SUPREME COURT OF NOVA SCOTIA
Citation: *Pardy v Moores*, 2018 NSSC 35

Date: 2018-02-22
Docket: 1204-005446
Registry: Kentville

Between:

June Pardy

Applicant

v.

Robert Trevor Moores

Respondent

Judge:	The Honourable Justice Gregory M Warner
Heard:	December 27 and 28, 2017, in Kentville, Nova Scotia
Final Written Submissions:	February 5, 2018
Counsel:	Cheri Killam, counsel for the applicant Judith Schoen, counsel for the respondent

By the Court:

[1] This is a costs decision regarding an application to vary the parenting and associated child support issues.

Background

[2] The parties married in 2000 and separated in 2009. Both parties have re-partnered. They have two sons, born in 2002 and 2005. Initially on separation, they were in Dad's primary care. The parties agreed, pursuant to a Consent Corollary Relief Order issued in 2012, to a week on / off shared parenting schedule. That scheduled continued until March 2017.

[3] In March 2017, the parties agreed, on a trial basis, that their younger son would remain for the rest of the school year in the primary care of mom. The older child remained in the week on / off schedule.

[4] This variation application involved the younger son. He plays competitive hockey, primarily through the efforts of Mom and her new partner. As noted, in March 2017, Dad agreed to a trial basis of allowing the youngest son to reside primarily with Mom. When she refused to return the younger son to the week on / off schedule at the end of the school year, he complained.

[5] Mom brought this application to obtain primary care on August 28, 2017. In September, she unilaterally changed the younger son's school to Wolfville, closer to where she lived.

[6] On September 19th, the parties agreed and the court ordered a Voice of the Child Report for the younger son. The report confirmed that he wished to reside primarily with Mom and remain in the Wolfville School.

[7] This application was set down for a half-day hearing. When both parties were late in providing financial disclosure of their and their new partner's incomes, and made cross motions to strike large portions of the other party's affidavits (each party filed three affidavits plus multiple affidavits of financial disclosure), the hearing was rescheduled to December 27th and 28th. Cross-examination of the

affiants occurred until mid-afternoon on December 27th; counsel requested an adjournment to the 28th to make submissions and for the court's oral decision.

[8] The issues at the hearing were:

1. the parenting of the younger son, as it was agreed that the older son would remain in the week on / off arrangement.

2. the determination of the parties' incomes for the purposes of calculating basic child support pursuant to ss. 8 and 9 of the *Federal Child Support Guidelines*.

3. the determination of Mom's retroactive and prospective basic child support and s. 7 claim with regards to orthodontic work commenced on the younger son and the younger son's sports activities.

Submissions

[9] Each side claims success.

[10] Mom made a settlement offer on November 30, 2017, when the hearing was still scheduled for a half day on December 4th. The offer was that:

1. The younger son would be Mom's primary care with access to Dad every second Friday to Monday, with unstated additional times, subject to cancellation if it conflicted with the younger son's activities. Dad was to transport the younger son for access purposes.

2. The parents would share equally the orthodontic and other s. 7 expenses, with Dad contributing $100.00 a month towards extracurricular activities.

3. Dad would pay, pursuant to the *Federal Child Support Guidelines*, child support of $326.10.

4. Dad would pay retroactive s. 7 sports costs of $800.00 ($100.00 a month) and 50% of the orthodontic work to date.

The offer was not accepted.

[11] In her last pre-trial brief, Mom's position was:

1. She was to be the primary care giver of the younger son and he would remain in school at Wolfville.

2. Prospective child support would not be based on total family income, she proposed that her income be the income of her business corporation ($54,000.00) and that Dad's income be $46,006.00. She made two calculations of the amount Dad would owe her for basic child support: one resulted in his obligation to pay $601.13; by the other, he would pay $326.10.

3. With respect to s. 7 expenses, she sought 45% of total s. 7 expenses of $393.62 ($177.13) for extraordinary, extracurricular activities, plus 45% ($108.00 a month) of the $240.00 per month orthodontic bill in respect of the younger son.

4. With respect to retroactive s. 7 expenses, she sought $100.00 for the extraordinary, extracurricular activities ($800.00), based on a prior agreement, and $1,675.00 of the $3,100.00 she had spent to date on orthodontic work on the youngest son.

[12] By her brief, it appears her actual legal costs, on a solicitor / client basis, will be approximately $5,300.00, inclusive of fees, HST and disbursements.

[13] In her submissions, Mom appears to seek solicitor / client costs to highlight disapproval of Dad's conduct in this proceeding. She then goes on to describe the 12 guidelines set out in *Gagnon v Gagnon*, 2012 NSSC 137 ("*Gagnon*"), a family law decision that applied Tariff A using the $20,000.00 a day as a rule of thumb for the "amount involved" when the primary issue is non-monetary.

[14] Applying the *Gagnon* principles, she submits:

1. The court's decision closely mirrored her application.

2. Her settlement offer, requiring Dad to pay $566.10 total child support, was close to the court's total award of $319.00 per month.

