. Boylan acknowledges that shielding *bona fide* parenting claims from costs so as not to deter them is a principled reason for denying costs. She argues that principle this does not apply to Mr. MacLean since he "raised issues that were more superficially related to parenting" and not significant changes to Skyler's parenting arrangements.

[21] All decisions relating to a child's parenting are to be determined on the basis of the child's best interests. That does not mean that all the issues address the child's best interests. Here, Mr. MacLean sought to re-arrange the days Skyler spent with each parent, but not to change the overall shared parenting arrangement. At paragraph 40 of *MacLean v. Boylan*, 2011 NSSC 314, I described the change to parenting time that Mr. MacLean sought as "fairly modest". Since the proposed assessment and psychological testing wouldn't provide information about how decision-making was best structured, I dismissed the motion for an assessment. Finally, as I noted in paragraph 20 of the earlier decision, Mr. MacLean failed to identify "any interest that is served by putting Skyler in a position where she participates in a religious ceremony that puts her at odds with the religious values of one of her parents or which detracts from the parents' agreement that Skyler may choose her faith "when she is older"."

[22] Since I am to deal with costs arising from the application heard by Justice Dellapinna as well as the applications and motions I heard, I have listened to the recording of his decision.

That application, as well, related to changing some days of Skyler's schedule, but not changing her overall schedule. Justice Dellapinna's reasons for dismissing Mr. MacLean's application with regard to winter break access were similar to my own reasons for dismissing the application with regard to summer access: Mr. MacLean didn't prove the modification he sought was in Skyler's best interests.

[23] The real qualitative change Mr. MacLean proposed had to do with decision-making and Mr. MacLean discontinued this application.

[24] In this case, fairly modest adjustments to Skyler's parenting time, immediate (rather than delayed) participation in a religious sacrament and a custody access assessment are not issues central to Skyler's best interests. My view of the importance of each of Mr. MacLean's applications and motions to Skyler's best interests is peculiar to this case. Another case may see similar issues characterized differently.

[25] The applications and motions before me and the application before Justice Dellapinna were not central to Skyler's best interests and so Mr. MacLean is not shielded from an order for costs with regard to them.

[26] This is a case where Ms. Boylan should be awarded costs.

The amount of costs

[27] An order of costs is in my discretion. *Civil Procedure Rule* 77 addresses claims for costs and provides tariffs of costs and fees determined under the *Costs and Fees Act*, R.S.N.S. 1989, c. 104.

[28] Ms. Boylan seeks costs of $10,500.00 inclusive of disbursements. She argues that I should apply Tariff A which deals with costs following proceedings rather than Tariff C which deals with costs following applications because "much of the same preparation for a trial went into preparing for the two hearings". Formally, Justice Dellapinna and I both heard applications. Additionally, I heard motions.

[29] I was referred to Justice Gass' decision in *Hopkie*, 2010 NSSC 345 where she applied Tariff A. At paragraph 7 she said "most of the contested hearings in matrimonial matters are formally considered "applications" but are, in reality "trials" as they carry with them all of the same features of a trial, including pre-trial preparation and court time, whether it be for one half day or several days." Mr. MacLean attempts to distinguish this decision, noting that it was made pursuant to the *Nova Scotia Civil Procedure Rules* (1972). The distinction between an application and an action found in Rule 3 of our current Rules did not exist in the *Nova Scotia Civil Procedure Rules* (1972).

[30] I think Justice Gass' comments in *Hopkie*, 2010 NSSC 345 remain particularly relevant in the context of our current Rules. In the Family Division, we continue to hear applications which are, in reality, trials. The Tariffs contained in Rule 77 are unchanged from those of Rule

63 of the *Nova Scotia Civil Procedure Rules* (1972) and appear not to have been revised to reflect the new distinction between an action and an application.

[31] Mr. MacLean said that this issue was "specifically addressed" by Justice Dellapinna in his decision in *Chan v. Lin* (July 15, 2011), Halifax, SFH MCA 076081 (NSSC). Mr. MacLean said that His Lordship "decided [. . .] to base a costs award of $250.00 following an Interim Hearing on parenting and support issues on Tariff C."

