

SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: *Cartwright v. Stewart*, 2019 NSSC 77

Date: 20190305

Docket: Sydney No. 1206-4174

Registry: Sydney

Between:

Christopher Cartwright

Applicant

v.

Michelle Stewart

Respondent

LIBRARY HEADING

Judge: The Honourable Justice Theresa M. Forgeron

Submissions on Costs: June 1, 2018; June 22, 2018, February 1, 2019; and February 5, 2019.

Decision: March 5, 2019

Key Terms: Family Law
Costs
Armoyan v. Armoyan, 2013 NSCA 136
Stewart v. Cartwright, 2018 NSSC 132
Rule 77

Summary: Costs of \$8,100, plus disbursements, were awarded to a mother who was largely successful in defending a father's Application to Vary. Although the matter was not complex, it was nonetheless important to the parties as the application involved the enforcement and quantification of child support for a vulnerable child. Further, the mother expended a significant amount of time preparing and conducting the hearing, while in contrast, the father did not. There was no formal settlement proposal, only oral discussions which were not reduced to writing. Tariff C was applied as well as a multiplier of three to achieve an award of costs that would do justice between the parties in the

circumstances of the case. Not an appropriate case for solicitor and client costs.

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Counsel: Mr. TJ McKeough for Christopher Cartwright

Mr. David J. Iannetti for Michelle Anne Stewart

By the Court:

Introduction

[1] Both parties seek costs. Ms. Stewart asks for an award of \$13,500; Mr. Cartwright suggests that he is entitled to costs of \$4,000 plus HST.

Issue

[2] What is the appropriate costs award?

Position of Ms. Stewart

[3] Ms. Stewart seeks costs of \$13,500 against Mr. Cartwright for various reasons including the following:

- She was the successful party on the issue of retroactive and ongoing child support.
- She was forced to defend her son's entitlement to child support by contesting Mr. Cartwright's application to vary. This was an expensive venture and one which she could ill afford.
- Mr. Cartwright breached his legal obligation by failing to pay for his son's post-secondary educational expenses as stipulated in the last court order.
- Mr. Cartwright's litigation conduct was less than appropriate. He conducted himself in a blameworthy fashion. He failed to produce financial information. He failed to respond in a meaningful and timely fashion. He did not file a brief or other relevant documentation.

- Mr. Cartwright unnecessarily lengthened the court proceeding by failing to disclose and by his inappropriate litigation conduct.
- No meaningful settlement offers were made. Mr. Iannetti advises as follows:

... Otherwise, I am not able to provide you with any exchange on offers to settle as they were verbal and usually over the telephone and the offers were lowball offers which my Client would not accept. There was no formal offer to settle and nothing filed with the court in that regard. Often the verbal offers would be the very last minute which my client would decline and would have little time to consider. ...

Position of Mr. Cartwright

[4] Mr. Cartwright seeks costs of \$4,000 plus HST against Ms. Stewart for several reasons, which include the following:

- Mr. Cartwright was the successful party. Mr. Cartwright made an oral settlement offer to pay Ms. Stewart \$30,000 plus the monthly table amount of child support until the child completed his final block of education, at which time, the parties would terminate child support and proportion the education expenses. The court's decision was not as generous.
- Mr. Cartwright is therefore entitled to 80% of his legal fees and expenses, which amounts to \$4,000 plus HST.

Law

[5] Rule 77 governs awards of costs. This Rule was reviewed in **Armoyan v. Armoyan**, 2013 NSCA 136, wherein Fichaud, J.A., stated the following relevant principles:

- The court's overall mandate is to "do justice between the parties": para. 10
- Solicitor and client costs are engaged in "rare and exceptional circumstances as when misconduct has occurred in the conduct of or related to the litigation": para. 11.
- Unless otherwise ordered, party and party costs are quantified according to the Tariffs. The court has discretion to raise or lower the Tariff costs applying listed factors, which include unaccepted written settlement offers, and the conduct of the parties insofar as it affects the speed or expense of the proceeding: paras. 12 and 13.
- The Rule permits the court to award lump sum costs and depart from Tariff costs in specified circumstances. Tariffs are the norm and there must be a reason to consider a lump sum: paras. 14 and 15.
- The basic principle is that a cost award should afford a substantial contribution to the parties' reasonable fees and expenses which means not a complete indemnity, but rather more than 50 and less than 100% of a lawyer's reasonable bill for services: para. 16.
- The Tariffs deliver the benefit of predictability by limiting the use of subjective discretion. This works well in a conventional case whose circumstances conform generally to the parameters assumed by the Tariffs. Some cases, however, bear no resemblance to the Tariffs' assumptions. For example, a proceeding begun nominally as a chambers motion may assume trial functions; a case may have no "amount involved"; efforts may be substantially lessened by the efficiencies of capable counsel, or handicapped by obstructionism; the amount claimed may vary widely from the amount awarded; the case may assume a complexity with a corresponding work load that is far disproportionate to the court time by which costs are assessed under the Tariffs; there may be rejected settlement offers, formal or informal, that would have saved everyone significant expense: paras. 17 and 18.
- When subjectivity exceeds a critical level, the Tariffs may be more distracting than useful. In such a situation, it is more realistic to circumvent the Tariffs and channel that discretion directly to the calculation of a lump

