SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION

Citation: *Chisholm v. Chisholm*, 2016 NSSC 325

Date: 2016-11-25
Docket: *SFSND* No. 1206-006808
Registry: Sydney

Between:

Patricia Ann Chisholm

Petitioner

v.

David Blair Chisholm

Respondent

- and -

Daren Todd Chisholm

Intervenor

Judge: The Honourable Justice Lee Anne MacLeod-Archer

Costs Decision: November 25, 2016

Counsel: Alicia Brown-Fagan, Counsel for Patricia Chisholm
Blair Chisholm, Self-Represented
Daren Chisholm, Self-Represented

By the Court:

[1] This is a costs decision arising from a divorce hearing which was held over several days between May 9 and July 7, 2016. The Petitioner was represented by counsel, while the Respondent and the Intervenor were both self-represented.

[2] The Court rendered its decision on September 22, 2016 (**Chisholm v. Chisholm** 2016 NSSC 245), in which the Petitioner's claims to a division of matrimonial assets and child support were successful.

[3] The Court invited written submissions on costs. Counsel for Ms. Chisholm filed submissions on October 26, 2016. Blair Chisholm requested, and was granted, an extension of time to file his submissions on costs, which were received on November 18, 2016. The Intervenor filed no submissions.

[4] Ms. Chisholm relies on Civil Procedure Rules 77.01(1)(a) in arguing that she should be awarded party and party costs under Tariff A in the amount of $25,000.00. She argues that she was the successful party, and that even though she was presented by Nova Scotia Legal Aid's Conflict Office, in accordance with **Burke v. Burke** [1983] NSJ No. 129, she should receive costs. In **Burke,** Justice Moir stated:

> I would be inclined to reach the same result even if it were not for subsection 21(1). In my view the common-law principle permits an award of costs where the successful party is represented by legal aid services. The overriding reason for party and party costs is indemnification and it follows that where a solicitor is acting gratuitously there can be no award. But legal aid lawyers do not act gratuitously they are paid a salary and a party represented by salaried counsel is not disentitled from costs: *City of Halifax v. Romans* (1881), 14 N.S.R. 271 (N.S.S.C.) in banco). It is sufficient that the lawyer is compensated. The details of his remuneration are not the business of the courts.

[5] She also relies upon MacDonald, J.'s synopsis of the law on costs in **Gagnon v. Gagnon**, 2012 NSSC 137:

> 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 "very good reason" and be based on principle.

4. Deference to the best interest 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 an otherwise successful party or to reduce a cost award.

5. The amount of a party and party cost award should "represent a substantial contribution toward the parties' [sic-party's] 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 costs award is a factor that can be considered, but as noted by Judge Dyer in *M.C.Q. [sic M.Q.C] v. P.L.T., 2005* NSFC 27 (Can LII), 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 (CanLII)].

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 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 in 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.

[6] She also relies on Warner, J.'s comments in **Lake v. Lake** [2016] NSJ No. 370 on family law cases in particular:

> 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 behavior".
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> 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.
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> 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).
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> 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.
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> 35. Costs awarded in family matters should reflect the same factors as costs awarded 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 cause them to lose objectivity and sight of the impact of litigation on the best interests of their children, and act unreasonably.
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> 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.

[7] Blair Chisholm argues that no costs should be awarded. He notes that CPR 77.02 allows the court to order each party to bear their own costs, in order to "do justice between the parties". He also notes that the Tariffs require consideration of the "amount involved", which

> (a) Where the main issue is a monetary claim which is allowed in whole or in part, an amount determined having regard to
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> 1.(i) the amount allowed,
>
> (ii) the complexity of the proceeding, and
>
> (iii) the importance of the issues:
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> (b) Where the main issue is a monetary claim which is dismissed, an amount determined having regard to
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> (i) the amount of damages provisionally assessed by the court, if any,
>
> (ii) the amount claimed, if any,
>
> (iii) the complexity of the proceeding, and
>
> (iv) the importance of the issues;
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> (c) where there is a substantial non-monetary issue involved and whether or not the proceeding is contested, an amount determined having regard to
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> (i) the complexity of the proceeding, and
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> (ii) the importance of the issues;
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> (d) an amount agreed upon by the parties.

[8] Mr. Chisholm argues that he did not delay matters, but I disagree. His actions created some delays and increased court time. Examples include:

- He filed a motion for disclosure of Ms. Chisholm's historic income tax and social services information which was dismissed, and then subpoenaed the same records at trial.
- He purported to tender a true copy of the social services file as an exhibit, without advising the court or counsel that he had redacted it. This became apparent when the witness testified, and necessitated an adjournment to allow counsel to review the complete file to determine which sections were removed. An hour of trial time was lost.

- He initially refused to waive solicitor-client privilege over his lawyers' files on the deed transfer. His brother (the Intervenor) claimed privilege over his lawyers' files (the same lawyers and he same files) as well. This forced one former counsel to retain legal counsel to file briefs and prepare to argue the issue of disclosure before the court on his behalf. I dealt with disclosure as a preliminary issue, and reminded the Intervenor that one of the express terms laid out by the court for his participation in the trial as Intervenor was to provide a complete copy of his lawyer's file. Daren Chisholm then withdrew his claim of privilege, but Blair Chisholm invoked it, meaning a hearing was required. Almost half a day of trial time was lost.

[9] Ms. Chisholm's counsel suggests there are two ways to determine the "amount involved: 1) using the "rule of thumb" of $20,000.00 for each day of trial (which equates to $20,000.00 as the final day involved only submissions) or 2) value Ms. Chisholm's share of the matrimonial home and an approximate value of her retroactive and prospective child support awards, and apply the Tariffs.

