

IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Paquet v. Clarke, 2005 NSSF 4

Date: 20050119

Docket: SFHMCA026553

Registry: Halifax

Between:

Danielle Paquet

Applicant

v.

David Clarke

Respondent

Judge:

The Honourable Justice Leslie J. Dellapinna

Heard:

September 14, 2004 and September 16, 2004,
in Halifax, Nova Scotia
DECISION ON COSTS

Counsel:

Sandra L. Barss, for the Applicant
Philip Whitehead, for the Respondent

By the Court:

- [1] Danielle Paquet applied pursuant to section 37 of the *Maintenance and Custody Act* of Nova Scotia to vary the custody and access provisions of the Consent Order of this Court dated November 6, 2003. In particular she sought the permission of the Court to relocate with the parties' two children from her home in Dartmouth, Nova Scotia to Sherbrooke, Quebec.
- [2] Her application was not successful. I indicated to counsel that unless they were able to agree I would be prepared to hear them on the issue of costs.
- [3] Mr. Whitehead on behalf of Mr. Clarke and Ms. Barss on behalf of Ms. Paquet have provided written submissions on the cost issue.
- [4] The costs of any party are in the discretion of the Court. As stated by Hallett, J. (as he then was) in *Bennett v. Bennett* (1981), 45 N.S.R. (2d) 683 (T.D.):

It is normal practice that a successful party is entitled to costs and should not be deprived of the costs except for a very good reason. ...

(at paragraph 9).
- [5] The Court of Appeal in *Kaye v. Campbell* (1984), 65 N.S.R. (2d) 173 stated:

There must be a good reason not to award cost to a successful party in a matrimonial cause ... but such reason must be based on principle.

[6] Rule 63.04 provides:

(1) Subject to rules 63.06 and 63.10, unless the court otherwise orders, the costs between parties shall be fixed by the court in accordance with the Tariffs and, in such cases, the "amount involved" shall be determined, for the purpose of the Tariffs, by the court.

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

(a) the amount claimed;

(b) the apportionment of liability;

(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;

(h) whether or not two or more defendants or respondents should be allowed more than one set of costs, where they have defended the

proceeding by different solicitors, or where, although they defended by the same solicitor, they separated unnecessarily in their defence;

(i) whether two or more plaintiffs, represented by the same solicitor, initiated separate actions unnecessarily; and

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

[7] In *Kaye v. Campbell (supra)* it was held that the impecuniosity of the parties is also a factor that can be considered.

[8] The Respondent argued that whereas he was successful in defending Ms. Paquet's application he is entitled to costs. Mr. Whitehead in his brief stated:

The Respondent submits that Ms. Paquet, came to court, eight months after the original Order, not because she believed it would be in the best interests of the children to move to Sherbrooke, but because it would suit her interests. [The] Respondent respectfully submits that Ms. Paquet should have to bear the cost of an application which was commenced to suit her interests and not primarily the best interests of the children.

[9] After referring to a number of cases including the decision of Justice Goodfellow in *Urquhart v. Urquhart*, [1998] N.S.J. No. 310., he requested costs in the sum of \$1,881.25 plus disbursements.

[10] Ms. Barss argued that both parties were “somewhat successful”. Although Ms. Paquet did not succeed in convincing the Court to permit her to relocate the children to Quebec, the Court nevertheless found that the children should continue to live with her in Nova Scotia.

[11] Ms. Barss also submitted that her client’s financial circumstances must be taken into account. She wrote:

Financial considerations are significant for Ms. Paquet. Since she retains the primary responsibility for the children, she does not have the liberty of deferring their expenses. Ms. Paquet has borne the cost of the children, their care while she is working, their clothing, housing, and all associated costs with no assistance from Mr. Clarke, aside from his child support. Through that is not insignificant to either household, Mr. Clarke’s contribution has been very limited.

Each party incurred legal expenses as a result of Ms. Paquet’s application, and Mr. Clarke’s counter application. While at first glance it appears the parties’ relative financial positions are similar, it is Ms. Paquet with whom the children reside, and she who bears the costs for their housing, clothing, groceries, child care (both during her working hours and recreational time) and all other incidental expenses

associated with children of their ages. Mr. Clarke does not share in these out-of-pocket expenses. Ms. Paquet respectfully suggests her fiscal acumen should not be used by Mr. Clarke as a justification for awarding him costs to offset his household deficit. Her ability to provide for the children's needs is contingent on her having available to her all of her resources.

[12] Ms. Barss asks that the Court not award costs to either party.

[13] The hearing of Ms. Paquet's application took approximately a day. For the most part, Mr. Clarke was successful. His position from the outset was that the children should remain in Nova Scotia and, provided that was the case, he would not seek primary care.

[14] Neither of the parties misconducted themselves and the case involved an issue of average complexity.

[15] After considering the cases referred to by counsel and Rule 63, I conclude that Mr. Clarke is entitled to costs. Nevertheless before awarding costs in a matrimonial proceeding consideration should be given to the financial circumstances of the parties and any child who may be effected by the Court's order.

- [16] While on the surface it appears that the parties are in similar financial circumstances, and Mr. Clarke is paying child support, up until now Ms. Paquet has paid a disproportionate share of the children's extra-curricular activities and child-care expense. Any decision that effects her finances will also impact the children. She has incurred legal expenses of her own and, based on her income I accept that costs in the amount requested by Mr. Clarke would result in a considerable burden on her budget.
- [17] I therefore order that Ms. Paquet pay to Mr. Clarke costs in the sum of \$750.00, inclusive of disbursements to be paid no later than March 31, 2005.

J.