sum. A principled calculation should turn on the objective criteria that are accepted by the Rules or case law: para. 18.

[6] In **Armoyan v. Armoyan**, *supra*, the Court of Appeal employed percentages to determine the appropriate award of costs. A rate of 66% was applied to achieve a substantial contribution towards incurred legal fees before the settlement offer, and 80% after the settlement offer. \$306,000, which included disbursements, was awarded in total.

Decision

[7] After reviewing the submissions of the parties, the law and the evidence, I have determined that Mr. Cartwright must pay costs of \$8,100 to Ms. Stewart for the following reasons:

- Ms. Stewart was the overall successful party. Mr. Cartwright asked me to terminate child support as of April 30, 2016 and fix arrears at \$4,000. Mr. Cartwright was not successful in achieving this outcome. In my decision, reported as **Stewart v. Cartwright**, 2018 NSSC 132, I found that Mr. Cartwright owed Ms. Stewart \$36,664 for s. 7 expenses incurred up to and including 2018; the sum of \$3,850 for s. 7 expenses in 2019; and the table amount of child support until July 2016.
- I assign limited weight to the informal settlement discussions. These conversations were often last minute. These conversations were never reduced to writing. No formal settlement offer was filed in conformity with the **Rules**. I have no agreement as to the content of the offers. Mr. Iannetti referred to the oral offers as “lowball”. If parties wish to invoke the litigation benefit of a settlement offer, such offers must, at a minimum, be reduced to writing so there is clarity.

- Ms. Stewart should not be penalized for defending this proceeding and seeking to enforce the maintenance provisions of the 2004 Corollary Relief Judgement, which stipulated Mr. Cartwright's legal obligation towards his son's ongoing maintenance.
- The Application to Vary was held in Chambers and included six court appearances: October 3, 2017; November 1, 2017; January 17, 2018; February 28, 2018; March 2, 2018 and May 22, 2018. A cost award of \$1,000 was already awarded on January 17, 2017 in respect of Mr. Cartwright's request to reopen the hearing. I therefore will not consider the court appearance on January 17th for the purposes of this decision.
- Each of the appearances on October 3rd, November 1st, February 28th, and May 22nd took less than one hour which according to Tariff C would produce a range of costs between \$250 to \$500 per appearance. The appearance of March 2, 2018 was for more than an hour but less than a half day. According to the provisions of Tariff C, the cost range is between \$750 to \$1,000. Applying these rates, an appropriate range of costs would fall between \$1,750 and \$3,000, but subject to Tariff C (4). I have determined that a base range of \$2,700 is appropriate in the circumstances of this case, but subject to the multiplier set out in Tariff C.
- Tariff C (4) provides the court with the discretionary authority to increase the maximum amounts by applying a multiple of two, three or four based on the matter's complexity, the matter's importance to the parties; and the amount of effort involved in the hearing's preparation and conduct. In this case, I note that the variation application was not complex. There were no novel questions of law or fact. Second, I find that the issues were of utmost importance to the parties because the application involved child support for a vulnerable child and the enforcement of the maintenance provisions of the 2004 Corollary Relief Judgement. Third, I find that Ms. Stewart expended a significant amount of effort to respond to the variation application. In contrast, Mr. Cartwright's efforts were minimal and last minute. His litigation conduct, although not entirely obstructionistic, did little to increase the flow and efficiency of the hearing. Given these circumstances, I have applied a multiplier of 3 to determine costs that are just and appropriate in the circumstances.

- An award of \$8,100, together with disbursements, will do justice between the parties in the circumstances of this case.

Conclusion

[8] Mr. Cartwright must pay costs of \$8,100, together with disbursements, to Ms. Stewart which are payable forthwith. Mr. Iannetti is to draft the order.

Forgeron, J.