SUPREME COURT OF NOVA SCOTIA
Citation: *Lake v. Lake*, 2016 NSSC 255

Date: 2016-09-26
Docket: 1204-005954
Registry: Kentville

Between:

Cory G. Lake

Applicant

v.

Candice E. Lake

Respondent

Judge:	The Honourable Justice Gregory M. Warner
Heard:	September 1 and 2, 2016, in Kentville, Nova Scotia
Final Written Submissions:	September 16, 2016
Counsel:	Bryen E. Mooney, for the applicant Donald A. Urquhart, for the respondent

By the Court:

[1] Cory Lake's (Dad's) application to vary parenting and child support, filed May 25, 2016; was heard on September 1 and 2, 2016; and, determined by oral decision late on September 2, 2016. The application to vary parenting was dismissed and basic child support was increased; however, Dad's share of ongoing work-related childcare expenses was deferred for written submissions, if necessary, when counsels' *Childview*-based calculations were inexplicably irreconcilable. Written submissions respecting costs were also requested. Submissions dated September 15, 16 and 20, 2016 have been received.

[2] This is the decision respecting prospective childcare expenses and costs.

[3] In August 2014, the parties participated in a judicial settlement conference which resulted in a detailed Consent Corollary Relief Order ("Consent CRO") dated August 20, 2014. The wording of that Consent CRO was central to whether there has been a material change in circumstances, a prerequisite to variation.

[4] With respect to parenting, the Consent CRO specifically provided in para 2 that "Candice Lake ["Mom"] shall have primary care and control of the children", born November 2007 and March 2010, and, in paras 3 to 9, a detailed schedule basically gave Dad physical parenting times equal to 6½ out of every 14 days.

[5] With respect to child support, the Consent CRO identified Dad's income as $29,800 and ordered him to pay child support of $435 per month (the s. 3 table amount for a primary care arrangement), together with a fixed contribution to work related childcare in the amount of $70 per month from September to June and $300 per month in July and August. Other section 7 expenses were to be prorated 60% to Mom and 40% to Dad.

[6] Significantly, the Consent CRO provides that "the parties agree to review employment related day care expenses in September 2015 when [the youngest child] starts school" (para 13), and further that "[Dad] shall not make application pursuant to s. 9 of the Child Support Guidelines while these parenting arrangements are in place" (para 18).

[7] The settlement and Consent CRO were unique in that the physical time the children spend with Dad constitutes a shared parenting arrangement for the purposes of s. 9 of the *Guidelines*, yet the parties agreed expressly to describe the arrangement as giving Mom primary care, and that Dad would pay child support other than by the application of s. 9. The only review provided in the Consent CRO was a review of childcare expenses when the youngest child commenced school.

[8] In May 2016, Dad applied to vary custody and child support. He sought primary care with child support from Mom or, alternatively, a different shared parenting schedule together with the application of s. 9 of the *Guidelines* to the "new" shared parenting arrangement. In addition, he sought to reduce child support further on the basis of undue hardship because of a new support order for an older child from a prior relationship even though his income had increased (unbeknownst to Mom) to $39,000 since the Consent CRO.

[9] Dad filed with his application a 155-paragraph affidavit, followed by other substantial and overlapping affidavits.

[10] Mom unsuccessfully sought the dismissal of the application at the appearance (setting down day) in June 2016, on the basis there had been no material change of circumstances since the Consent CRO. Dad made an offer to settle, not responded to by Mom (but not near to or as good to Mom as the court's decision), and an offer to participate in a settlement conference. Mom says she had offered to mediate through her Employee Assistance Program (i.e. at no cost to the parties), but declined to participate in another settlement conference, because of the legal cost - "only to have [Dad] later disagree with what he had agreed upon, as he is doing now".

[11] In response to Dad's disclosure of his increased income, first made during this application, Mom sought a retroactive adjustment of basic child support and childcare expenses.

[12] The decision of the court, given orally at the end of the second day, was to the effect that there had been no material change in circumstances since the Consent CRO of August 2014. Dad was simply not satisfied with the terms of the Consent CRO and was effectively re-litigating what was agreed to in August 2014. The application and lengthy affidavits were filed immediately after the closing of an investigation by the Department of Community Services ("DCS") into Mom's household. The investigation was initiated by a phone call from a person at the IWK Mental Health Centre ("IWK") to DCS on the same day that Dad's partner (who is the ex-spouse of Mom's partner and who are involved in high-conflict family situation themselves) contacted the IWK in respect of Dad's issues with Mom's parenting of their children, and reported the incidents passed on by the IWK employee to DCS.

