Date: 20020829
Docket: SFHCAA 013786

IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

[Cite as: J.E.A. v. C.L.M., 2002 NSSC 204]

BETWEEN:

J. E. A.

APPLICANT

- and -

C. L. M. and A. D. M.

RESPONDENTS

D E C I S I O N O N C O S T S

Editorial Notice

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

HEARD: At Halifax before The Honourable Justice Walter R. E. Goodfellow on May 6, 7, 8, 9, 10, 2002 - (Final written representations August 14th, 2002)

DECISION: August 29th, 2002

COUNSEL: Christopher S. Berryman and Sarah Davis A/C for the Applicant, J. E. A.
Craig M. Garson, Q.C. for the Defendant, C. L. M.
Myrna L. Gillis for the Defendant, A. D. M.
Alan J. Stern, Q.C. for the Child, K. M. A.

GOODFELLOW, J.:

BACKGROUND

[1] This matter came on by way of an Application to apply the Hague Convention, a Convention on the Civil Aspects of International Child Abduction. The matter was heard before me May the 6th, 7th, 8th, 9th and 10th, 2002 and I rendered a decision May the 16th, 2002. I repeat the initial background recited in my decision of May the 16th, 2002 as follows:

[2] J. A. and Dr. C. L. M., who now goes by her maiden name S., met in March 1990 and were married in [...], Iowa on November the 1st, 1990. Mr. A. had custody of his son, J., from a previous marriage. They moved to Minnesota where Doctor S. obtained employment as a Staff Physician and Assistant Fellowship Director in Emergency Services at [...] Hospital. Their daughter, K. A., was born January * , 1992 and the parties moved back to [...], Iowa in May of 1992, as Doctor S. had been recruited to set up a Paediatric Emergency Department at [...] Hospital in Des Moines. The parties separated in September, 1992.

[3] On April the 24th, 1993 the Iowa District Court for Madison County granted Doctor S.'s Petition for Divorce and recited that both parents were

joint legal custodians of K., with the mother having "physical care". On March the 10th, 1995 Doctor S. applied for a variation of the access provisions and this resulted in the father's visitation with K. being suspended pending reports by investigators of the Iowa Department of Human Services. Subsequently, supervised access was reinstated. There were a number of assessments made which I will refer to in my determination with respect to the issue of whether or not Doctor S. has demonstrated under Article 13 of the Hague Convention that there is a grave risk K.'s return to Iowa would expose her to physical or psychological harm or otherwise place her in an intolerable situation.

[4] In summary, Doctor S., not finding the legal process to her liking, obtained, by fraud, passports for herself and daughter, K/, and contacted the "underground". She and K. disappeared surfacing shortly thereafter at [...] in British Columbia where Doctor S. met and entered into a relationship with a Doctor A. M., whom she married on October the 3rd, 1996, her fourth marriage. They have a daughter, E. A/ M., born May the *, 1997 in British Columbia. In July 1997, Doctor M., Doctor S., K. and E. moved to Nova Scotia where Doctor S. and Doctor M. separated in May of 2001. There has been a measure of litigation between them and particularly in

relation to their daughter, E.. Doctor M. was concerned with respect to the possible absconding by Doctor S. with their daughter, E., and there have been a number of Interim Orders, the consistent feature of which neither party is to remove either children, K. or E., from the Province of Nova Scotia without Order of the Court. The R.C.M.P. being advised of the divorce proceedings apparently conveyed the whereabouts of Doctor S. and K. to the authorities in Iowa.

[5] Mr. A., who engaged the services of Missing Children Agencies, learned around July 2001 of the whereabouts of his daughter, K., who the mother had kept in hiding for approximately six years and Mr. A. has proceeded to file this Application pursuant to the *Child Abduction Act*, R.S.N.S. c.67, which incorporates the Convention on the Civil Aspects of International Child Abduction, commonly referred to as the Hague Convention.