3. Dad should have accepted the Voice of the Child Report.

4. While costs for applications in chambers normally follows Tariff C, Tariff A is often used in family applications when they take on a trial-like feature.

5. This court's decision on costs in *Lake v Lake*, 2016 NSSC 255 ("*Lake*"), determined that an award should be a substantial contribution to a party's costs where the other side acted unreasonably.

6. Applying Tariff A, and adding $2,000.00 a day for one-and-a-half days ($3,000.00) added to the scale for the "amount involved" of $30,000.00, leads to a cost range of between $8,188.00 and $11,313.00. She seeks a costs award at the higher end of the range, but in any event, not less than $6,500.00 nor more than $11,313.00.

[15] Dad submits that success was divided and seeks costs of $3,500.00.

[16] Dad indicates that he responded to Mom's settlement offer.

[17] His proposed parenting plan was only one day different, in total, from what the court awarded and notes that Mom refused to agree that the week on / off parenting would resume for the summer months, which the court ordered.

[18] He was successful on the child support issues and did not oppose the younger son's orthodontic work but only asked that the timing be delayed because of the severe financial distress that he was under at the time of the request.

[19] He justified a request for an adjournment, based upon the lengthy, last-minute financial disclosure from Mom and her partner.

[20] He suggests that the hearing consumed closer to one day than one-and-a-half days.

[21] He noted that Mom's request was effectively for twice her actual solicitor – client costs; in contrast, he says his actual legal costs, because of his counsel's requirement to travel frequently from Halifax, was over $13,000.00.

[22] Finally, he repeats that he has four dependent children (two very young children with his present partner, who only recently returned to work) and has financial difficulties.

Analysis

[23] Success in this variation application was divided.

[24] Regarding parenting, the court's decision did not "almost mirror" Mom's settlement offer or pre-trial brief.

[25] The court accepted that it was in the best interests of the younger son to remain in Mom's primary care during the school year only, and to remain in the Wolfville School, because of his current participation in an elite hockey program largely supported by Mom.

[26] The court's decision at the same time reflected concern that Mom was making unilateral decisions without reasonable consultation with Dad, which decisions adversely affected Dad's ability to have an effective relationship with their younger son. In the result, the court found that the younger son remains in a week on / off arrangement in the summer vacation period with weekend accesses during the rest of the year.

[27] Regarding basic child support, Mom's pre-trial brief proposed basic child support either in the amount of $601.00 or, using another method, $326.00 a month. This was based on her proposed income - for Dad of $46,006.00, and for herself of $54,000.00.

[28] The court determined that Dad's go-forward income as $48,319.00 and Mom's go-forward income, including imputed income, as $69,584.00.

[29] Furthermore, the analysis for child support did not fall clearly within ss. 8 or 9 of the *Federal Child Support Guidelines*. As a starting point, the court found, for two children, Dad owed Mom $696.00 and, for one child, Mom owed Dad $595.00, resulting in a net amount owed by Dad to Mom of $101.00. The court then went on to take into consideration the condition, means and needs of both households, and determined that no adjustment to the set-off would improve the best interests of the children.

[30] The only increased expenses to Mom were the elite hockey expenses and the orthodontic expenses for the younger son. Dad was ordered to contribute to these separately as s. 7 expenses. In addition, Dad's financial circumstances were distressed, and he parents two other young children from his present relationship.

[31] With respect to Mom's s. 7 claim, the court ordered that Dad contribute retroactively and prospectively to the younger son's orthodontic costs at the rate of 40.89% of the net cost (neither party had dental insurance).

[32] With regards to "extraordinary", extracurricular expenses, the court determined that some of those claimed expenses were not "extraordinary" and are included in the basic child support calculation. The court did order that Dad contribute to the younger son's elite hockey expenses on a pro-rated basis.

[33] The primary contest was whether to permit the younger son to remain in the primary care of Mom, based upon his present involvement in elite hockey activities, largely supported and encouraged by Mom. Dad should have been more respectful of his younger son's present wish to pursue this interest.

[34] While success was divided, and affects the court's analysis, Mom was more successful in this most important issue.

[35] Mom estimated that her actual legal costs totalled about $5,300.00; however, she sought a substantially higher costs award by the application of Tariff A.

[36] This proceeding was a chambers application. The evidence portion involved cross-examination of the affiants for about three-quarters of a day with an early adjournment at the request of counsel to prepare their submissions for the next morning. Their submissions and an oral decision were completed the next morning.

[37] Tariff C, not Tariff A, is the appropriate scale for this type of application. This was not a trial-like proceeding.

[38] The range under Tariff C for between one-half and one full day is between $1,000.00 and $2,000.00. The range under Tariff C for a hearing of more than one hour and less than one-half day is $750.00 to $1,000.00. Based on the time spent in this matter, a costs award, based on Tariff C to a successful party, would be between $1,750.00 and $3,000.00.

[39] Considering the mixed success of the parties, and in the context of the actual solicitor – client costs to Mom, fairness dictates that the costs award in her favor be in the amount of $2,300.00.