[10] Using these alternative approaches, she calculates Ms. Chisholm's costs award at somewhere between $11,000.00 and $20,188.00. She then asks the Court to increase the Tariff amount under CPR 77.02(2) because: 1) Mr. Chisholm did not participate in a scheduled settlement conference for which costs of $500.00 were awarded, but remain unpaid, and 2) the settlement conference judge provided her views with respect to the merits of Mr. Chisholm's case, and Mr. Chisholm failed to take heed.

[11] I reject the argument for an increased Tariff where Mr. Chisholm cancelled the settlement conference, because costs were already awarded against him. The fact that they remain unpaid is not a reasonable basis to increase the Tariff in this case.

[12] I also reject the second argument advanced in support of an increased Tariff. Any discussions between the settlement conference judge, counsel, and Mr. Chisholm about the merits of his case would have been held off the record, as is always the case in settlement conferences. A written offer incorporating the views of a settlement judge is the appropriate way to bring such opinions to the attention of a trial judge who is deciding whether costs should be awarded after a trial. Neither party brought a written offer to settle to my attention, so that factor is not persuasive.

[13] This proceeding involved numerous pretrial appearances and filings. Ms. Chisholm's counsel notes that her client was forced to deal with not only this proceeding, but also a Residential Tenancies hearing, a Small Claims Court hearing, and a Supreme Court claim filed by Daren Chisholm which ran parallel to this proceeding. This trial lasted 4 days, and submissions took 1.5 hours on the fifth day.

[14] Ms. Chisholm was successful in all of her claims. Blair Chisholm successfully advanced his claim that he had paid some child support, which should be credited against any arrears. However, for purposes of party and party costs, I find Ms. Chisholm was the more successful party. In particular, she successfully proved that the deed to the matrimonial home was fraudulently conveyed, and the deed should be overturned.

[15] The caselaw suggests that party and party costs should represent a "substantial contribution" to Ms. Chisholm's costs. She was represented by N.S. Legal Aid, so she incurred no costs personally. However, that service comes at a cost to the public. Her counsel spent over 200 hours dealing with this and related matters. She suggests an award under the Tariffs could range from $11,000.00 to $20,188.00 for the amount and time involved.

[16] Mr. Chisholm says that he cannot afford to pay costs. He has an ongoing child support obligation and he owes a large sum in Provincial Court fines for selling illegal cigarettes. So a large costs award would undoubtedly cause him some hardship.

[17] However, Mr. Chisholm is entitled to be paid for his share of the net equity in the matrimonial home, which may offset any hardship created by a costs award. And fairness dictates that a claim of impecuniosity should not thwart Ms. Chisholm's recover of costs (**Muir v. Lipon**, *supra*).

[18] He also points out that Ms. Chisholm was not forthright in her evidence about sums he paid as child support. The Court credited Blair Chisholm with a number of payments, despite Ms. Chisholm's evidence that he did not pay child support.

[19] Neither Blair Chisholm nor Patricia Chisholm was entirely candid in their evidence, but I determined, based on all of the evidence at trial, that Blair Chisholm had orchestrated the fraudulent conveyance of the deed to his brother in

an effort to defeat Ms. Chisholm's claim. In terms of degree, his evidence was much less credible than Ms. Chisholm's.

[20] Mr. Chisholm cites and relies upon the decision of Justice MacLellan in **Pelley v. Peters**, 2014 NSSC 277, and Justice Beaton in **O'Neil v. O'Neil**, 2013 NSSC 64 to suggest that success was divided, so each party should bear their own costs.

[21] He notes that **O'Neil**, *supra* is more in line with this case, but it is not. **Pelley**, *supra* is more in line with the facts of this case, and in that decision MacLellan, J. awarded costs of $20,000.00 against the wife, who disputed all issues, was untruthful and contradictory, failed to supply evidence to support her illness, and was generally unsuccessful. She "displayed the type of conduct Judge Dwyer [*sic*] referred to when he condemned parties who drag out proceedings because it costs them nothing". Mr. Chisholm was self-represented and incurred no legal fees in this case.

[22] Having considered the issues at play in the trial, the arguments advanced by Patricia Chisholm and Blair Chisholm, the case law, and the Civil Procedure Rules, I exercise my discretion in awarding a lump sum costs award under CPR 77.08 in the amount of $15,000.00, payable by Blair Chisholm to Nova Scotia Legal Aid.

[23] This figure falls within the range of possible Tariff awards for party and party costs suggested by Ms. Chisholm for the amount involved, but also reflects the priority of child support, the possible hardship to Mr. Chisholm of a larger award, the fact that Ms. Chisholm did not personally incur fees, and the fact that Mr. Chisholm met with some success at trial on the issue of child support. I find that a lump sum award of $15,000.00 will do justice between the parties in all of the circumstances in this case.

[24] This sum will be added to any outstanding costs awarded against Mr. Chisholm for the cancelled settlement conference, all of which shall be paid from the funds payable to him from his share of equity in the matrimonial home. Any remaining balance owing by him shall be paid in monthly increments of $100.00, commencing December 1, 2016, and continuing monthly until paid in full.

[25] Daren Chisholm did not file submissions on costs, but as an Intervenor, the Rules on costs apply to him as well. He applied to be added as a party, and Ms. Chisholm consented rather than force him to argue the matter in a hearing. Thereafter he played an active role in the trial, although he was unsuccessful in

advancing his position, and he was partly responsible for some of the delays outlined above. I award lump sum costs payable by him to Nova Scotia Legal Aid in the amount of $1,000.00.

[26] Ms. Brown-Fagan is asked to prepare and file the order.

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MacLeod-Archer, J.