CIVIL PROCEDURE RULES - COSTS

Definitions

CPR 1.05 In these Rules, unless the context otherwise requires,

(w) "proceeding" means any action, suit, cause or matter, or any interlocutory application therein, including a proceeding formerly commenced by a writ of summons, third party notice, counterclaim, petition, originating summons, originating motion, or in any other manner;

Costs in discretion of court

CPR 63.02.

(1) Notwithstanding the provisions of rules 63.03 to 63.15, the costs of any party, the amount thereof, the party by whom, or the fund or estate or portion of an estate out of which they are to be paid, are in the discretion of the court, and the court may,

When costs follow the event or are determined by the Rules

CPR 63.03.

(1) Unless the court otherwise orders, the costs of a proceeding, or of any issue of fact or law therein, shall follow the event.

Party and party costs fixed by court

CPR 63.04.

(2) In fixing costs, the court may also consider

> **(c)** the conduct of any party which tended to shorten or unnecessarily lengthen the duration of the proceeding;
>
> **(d)** the manner in which the proceeding was conducted;
>
> **(e)** any step in the proceeding which was improper, vexatious, prolix or unnecessary;

(f) any step in the proceeding which was taken through over-caution, negligence or mistake;

(g) the neglect or refusal of any party to make an admission which should have been made;

(j) any other matter relevant to the question of costs.

Disbursements

63.10A Unless the court otherwise orders, a party entitled to costs or a proportion of that party's costs is entitled on the same basis to that party's disbursements determined by a taxing officer in accordance with the applicable provisions of the Tariffs.

Costs arising from misconduct or neglect

CPR 63.15.

(1) Where any thing is done or an omission is made, improperly or unnecessarily, by or on behalf of a party, the court may order,

(b) the party to pay the costs of any other party occasioned by the act or omission;

Part II. Solicitor and Client Costs: General

Costs to be reasonable

CPR 63.16.

(1) A solicitor is entitled to such compensation from a client, who is a party, as is reasonable for the services performed, having regard to

(a) the nature, importance and urgency of the matters involved,

(b) the circumstances and interest of the person by whom the costs are payable,

(c) the fund out of which they are payable,

(d) the general conduct and costs of the proceeding,

(e) the skill, labour and responsibility involved, and

(f) all other circumstances, including, to the extent hereinafter authorized, the contingencies involved.

ISSUES

1. WHAT IS THE STATUTORY AUTHORITY FOR COSTS IN THE *CHILD ABDUCTION ACT*

2. SHOULD J. E. A. HAVE COSTS OF THIS PROCEEDING ON A SOLICITOR AND CLIENT BASIS?

3. SHOULD A. D. M. HAVE COSTS OF THIS PROCEEDING ON A SOLICITOR AND CLIENT BASIS?

4. TAXATION OF COSTS AND DISBURSEMENTS - J. E. A..

5. TAXATION OF COSTS AND DISBURSEMENTS - A. D. M.

ISSUE NUMBER ONE

1. WHAT IS THE STATUTORY AUTHORITY FOR COSTS IN THE *CHILD ABDUCTION ACT?*

[6] Mr. Garson takes the position that Article 26 of the Hague Convention incorporated in the *Child Abduction Act* represents a complete regime with respect to the authority to grant costs.

[7] Article 26 states:

> Each Central Authority shall bear its own costs in applying this Convention.
>
> Central Authorities and other public services of Contracting States shall not impose any charges in relation to applications submitted under this Convention. In particular, they may not require any payment from the applicant towards the costs and expenses of the proceedings or, where applicable, those arising from the participation of legal counsel or advisors. However, they may require the payment of the expenses incurred or to be incurred in implementing the return of the child.
>
> However, a Contracting State may, by making a reservation in accordance with Article 42, declare that it shall not be bound to assume any costs referred to in the preceding paragraph resulting from the participation of legal counsel or advisers or from court proceedings, except insofar as those costs may be covered by its system of legal aid and advice.
>
> Upon ordering the return of a child or issuing an order concerning rights of access under this Convention, the judicial or administrative authorities may, where appropriate, direct the person who removed or retained the child, or who prevented the exercise of rights of access, to pay necessary expenses incurred by or on behalf of the applicant, including travel expenses, any costs incurred or payments made for locating the child, the costs of legal representation of the applicant, and those of returning the child.