[13] In addition to finding no material change in circumstances, the court found that Dad's reasons for more time with the children were entirely without merit.

[14] With regards to child support, the court found that Dad's income had increased by $10,000, or about 25%, and his hardship claim, based on a new child support obligation imposed for an older child from another relationship but for which he refused to disclose particulars to Mom, was not established. Child support for the two children in this proceeding was increased, but he was given credit for his obligation to the other child. The claim for retroactive adjustment of Dad's childcare contribution was not proven.

[15] In short, the court found Dad's application was without merit and dismissed.

[16] In closing submissions, counsel submitted to the court conflicting *Childview* calculations as to what the net childcare costs to Mom were and therefore how they would be prorated. Counsel were requested to recalculate and agree upon the net shareable childcare expenses. They have failed to do so and made submissions with their costs submissions.

Childcare Expenses Decision

[17] The Consent CRO required Dad to pay $70 per month from September to June and $300 per month in July and August as his "contribution to s. 7 employment related daycare expenses … arrived at after considering that [Mom] shall claim all daycare expenses on her income tax return."

[18] As noted previously, para 13 states that the parties agreed to review employment related daycare expenses in September 2015, when the youngest child started school. All other section 7 expenses were divided 60% to Mom; 40% to Dad. Dad's income was identified as $29,800.

[19] Mom sought retroactive adjustment of Dad's contribution to these expenses, based on his higher income, not disclosed until this application. This was dismissed for several reasons. One was the court's concern about the evidence as to what Mom's actual childcare expenses have been.

[20] Post hearing, the parties have exchanged further particulars of what Mom's actual expenses have been. They were attached and identified in Dad's brief of September 16, 2016.

[21] I prefer and accept the analysis in Dad's September 16th brief, pp. 2 to 4 and the attached Tabs A to E, as being the proper basis for an order for Dad's prospective contribution to the childcare expense.

[22] In Mom's September 20th letter, she argues that the cost estimates in that submission are speculative and the court should rely upon the 2015 childcare costs. That is not appropriate because the youngest child was in daycare full time until September 2015 and we know that that is not the scenario on a go-forward basis.

[23] Mom further submits that para 12 of the Consent CRO required Mom, for the purposes of the allocation of the expense, to only deduct from her childcare expense the tax savings. I do not interpret para 12 of the Consent CRO to suggest that Mom should keep the benefit of any subsidies, benefits, and credits related to the children's childcare expenses except tax savings.

[24] If I am wrong, there are two other reasons why it would be unfair. Section 7(3) of the *Guidelines* reads that, subject to s. 7(4), in determining the amount of a shareable expense, the court **must** take into account any subsidies, benefits or income tax deductions or credits relating to the expense or any eligibility to claim a subsidy, benefit or income tax deduction or credit relating to the expense. Paragraph 13 of the Consent CRO provides for a review of daycare expenses when the youngest child started school in September 2015. That means there is no need to prove a material change; the court starts with a clean slate for the purposes of calculation of those childcare expenses.

[25] I find that the parties' respective 2015 incomes were Dad - $39,002 and Mom - $42,387. Dad's share of net childcare costs for 2016 is 47.5%.

[26] Mom has paid in 2016, to date, total childcare expenses of $3,391.82. Based on Mom's evidence, the childcare expenses for both children for September to December 2016 will likely be $1,475.60. The total for 2016, before subsidies, benefits, income tax deductions or credits, is $4,867.42.

[27] Based on Mom's 2015 income, and net of subsidies, benefits, and income tax deductions or credits, Mom's net expense, according to the *Childview* calculation in Tab E, is $2,278.00. Dad's share is $1,082.05. Dad has paid in 2016, to date, $820.00 and will owe for the rest of the year $262.05 or $65.51 per month. He shall pay that amount for the rest of this year.

[28] I estimate, based on the evidence before me, that the childcare expense will approximate the same gross and net amounts in 2017 as in 2016. If the party's respective incomes change in 2016, the proportionate sharing of that expense in 2017 might change slightly.

[29] Based on the *Childview* calculation in Tab E of Dad's September 16 brief, the court accepts and projects that Dad's share of the childcare expenses for 2017 should be fixed at $90 per month. I order that effective January 1, 2017, he pay $90 per month in 2017.

