SUPREME COURT OF NOVA SCOTIA
Citation: *March v. Gibson*, 2019 NSSC 245

Date: 20190730
Docket: 1205-003139
Registry: Pictou

Between:

DAVID JOHN MARCH

Applicant

v.

HILARY GIBSON (formerly March)

Respondent

Judge: The Honourable Justice Scott C. Norton

Heard: June 26, 2019, in Antigonish, Nova Scotia

Counsel: Applicant – Self-Represented

Daniel F. Roper for the Respondent

By the Court:

[1] By Oral Decision on June 26, 2019 I responded to cross applications by the parties each seeking to vary the Corollary Relief Order April 4, 2013. The parties have since submitted written briefs on the issue of costs. The outcome of those competing claims can be summarized as follows:

1. The following claims of the Applicant were dismissed:

    a. Undue hardship for the period 2013-2015;
    b. Reimbursement of $8,471in travel related expenses to exercise access rights;
    c. Claim for overpayment of child support in the amount of $13,962;
    d. Claim for child tax credit adjustment;

2. The following claims by the Respondent were dismissed:

    a. Retroactive child support of $10,000;

3. The Respondent was successful in:

    a. An award of $4,000 in retroactive section 7 expenses;
    b. The determination of the RESP issue.

[2] Both parties claimed success in respect of prospective child support and section 7 expenses but on a fair analysis there was never much of a dispute that either was owing or what should be included.

[3] As is apparent from this summary and from an examination of the decision itself, the Respondent was overall more successful than the Applicant, but I would not consider the success to be overwhelming.

[4] The award of costs in family matters is challenging because of the nature of the issues being litigated. Judge Daley in *A.M. v S.F.* 2016 NSFC 26 provided the following accurate summary of the point:

> [6] As with all decisions regarding costs, the necessary first step in the analysis is to determine whether there has been a successful party and, if so, which party that is. Determining success in any civil litigation matter is often a nuanced exercise. In family law cases, parties often contest various issues in including custody, access, child support and spousal support and within each of those issues the parties will take various positions. For example, in a custody dispute one party may seek sole custody with supervised access. That party may be successful on the sole custody claim but unsuccessful on the supervised access claim. Thus, overall success or failure of a party for purposes of determining costs usually and necessarily involves an analysis of all of the issues at play at the hearing and the relative level of success or failure of each party, both on individual issues and in the overall context of the matters before the court.

[5] I am alert to the provisions of Rule 77 and mindful of the relevant principles with respect to costs in family law proceedings as were summarized in the decision of *Lubin v Lubin* 2012 NSSC 93, at para. 3:

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

4. Deference to the best interests 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 towards the parties' 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 cost award is a factor that can be considered; but as noted by Judge Dyer in *M.C.Q. v. P.L.T.* 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 are not thwarted by later pleas of inability to pay. [See *Muir v. Lipon*, 2004 BCSC 65]."

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 $20,000.00 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 is 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] Tariff C of Rule 77 is applicable to costs payable following a contested application such as was the case here:

For applications heard in Chambers the following guidelines shall apply:

(1) Based on this Tariff C costs shall be assessed by the Judge presiding in Chambers at the time an order is made following an application heard in Chambers.

(2) Unless otherwise ordered, the costs assessed following an application shall be in the cause and either added to or subtracted from the costs calculated under Tariff A.

(3) In the exercise of discretion to award costs following an application, a Judge presiding in Chambers, notwithstanding this Tariff C, may award costs that are just and appropriate in the circumstances of the application.

(4) When an order following an application in Chambers is determinative of the entire matter at issue in the proceeding, the Judge presiding in Chambers may multiply the maximum amounts in the range of costs set out in this Tariff C by 2, 3 or 4 times, depending on the following factors:

(a) the complexity of the matter,
(b) the importance of the matter to the parties,
(c) the amount of effort involved in preparing for and conducting the application.

Length of Hearing of Application	Range of Costs
Less than 1 hour	$250 - $500
More than 1 hour but less than ½ day	$750 - $1,000
More than ½ day but less than 1 day	$1000 - $2000
1 day or more	$2000 per full day

[7] The Applicant has submitted that each party should bear their own costs or alternatively he should be awarded costs on the basis that the amounts being claimed by the Respondent for prospective child support were far greater than what was ordered.

[8] Respondent seeks costs based on the following rationale:

1. Her actual legal fees are $11,562.10 inclusive of HST and disbursements are $255.68 (Affidavit of Daniel Roper).
2. The length of hearing including time for pre-trial appearances was a full day and should attract a $2,000 award under Tariff C.
3. This amount falls far short of the substantial contribution described in the case law.
4. The complexity and effort involved in preparing for an conducting the application warrants a multiplication of the Tariff amount by a factor of four to $8,000.
5. The behaviour of the Applicant warrants an increased costs award by $1,000 to $9,000.

[9] With regard to the multiplier, I would not describe the issues as complex. Counsel for the Respondent argued that significant time and effort were involved

to undertake a thorough examination of financial information which was compounded by the failure of the Applicant to meet filing deadlines, clearly articulate arguments, provide full and proper disclosure or cogent documentary evidence.

[10] While some of the difficulty with the presentation of financial information to the court was due to the Applicant being self-represented and should not draw increased costs for that discrete reason, there was a failure by the Applicant to meet clearly defined and agreed upon filing deadlines and a failure to provide the source material from which financial summaries were prepared by the Respondent to support his claims that were not caused by the Respondent being self-represented.

[11] It is clear that the Applicant's failure to provide this information in a cogent and timely manner caused the Respondent to incur increased legal fees to respond to the claims she was facing.

[12] I refer to the decision of Justice Leblanc in *Leigh v Belfast Mini-Mills Ltd*. 2011 NSSC 23 where at paras. 40 and 41 he stated:

> In another case, *Mills v. Jemmott*, 2005 Carswell Ont 157 (Ont. S.C.J.) the Court addressed the problems facing self-represented litigants with the application or interpretation of the Rules, at para. 10:

> I am also concerned about determining an amount for costs against an unrepresented litigant. I indicated earlier in these reasons that I am satisfied that much of the delay was brought about by the manner in which the plaintiff conducted for trial, and that much of this case was due to her refusal to accept adverse interlocutory decisions and her determination to proceed in the manner she thought best notwithstanding rulings from the bench that she do otherwise. However some of the delay can, in my view, be attributed to the fact that Mrs. Mills is professionally unskilled in the *Rules of Civil Procedure* and of trial evidence. She is no stranger to the courts and has some other experience in conducting a trial. However, some of the mistakes she made were clearly ones brought about by her lack of experience and knowledge of these professional amount is. With the ever-increasing number of unrepresented litigants appearing before the court, the judge, fixed with the responsibility of fixing costs, must take into account the delays and false starts which almost certainly will present themselves in the course of the trial.
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> I am mindful of these comments, and although I have taken that into consideration, it is important to remember that successful parties who have counsel should not be asked to subsidize the justice system's failure to ensure access to justice or a self-represented litigant's choice not to hire counsel.

[13] Taking into account all of these principles it is my opinion that a just and appropriate award of costs in the circumstances should be that the Applicant pay to the Respondent a lump sum of $5,000 inclusive of disbursements. This amount recognizes that the Respondent was not entirely successful in the matter; is based upon a multiplier of two times the Tariff amount; and includes an amount to

sanction the failure of the Applicant to meet court imposed deadlines and his failure to produce source evidence to support his financial summaries as he was required to do.

Norton J.