

SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: *F.D.F. v. R.F.*, 2012 NSSC 208

Date: 20120530

Docket: 1201-065277; SFH-D-075130

Registry: Halifax

Between:

F.D.F.

Applicant

v.

R.F.

Respondent

Judge:

The Honourable Justice Elizabeth Jollimore

Written Decision:

May 30, 2012

Counsel:

Kay Rhodenizer for F.D.F.
Lynn Reiersen, Q.C. for R.F.

By the Court:

Introduction

[1] In November 2011, I was scheduled to hear Ms. DF's application seeking her husband's response to a request for admissions, production of documents or authorization for third party production of those documents, and authorization for her use of her husband's Canadian Armed Forces health insurance. By the date of the hearing, the only issue before me related to document production. Mr. F had agreed to sign the health insurance authorization (though his attempts to do so were flawed) and he had filed his response to the request for admissions approximately one week before the hearing.

[2] The spouses separated in early 2010 and, in May of that year, they signed a comprehensive settlement agreement. Both had counsel in negotiating this agreement. Ms. DF petitioned for divorce in April 2011. In her petition she sought to overturn the settlement agreement. This, and a desire to re-negotiate child support, formed the basis of Ms. DF's application for the production of documents.

[3] The application could not be completed within the hour allotted to it and, prior to its resumption, Mr. F retained counsel and the disclosure issue was settled. Counsel for the parties did not agree whether I should deal with costs at this juncture or leave this question for the judge who would hear the trial. I am better situated than the trial judge to assess costs arising from the application, so I received submissions from each party's counsel. Ms. DF asks that I order her husband to pay her costs of \$6,000.00. Mr. F submits that the appropriate amount of a costs award is \$1,000.00.

Costs

[4] Costs are governed by Civil Procedure Rule 77. Costs are to be fixed in accord with the tariffs of costs and fees set by the *Costs and Fees Act*, R.S.N.S. 1989, c. 104. According to Rule 77, Tariff C, "Unless otherwise ordered, the costs assessed following an application shall be in the cause and either added to or subtracted from the costs calculated under Tariff A."

[5] The application was scheduled for one hour. It exceeded that time. One-half hour was spent on Ms. DF's motion to strike portions of her husband's affidavit and brief, which was largely a narrative of his evidence and argument relating to Ms. DF's claim that their separation agreement should be overturned. The other half hour was occupied by Mr. F's cross-examination of Ms. DF, when he attempted to prove that the circumstances of the marriage were such that she knew about the family's financial situation and her assertions and argument that she was kept in the dark or inadequately informed, were untrue. His cross-examination didn't address the merits of the production application, but his wife's efforts to overturn their separation agreement. The cross-examination was characterized by argument, interruption and raised voices by both parties.

[6] The completion of the application was adjourned to a half-day hearing which wasn't necessary because it was resolved by agreement.

[7] The range of costs for hearings requiring less than one-half day is \$750.00 to \$1,000.00. The actual time used was an hour because the application was resolved before the hearing resumed.

[8] In addition, I consider Rule 39.04(5) which states that "A judge who strikes parts, or the whole, of an affidavit must consider ordering the party who filed the affidavit to indemnify another party for the expense of the motion to strike and any adjournment caused by it." Mr. F argues that he should not be "penalized for common self-rep errors" because once I explained to him why portions of his affidavit or brief were inappropriate, he consented to their being struck. I appreciate Mr. F's respect for my rulings, but this does not detract from the fact Ms. DF was required to seek these rulings.

[9] I am mindful of Justice B. MacDonald's outline of the general principles applicable to costs awards in *Fermin v. Yang*, 2009 NSSC 222, at paragraph 3. In particular, I consider the reasonableness of expenses. Costs should represent a substantial contribution to a party's **reasonable** expenses and the tariff is to be my first guide in determining the appropriate quantum. Fees billed are only one factor to be reviewed in determining reasonable expenses.

[10] In her submissions on costs, Ms. DF gives the conservative estimate that the time spent preparing for the one hour hearing in November and its adjourned completion in February as "equivalent to the time usually spent to prepare for and litigate a two day hearing." The financial circumstances of this couple are not such that a disclosure application should require such preparation. I was provided with considerable detailed information about requests made of Mr. F and his responses. While it would have taken hours to organize the chronology of requests and responses into an affidavit, this is a task requiring skills more of a clerical nature than legal analytical skills. The reasonable legal fees for this task should not reflect the hourly rate of a senior practitioner on a time spent basis.

[11] Mr. F was unrepresented. He was not obstructionist, but ignorant of the Rules and law. I accept that an unrepresented party, just as any other, should follow the Rules and be liable for costs where the Rules dictate, as in Rule 39.04(5). I am not willing to elevate an unrepresented party's ignorance of the Rules and law to arrogance, and determine costs on such a basis.

[12] Recognizing the time this matter should have required, the reasonable fees relating to the application, and the time taken to strike portions of Mr. F's affidavit and brief, I order Mr. F to pay Ms. DF costs, inclusive of disbursements, of \$1,500.00. This amount shall be in the cause and may be added to or subtracted from costs awarded at trial. Ms. Rhodenizer shall prepare the order.

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

Halifax, Nova Scotia