SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: Gagnon v. Gagnon, 2012 NSSC 137

Date: 20120410
Docket: 1201-064264, SFHD-068425
Registry: Halifax

Between:

Lori-Ann Marlin Gagnon

Applicant/Petitioner

v.

Robert Ronald Gagnon

Respondent

Judge:	The Honourable Justice Beryl MacDonald
Written Submissions:	February 6, 2012 from Kim Johnson April 2, 2012 from Owen G. Bland
Counsel:	Owen G. Bland, counsel for the Applicant/Petitioner Kim Johnson, counsel for the Respondent

By the Court:

[1] On December 30, 2011 I provided a written decision in this matter. It is reported as *Gagnon v. Gagnon*, 2011 NSSC 486. The Father has now requested costs. Counsel have provided written submissions about the cost award each requests on behalf of his and her client.

[2] When deciding whether to award costs the *Civil Procedure Rules* provide guidance as do several decisions, 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.). 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.

[3] The Father seeks costs as the successful party in this proceeding. There was a settlement proposal provided to the Mother by letter dated October 12, 2011. That offer was substantially similar to my judgment at trial. Because of this the Father suggests the use of Tariff 3 on the scale of Costs and Fees.

[4] Inclusive of the interim hearing this was a four-day proceeding. Tariff 3 suggests a cost award of $12,188.00. The tariff also provides for the addition of $2,000.00 per day of trial which would increase the cost award to $20,188.00. The basic tariff, inclusive of the additional amount for the days of trial, would result in a cost award of $17,750.00. I am informed that the Father's legal costs, inclusive of disbursements, were $26,833.00.

[5] As is typically the case in family matters there is no specific dollar amount that can appropriately be used to calculate the cost award. As a result, utilization of the $20,000.00 "rule of thumb" amount is appropriate if the tariff is to be applied. I am mindful of the amounts that would be provided by the tariff in my consideration of this request for costs.

[6] The Mother recognizes that some amount of costs should be awarded but suggests costs should be no more than $5,000.00 because:

- the judge did not award costs at the interim hearing,
- the Father, on several occasions, failed to file documents as directed,
- new documents were filed on the date of the trial,

- the Father's counsel failed to provide legal precedents prior to trial,

- the Mother is of limited economic means and any award will have a negative impact on her ability to financially care for the children when they are in her care.

[7] The judge at the interim hearing did not award costs because neither party made submissions seeking costs during the hearing. That judge did not make a decision that no costs were to be awarded for the interim hearing. Costs remained in the cause.

[8] While there were filing dates missed by the Father, the Mother also failed to file when ordered to do so. The Mother had everything she needed in respect to the Father's financial circumstances by October 12, 2011 when she received the settlement letter from the Father's counsel. She had information about his total 2010 income and she had pay stub information from which his estimated 2011 income could be calculated. The offer provided to her would have given her more monthly child support than I ordered the Father to pay. The amount of child support to be paid is directly related to income. None of the delays in filing material in this proceeding prejudiced either party. Most of the delays on the Father's part were explained and were understandable. I do not intend to repeat the information provided by his counsel which I accept.

[9] The Father's counsel did not file a pre-trial brief. I did not require her to do so. She provided oral submissions and made reference to case law in doing so. There was nothing new in the case law she quoted. Because it was requested, I provided the Mother's counsel time to consider those submissions before responding to them although, in effect, the Father's counsel was responding to the Mother's previously filed written submissions. There was nothing "new" in the Father's submissions. Providing the Mother's counsel with time to consider the submissions may have resulted in another half day but the Father cannot be faulted for this.

[10] The Father's success at trial and the settlement proposal he made support his request for a substantial contribution towards his legal costs. The shared parenting arrangement and the Mother's level of income support her request for a limited award. Having reviewed all of the circumstances the Father shall have costs in the amount of 13,500.00 which is approximately one half his legal account.

[11] In submissions the Mother asked for payment terms. If I do have jurisdiction to direct how the cost award is to be paid, I decline to do so. The parties may negotiate payment terms if they wish to do so.

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Beryl MacDonald, J.S.C.