[8] The Central Authority for the purpose of the Convention is the Attorney General and Section 4 of the *Act* makes it clear that the Crown is not bound to assume any cost resulting under the Convention from the participation of legal counsel or advisors or from court proceedings except in accordance with the *Legal Aid Act*.

[9] The Convention permits a reservation as it relates to the Contracting Authorities assumption of costs. The Convention specifically states that a judicial authority may order the person who removed or retained the child or prevented the exercise of rights of access to pay some of the Applicant's costs and such does not, in my opinion, state any prohibition in the awarding of costs to an interested party who joins in the Application and has standing which has not been called into question.

[10] In *Pollastro v. Pollastro*, [1999] O.J. No. 911, the trial Court of Ontario ordered the child returned to her father, the Applicant, under the Hague Convention. The Court of Appeal of Ontario heard an appeal from the child's mother, the Respondent. It allowed the appeal, set aside the decision of the Trial Judge, and dismissed the Applicant's Application with costs.

[11] In *S.S. v. Y.G.*, [2002] O.J. No. 1894 (Court of Justice), the court ordered solicitor/client costs against the Respondent: "Mr. Gottlieb submitted that

his client's costs for proceeding in this court were $12,500. The respondent is ordered to pay costs forthwith to the applicant in the amount of $12,500. She shall not be permitted to commence any proceedings in Ontario regarding this child until such time as this costs order is paid in full and proof thereof is filed with the court" (at para. 28). The Convention does indicate that the cost of legal representation of the applicant can be payable by the respondent. In *S.S.*, the court ordered full costs payable. The Convention does not indicate the court has discretion to bar further legal proceedings until costs are payable; the court in *S.S.* clearly considered this to remain within its jurisdiction and its discretion and made a payment of costs a condition to further proceedings.

[12] In my view, the *Act* incorporating the Convention is not exhaustive in that it does not establish a complete scheme or address all aspects, such as how the court is to exercise its discretion regarding costs. The court in exercising its discretion with respect to costs does not interfere with the goal of the Convention. The Convention does not establish any prohibition or limitation on the exercise of discretion with respect to costs and it is clearly permissive "may, where appropriate,".

[13] I conclude that the Convention and, in particular, Article 26 does not limit the jurisdiction of this court to exercise its discretion with respect to costs nor does the exercise of such discretion conflict with the Hague Convention, particularly where the exercise of discretion relates to a party's deliberate, conscious embarking upon a conduct of disrespect for the law and courts carried to the extent of making misrepresentations to innumerable authorities, including this court.

ISSUE NUMBER TWO

2. SHOULD J. E. A. HAVE COSTS OF THIS PROCEEDING ON A SOLICITOR AND CLIENT BASIS?

[14] *Walker et al v. Walker Estate* (1998), 169 N.S.R. (2d) 336 at p. 338:

> **[6]** The onus is upon the applicant to satisfy the court that there are exceptional circumstances that warrant the exercise of discretion in favour of awarding solicitor and client costs.

[15] *Brown v. Metropolitan Authority et al* (1996), 150 N.S.R. (2d) 43 (N.S.C.A.) Pugsley, J. A. at p. 55:

[78] While it is clear that this Court has the authority to award costs as between solicitor and client, it is also clear that this power is only exercised in rare and exceptional circumstances, to highlight the court's disapproval of the conduct of one of the parties in the litigation (*Wournell (P.A.) Contracting Ltd. et al v. Allen* (1980), 37 N.S.R. (2d) 125; 67 A.P.R. 125 (C.A.)).