[32] This decision is unreported. I was not provided with a transcript of the decision, so I reviewed the recording of the decision. Ms. Chan sought costs of $1,500.00 for a half-day hearing. Justice Dellapinna's decision was brief. He said that there was no real contest over the claims for custody, access or exclusive occupation of the family's residence and the real issues were the claims for spousal and child maintenance. Justice Dellapinna commented that Mr. Lin could be said to be successful because his unemployment resulted in an order that there be no interim child maintenance. Since an exclusive occupation order can only be made where there is a spousal maintenance order, Justice Dellapinna awarded Ms. Chan spousal maintenance in the nominal amount of one dollar per year. He said that Ms. Chan wasn't unreasonable in her position: in bringing her application, she didn't know about her husband's unemployment. Mr. Lin should have informed her of his employment status and the information he provided was confusing. If Mr. Lin had provided updated information and proof from his former employer about his employment status, the parties would have saved time and money. For that reason alone, described as a "lack of disclosure", Justice Dellapinna said he would order costs. Considering the "other outcomes", Justice Dellapinna ordered costs of $250.00. His Lordship made no comment, specific or otherwise, about any Tariff. I do not accept the submission that this decision supports the proposition suggested by Mr. MacLean.

[33] I don't believe that the combined effect of the new Rules and the pre-existing Tariffs was intended to result in a situation where matters which proceed by way of application in the Family Division are, systematically, to be subject to lesser awards of costs. I don't intend to give them this effect.

[34] Monetary matters were not in issue before me or Justice Dellapinna, so Ms. Boylan encourages me to use the rule of thumb that each day or part day of a trial should be treated as the equivalent of $20,000.00 in issue. When this rule of thumb was first propounded by Justice Goodfellow in *Collins v. Speight* (1993), 123 N.S.R. (2d) 71 and *Wyatt v. Franklin* (1993), 123 N.S.R. (2d) 347, the amount was $15,000.00. Justice Lynch adjusted the amount to $20,000.00 in 2007 in *Jachimowicz*, 2007 NSSC 303 at paragraph 26.

[35] Together, the hearings required five hours of court time. The usual court day is five hours long. There was a one hour conference, as well. Ms. Boylan claims the time in court should be treated as one and one-quarter days. Using the rule of thumb that each day of hearing is the equivalent of $20,000.00, she argues that the amount involved is $25,000.00.

[36] As well, Ms. Boylan notes that the length of trial is an additional factor to be considered in calculating costs under Tariff A and $2,500.00 should be added to the amount calculated

under Tariff A for each day of trial, since the hearings consumed one and one-quarter days. The resulting award is $8,750.00.

[37] Ms. Boylan argues that $8,750.00 is not a sufficiently substantial contribution to her legal expenses. She says she has incurred over $19,000.00 in costs to defend the applications and motions. More precisely, Ms. Boylan has incurred costs of $16,366.02 for legal fees. There have been taxes of approximately $2,500.00 and disbursements of approximately $220.00. It is difficult to make any comment about the fees charged because I wasn't provided with a breakdown of the fees and the work performed. Based on the hourly rates identified for me, dealing with the five hours of contested applications and motions required approximately twenty-five hours of work by the partner working on this matter, thirty-six hours of work by the associate who assisted, seven and one-half hours of work by an articled clerk and slightly more than one hour of work by a paralegal. Combined, almost seventy hours were spent working on this. In this calculation, I am assuming that none of the work was performed on an emergency basis, though the timing of Mr. MacLean's first application may mean this assumption is incorrect. I have not been provided with a breakdown of the work performed, so I cannot judge the reasonableness of the expenses incurred.

[38] I was not provided with a breakdown of disbursements. The "rate schedule" provided to me notes a number of disbursements (a file opening fee, computerized legal research and use of in house computerized precedents) which are typically excluded from costs awards on the basis that they are normally part of a law firm's overhead: *Boyne Clarke v. Steel*, 2002 NSSM 1.

[39] I reject Ms. Boylan's calculation that the length of the trial includes the time spent in pre-trial conferences. I'm not aware of any decision in which the length of a trial has been calculated to include conferences. The hearings before Justice Dellapinna and me combined to consume one day. The amount involved is, therefore, $20,000.00. Based on Tariff A, which I find is the appropriate Tariff, Ms. Boylan is entitled to costs of $4,000.00. To this, I add $2,000.00 to consider the day spent in court.

[40] If I am wrong and costs should be determined based on Tariff C, I make my order pursuant to guideline (3) of that Tariff which provides that in the exercise of my discretion, notwithstanding Tariff C, I may award costs that I find are just and appropriate in the circumstances. In these circumstances, the amount which is just and appropriate is $6,000.00.

Conclusion

[41] I award Ms. Boylan costs of $6,000.00. These shall be paid forthwith. Ms. Boylan is the successful party and I ask that her counsel prepare the order ordering Mr. MacLean to pay costs of $6,000.00 forthwith.

Elizabeth Jollimore, J.S.C.(F.D.)

Halifax, Nova Scotia