[30] Dad seeks to receive monthly records for daycare expenses and frequent adjustments. Because of the high level of conflict between these parties and their partners, I intend to minimize communications and any reason for frequent disputes. I therefore direct that childcare expenses shall be adjusted annually in May, for the preceding calendar year, on the basis of: (1) disclosure by each party of their actual income for the calendar year used to calculate their pro-rated share of any expenses, (2) by Mom's production of the actual receipts for the expenses incurred, and (3) by application of the *Childview* calculation to determine the net cost and proportionate share of each parent.

Costs Decision

[31] In recent years, substantial costs awards have been issued in family proceedings to reflect what Justice Jollimore described in *Poirier v Poirier*, 2013 NSSC 366, ("*Poirier"*) at para 45 as a recognition of Recommendation 26 in the Access to Justice Report: "judges should use costs awards more freely and more assertively to contain process and encourage reasonable behaviour".

[32] *Armoyan v Armoyan*, 2013 NSCA 136, ("*Armoyan"*) sets out the principle that costs awards in family litigation should represent a substantial contribution to the successful parties' reasonable expenses.

[33] In the Family Division, the practice is to apply Tariff A to the hearing of family applications and to apply a rule of thumb of $20,000 for each day where the issues are not primarily monetary but involve parenting. In the Districts, where divorce petitions proceed as actions (*CPR 4* and *66.22*) and involve trials without affidavits, and interim motions and variation applications proceed by way of affidavit evidence and cross-examination, the practice is to apply Tariff C to chambers applications and Tariff A to trials and court applications. (See *Harris v. Durling and Weir*, 2016 NSSC 19)

[34] The end goal of costs awards is to do justice between the parties. The quantum of costs awards should not depend on whether Tariff A or Tariff C is applied, in circumstances where the issues, time and effort involved, are similar.

[35] Costs awards in family matters should reflect the same factors as costs awards in civil litigation generally. Traditionally cost awards in family matters were low because of the court's concern about the adverse impact upon the resources available to support children. That concern has diminished in circumstances where the emotions and ill-will of parents causes them to lose objectivity and sight of the impact of litigation on the best interests of their children, and act unreasonably.

[36] The following family costs decisions are examples of the new approach. They apply the general principle that costs awards on a solicitor-client basis should be reserved for rare and exceptional occasions, but that costs awards in family litigation should follow the general principle that, subject to the factors identified in the decisions, the loser should pay the winner a substantial contribution of their reasonable legal expenses.

1. *Doncaster v Field*, 2014 NSCA 39, upholding an award of $16,000.

2. *Moore v Moore*, 2013 NSSC 281, award of $23,250 or 60% of the successful party's actual legal costs; 5½-day variation hearing.

3. *Lyttle v Lyttle*, 2013 NSSC 346, award of $15,000 on the successful party's actual costs of $30,000; 3-day hearing.

4. *CDMZ v REH-Z*, 2013 NSSC 347, award of $13,000 on actual costs of $29,000; 2-day hearing.

5. *Poirier*, award of $8,750 on actual costs of $15,484; 1½-day variation hearing.

6. *Clements v Boutilier*, 2014 NSSC 32, award of $8,000 on actual costs of $10,594.

7. *Godin v Godin*, 2014 NSSC 46, award of $28,375, described as substantial contribution to the successful party's costs; 6-day hearing;.

8. *Mahaney v Malone*, 2014 NSSC 146, award of $6,000 on actual costs of $16,000; variation application.

9. *Boulet v Rushton*, 2014 NSSC 265, award of $22,063 on estimated total expenses of $55,000; 2½-day divorce respecting property division and spousal support.

10. *Reid v Reid*, 2014 NSSC 276, award of $16,000; 2-day trial;

11. *Pelley v Peters*, 2014 NSSC 277, award of $20,000 against a party represented by Legal Aid despite hardship to the losing party, because of bad behaviour.

12. *Cameron v Cameron*, 2014 NSSC 325, award of $29,000, representing 67% of actual legal expenses. Denied solicitor-client expenses despite other party's non-disclosure and intransigence.

13. *Devereaux v Taylor*, 2014 NSSC 397, award of $11,000 on actual costs of $20,000; 1-day hearing respecting spousal support.

14. *Smith v Smith*, 2015 NSSC 73, award of $10,000 on actual costs of $30,000; a 1-day hearing based on the applicant's unfounded allegations and unreasonableness.

15. *Elliott v Melnyk*, 2015 NSSC 81, award of $4,000 on actual costs of $21,000; half-day chambers appearance.