[79] This court has refused to award costs as between solicitor and client even though the conduct of the party in question has been found to be reprehensible. (*Lockhart v. MacDonald* (1980), 42 N.S.R. (2d) 29; 77 A.P.R. 29 (C.A.) *Warner v. Arsenault* (1982), 53 N.S.R. (2d) 146; 109 A.P.R. 146 (C.A.)).

[82] There is, however, a difference between reprehensible conduct as demonstrated here, and those rare and exceptional circumstances which attract the sanction of costs as between solicitor and client. In my opinion, the Authority's actions do not cross that line, and accordingly, I would not award costs as between solicitor and client.

[16] In *MacKay v. Bucher* (2001), 199 N.S.R. (2d) 248 (N.S.C.A.), Bateman, J.A. at p. 249:

[5] In ordering solicitor client costs the judge found that Ms. MacKay swore a false affidavit misrepresenting, among other things, the quality of the legal advice which she had received at the time of entering into the lump sum agreement. That finding of fact is supported by the record.

[6] Ms. MacKay was represented by counsel at the costs hearing. She provided no explanation for the statements in her affidavit. The judge accepted that her false evidence on the various issues drew the respondent into disproving the allegations. In this regard Mr. Bucher incurred substantial additional expense. The judge accepted that this was a reasonable course of action.

> **[7]** It appears, from a reading of the decision, that the costs award was driven by the appellant's misconduct which the judge characterized as a rare and exceptional circumstance meriting that award.

[17] I have absolutely no reservation in concluding that there exists in this case rare and exceptional circumstances that warrant Dr. S. paying solicitor and client costs to J. A.. Dr. S. is a sophisticated, well educated professional with substantial financial resources who clearly understood the course of conduct or more appropriately, misconduct, that she embarked upon in the State of Iowa for which she had the ability and resources to invoke and extend her misconduct over a prolonged period.

[18] Dr. S. did not hesitate to resort to the Courts in the State of Iowa and in the Province of Nova Scotia then make her own determination as to whether or not she would accept any courts determination. Her initial action resulted in her obtaining a Divorce Judgment in Iowa which provided for joint custody between the father and mother of their daughter, K.. Dr. S. I found embarked on a deliberate course of action best described in her own words authored in November, 1992, "I will not put up with him anymore and I will go to any length to keep my daughter in my custody" ... "there is no way that I will let my daughter go to him". She consistently showed a total disrespect for the law, determined that the law would not interfere with her

stated goal, and as I have found, she deliberately and falsely misled innumerable people and, from the very outset, she made innumerable complaints to varying authorities in Iowa consistent with her determination of November, 1992, deliberately failed to disclose to professionals the significant feature of her own background and that she was subject to a degree of sexual abuse within her own family and enhanced what might have happened to K. to a level to which there is not the slightest shred of evidence or comment by anyone else, etc. I concluded that Dr. S. had a willingness to mislead that knew no boundaries. It was established before me that she misled this court on another occasion on an Interim Application and I concluded she did so on that occasion deliberately. She signed a Petition for Divorce to this court knowing her representation as to no other proceedings relating to the children constitute a deliberate misrepresentation.

[19] Dr. S.'s conduct throughout has produced a rare and exceptional set of circumstances and established beyond a reasonable doubt the proper exercise of discretion with respect to costs is to require her to pay J. A.' costs on a solicitor and client basis.

[20] The misconduct of Dr. S. was a course of conduct that was conscious and deliberate and included a number of false and misleading representations that far exceeded the conduct of Ms. MacKay in *MacKay v. Bucher* above and J. A. has, over a lengthy period of time but more particularly in this litigation, incurred substantial additional expense to pursue the right of their daughter, K., to know her father.

[21] I agree with Mr. Garson that it is incumbent upon counsel for J. A. to present full and complete records and details as to time, services and disbursements incurred. In *Binder v. Murrant* (2001), 196 N.S.R. (2d) 25 at p. 32:

> **[17]** No matter what the fee arrangements, contingency, flat fee, hourly service rate, etcetera, there is a duty on the barrister a stated in the N. S. Barristers' Society Handbook, Chapter 12:
>
> "FEES
>
> Rule
>
> A lawyer has a duty to
>
> (a) stipulate, charge or accept only fees that are fully disclosed, fair and reasonable."
>
> **[18]** There is no better way to substantially comply with this duty than to keep

> accurate timely records of all services, retainers, disbursements, payments and time spent by the barrister on the client's file. Mr. Murrant failed this duty and the client should not bear any portion of the taxation costs before Mr. Fownes.

[22] It will therefore be necessary for J. A.'s solicitor to present his records for the taxation of costs on a solicitor and client basis. The taxation of party and party costs on a solicitor and client basis does not necessarily equate to the account a solicitor submits to his client. See *Phillips v. Robert A. Jeffries Architecture and Design Limited et al*, [2002] N.S.J. No. 220 and also *Halifax Regional Municipality v. Joudrey* (2002), 198 N.S.R. (2d) 356.

[23] The court sincerely hopes that counsel will be able to resolve the issue of the appropriate level of costs for J. A., however, if they are unable to do so, then I am prepared to do a formal taxation of his costs and disbursements on a solicitor and client basis.

ISSUE NUMBER THREE

3. SHOULD A. D. M. HAVE COSTS OF THIS PROCEEDING ON A SOLICITOR AND CLIENT BASIS?

[24] After careful reflection, I have concluded that A. D. M. should be entitled to costs on a party and party basis and not on a solicitor and client basis. Two features of his position weigh heavily in this determination. First of all, A. D. M. had knowledge of and supported Dr. S.'s course of conduct in avoidance of the authority and orders of the State of Iowa. He now says that he was unaware of the full extent of her conduct and deception and, while there is no doubt a measure of validity to that position, nevertheless, it is clear that for a prolonged period he was supportive of Dr. S.'s turning a blind eye to the rule of law. Additionally, there are a number of proceedings that are relevant to Dr. M. that are not before me. I have no doubt that substantially through the efforts of his solicitor in this matter before me many of Dr. S.'s untruths, half-truths and deceptions were uncovered, some directly relating to proceedings involving Dr. S. as Mrs. M. and A. D. M. as relates to their daughter, E., and in particular, the Divorce Application outstanding in Nova Scotia. Dr. S. has apparently utilized the services of Joel Pink, Q.C., Lynn Reierson, Lee Cohen and perhaps others in proceedings and processes that are relevant to the matter before me as it may impact on the child, E. M. but, nevertheless, are before this court in an entirely different file and it is more appropriate that costs

relating to those issues be addressed by the Justice dealing with those matters. *Gilfoy et al v. Kelloway et al* (2000), 184 N.S.R. (2d) 226. I conclude that the involvement of Alan J. Stern, Q.C. was more in the nature an associate of Mr. Garson with respect to the cost issues and is not a consideration for any additional costs.

[25] That is not to say that the course of deception embarked upon by Dr. S. in this matter did not require a great deal of additional time and effort, particularly on the part of A. D. M.'s solicitor and, when this results in the need for additional professional time and effort through misconduct of a party, it is an appropriate exercise of discretion for the court to utilize Tariff 'A', scale 5. *Gilfoy et al v. Kelloway et al* above.

[26] It is difficult, if not impossible, to put a monetary value on the harm caused by Dr. S. and all I can do is relate this five day trial to the time and effort that would normally be involved in a trial of comparable professional requirement and doing the best I can I fix the "amount involved" at $75,000 and, using Tariff 'A', scale 5, tax, party and party costs payable by Dr. S. to A. D. M. in the amount of $8,475. I am prepared to tax the reasonable disbursements of A. D. M. should the parties be unable to reach agreement

on his reasonable recovery of disbursements relating to this Application.

J.