16. *Wilman v Sutton*, 2015 NSSC 193, award of $15,000; 2-day variation application respecting parenting. Declined to award solicitor-client costs.

17. *Lethbridge v Lethbridge*, 2015 NSSC 252, award of $7,000; hearing regarding parenting.

18. *Higgins v Bourgeois Higgins*, 2015 NSSC 293, award of $15,000 on actual costs of over $50,000; 3½-day hearing. Losing party forced the hearing by taking unreasonable positions.

19. *PJL v JLC*, 2015 NSSC 336, award of $5,000 on claim for $11,250. The applicant sought to vary custody based on legitimate concerns and obtained more access, but not the remedies sought.

20. *Maxwell v Garner*, 2015 NSSC 337, award of $7,688; 2-day hearing on application regarding the child's school. The court commented costs should act as a reality check to encourage child focused objectivity by parents. Costs are not reserved for instances of unreasonable conduct in litigation.

21. *Raven v Lucas*, 2016 NSSC 100, award of $3,500; application regarding parenting issues.

[37] Mom seeks solicitor-client costs on the basis of the court's finding that the Dad's conduct was unreasonable, the application was without any merit and, in particular, there had been no material change in circumstances from the comprehensive Consent CRO issued following a judicial settlement conference. Her actual legal expenses are about $14,000, inclusive of over $11,000 in fees.

[38] Mom earns $40,000 a year as a civil servant.

[39] Alternatively, Mom seeks elevated costs under Tariff A. The rule of thumb for a two-day hearing involving non-monetary issues like parenting is to impute an 'amount involved' of $40,000, for purposes of applying Tariff A. This produces a cost award (adding $2,000 for each day of trial) of between $8,688 (scale 1), $10,250 (scale 2) and $11,813 (scale 3).

[40] Dad submits that each should pay their own costs. He acknowledges the factors enumerated in *Gagnon v Gagnon*, 2012 NSSC 137, but emphasizes only three factors:

1. Costs are discretionary;

2. Deference to the children's best interest may justify no award to a successful party; and,

3. The inability of Dad to pay is relevant.

[41] He submits that his concerns about the discipline of the children were legitimate; that Mom refused to participate in a settlement conference; that she was not completely successful; and, most important, the best interests of the children, in the context of his impecuniosity, would be adversely affected as any costs award would "highly impact the children and [Dad's] ability to financially support them while in his care."

[42] There is some merit to what each party submits. There is no spare change in either parent's pocket. The cost of this application will impact both parents' ability (not just Dad's) to provide for their children when in their care.

[43] Dad's pursuit of this application was unreasonable. On its face, the application was for primary care or, alternatively, more shared parenting time. Dad's statement that he did not have enough time with the children made no sense. It appeared that the application was in part a play for power and control by Dad. This is reflected in the back-and-forth contest regarding sports registration. It makes no sense for someone who has 6½ days out of 14 to complain that they do not have enough time.

[44] I conclude that the application was equally an attempt to get out from the child support provisions of the Consent CRO and, in particular, para 18.

[45] Dad complains that Mom refused to participate in a settlement conference. Her reply is that her refusal to participate in a settlement conference, with the additional legal costs, which she was skeptical would deter Dad, was not unreasonable. She offered to have his concerns mediated through her work plan at no costs to the parties; he declined. I did not sense any willingness on the part of Dad to compromise, either in his lengthy affidavits or his cross-examination. I doubt the matter would have settled or saved any expense to the parties.

[46] It was Dad who commenced this application respecting parenting, in part to get out from under his child support obligations. He also sought to reduce his childcare contributions. Mom's claim for increased child support (retroactive and prospective) was only claimed after Dad's disclosure during the application of a substantial increase in his income. Only the retroactive part of her claim was rejected. This consumed a small part of the application's time and effort.

[47] Both parents incurred costs that neither could afford. Mom was successful. She has incurred substantial, unnecessary costs because of Dad's unreasonable conduct. I agree with the principle set out in the Access to Justice Report cited in *Poirier* and with the Court of Appeal analysis in *Armoyan*.

[48] Mom should receive a substantial contribution to her reasonable legal expenses of about $14,000.

[49] Her entitlement to this should only be tempered by the practical reality that the children will be financially impacted when in Dad's care – a reality that lies entirely at Dad's feet. It is in the best interests of the children that they spend significant time with their Dad. That is the only reason that I temper the amount of "substantial contribution" that is ordered.

[50] Costs are ordered to Mom in the amount of $7,000.

Warner, J.