

SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: *Weilgart v. Whitehead*, 2019 NSSC 221

Date: 20190712

Docket: No. 1201-62831

Registry: Halifax

Between:

Linda Susan Weilgart

Applicant

v.

Henry Paine Whitehead

Respondent

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Judge: The Honourable Justice Cindy G. Cormier

Heard: Submissions filed by the Applicant on July 20, 2018 and the Respondent on August 3, 2018

Written Decision: July 12, 2019

Subject: **Costs**

Summary: The Applicant requested costs based an amount of \$134,773.10, (\$68,150.00 lump sum retroactive, plus periodic spousal support for a “conservative period” of three years of \$66,150.00 (\$94,500.00 less taxes at 30%). Or Tariff A, scale 3, (\$20,938.00) based on a hearing of three and a half days, with an additional amount of \$7,000.00 for trial time for a costs award of \$27,938.00 and \$4,332.46 for disbursements, following an Application to Vary spousal support. Total costs requested: \$32,270.46. Or a lump sum award of costs in the amount of \$50,000.00. The Respondent argued that the parties should bear their own costs or costs should be awarded according to the rule of thumb of \$20,000.00 per day of trial, and they should be

awarded to Dr. Whitehead as the substantially successful party

Result: Dr. Whitehead shall pay Dr. Weilgart costs of \$20,520.46 on or before September 1, 2019.

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**SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION**

Citation: *Linda Susan Weilgart v. Henry Paine Whitehead*, 2019 NSSC 221

ENDORSEMENT

July 12, 2019

Prothonotary No. 1201-62831; SFH-D 059911

- Jane Lenehan for Linda Susan Weilgart
- Sara L. Scott for Henry Paine Whitehead

Costs submissions were filed by the Applicant on July 20, 2018 and by the Respondent on August 3, 2018.

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Or a lump sum award of costs in the amount of \$50,000.00.

The Respondent argued that the parties should bear their own costs or costs should be awarded according to the rule of thumb of \$20,000.00 per day of trial, and they should be awarded to Dr. Whitehead as the substantially successful party.

Decision:

Dr. Whitehead shall pay Dr. Weilgart costs of \$20,520.46 on or before September 1, 2019.

Background:

1. The parties began living together in 1983, and they married August 24, 1985. When this matter was heard Dr. Weilgart was **57** years old, Dr. Whitehead was 65 years old, and the parties had been separated more than 10 years. The parties have three children Benjamin born in 1987, Stefanie born in 1991, and Sonja born in 1994. Sonja struggles with symptoms of cerebral palsy.
2. When the parties separated in November 2007, the children were 20, 16, and 13. The Rule of 65 is applicable in this case, *Djekic v Zai*, ONCA 2015.

3. The parties divorced in May 2010, when the children were 23, 18, and 15. Dr. Whitehead's income at that time was \$128,444.00, Dr. Weilgart's income was \$50,000.00.
4. The parties came to an agreement with respect to the division of property, and an agreement regarding child support, and spousal support. As part of the agreement, Dr. Weilgart did not initially pay spousal support to Dr. Weilgart.
5. It was argued that Dr. Weilgart received an unequal division of matrimonial assets. In addition, Dr. Whitehead had agreed to pay all expenses for the children, including university expenses. The Corollary Relief Judgment acknowledges the unequal division, the child support agreement, and Dr. Weilgart's entitlement to spousal support.
6. In 2013 Dr. Weilgart sought to address the quantum of spousal support. Various agreements were reached, the last agreement resulting in a payment of spousal support from Dr. Whitehead to Dr. Weilgart in the amount of \$4000.00 per month.
7. In October 2015 Dr. Weilgart applied to change the child and spousal support provisions of the parties' Consent Corollary Relief Judgment Issued on May 26, 2010.
8. On the Application, Dr. Weilgart sought \$8,743.00 per month in spousal support as well as retroactive spousal support in the amount of \$120,870.40 (after tax).

Reasons:

9. The parties reached a final agreement regarding child support and the terms to be included in the Variation Order in advance of the hearing. The Agreement was filed with the Court on April 16, 2018.
10. The most significant issues at the hearing were entitlement to spousal support, quantum of spousal support both retroactive and prospective, and duration of spousal support.
11. The hearing was originally scheduled for three days but required two days, April 16 and 17, 2018, with counsel filing written submissions. Dr. Weilgart argues that this matter was in fact three and a half days: comprised of two days of hearing, followed by submissions, and a half day for the oral decision rendered on June 25, 2018.

12. Dr. Weilgart sought retroactive spousal support and prospective spousal support on an indefinite basis. Dr. Whitehead argued that Dr. Weilgart had not met her burden of demonstrating an entitlement to retroactive spousal support, or her entitlement to prospective spousal support. He argued that Dr. Weilgart was not disadvantaged by the breakdown of the marriage.
13. The Court found Dr. Weilgart was disadvantaged by the breakdown of the marriage, determining Dr. Weilgart had both a strong compensatory and non compensatory claim for spousal support.
14. Dr. Whitehead was ordered to pay \$2,625.00 in spousal support to Dr. Weilgart on an indefinite basis, subject to variation, and he was also ordered to pay retroactive spousal support in the amount of \$68,623.10 (after tax).
15. I find Dr. Weilgart was substantially successful in her Application to the Court to vary the spousal support provisions of the parties' Consent Corollary Relief Judgment issued on May 26, 2010.
16. Civil Procedure Rule 77.03(3) provides that "Costs of a proceeding follow the result". Costs are in my discretion. A decision not to award costs must be principled.
17. I find it is not possible to determine with any precision, an amount involved.
18. According to Tariff A, where there's a substantial non-monetary issue involved, the amount involved is determined having regard to the complexity of the proceeding and the importance of the issues.
19. In both *Collins v. Speight*, 1993 CanLII 4668 (NS SC), and in *Wyatt v. Franklin*, 1993 CanLII 4580 (NS SC), Justice Goodfellow concluded that the amount involved in two and one-half day trials was \$45,000.00. *Collins v. Speight*, 1993 CanLII 4668 (NS SC), was a case involving a dispute over an entitlement to a right of way and *Wyatt v. Franklin*, 1993 CanLII 4580 (NS SC), was a land dispute. Justice Goodfellow described both as not complex. Later, in *Toronto Dominion Bank v. Liensaux*, 1997 CanLII 15017 (NS SC), Justice Goodfellow suggested a general rule for cases where a substantial non-monetary issue was involved. He said that he treated each day or part day of the trial as equivalent to \$15,000.00 for the purpose of determining the "amount involved".
20. In 2007, Justice Lynch reviewed this general rule in *Jachimowicz v. Jachimowicz*, 2007 NSSC 303 (CanLII), at paragraph 26. There, the parenting trial took

approximately thirteen days: six days of evidence from the initial trial, five days of review evidence and numerous other appearances which added approximately two more days. She adjusted the daily equivalent amount from \$15,000.00 to \$20,000.00 “to reflect the increased costs of litigation.”

21. I accept Dr. Weilgart’s argument that the complexity of the financials in this matter were a factor to be considered in awarding costs. I find the cost of litigation was increased due to Dr. Weilgart having to determine, and bear much of the burden of proving Dr. Whitehead’s financial circumstances. This was in part due to Dr. Whitehead’s admitted lack of knowledge about his own finances.
22. Civil Procedure Rule 77.02(1) states that I “may, at any time, make any order about costs as I am satisfied will do justice between the parties.”
23. I have reviewed the written submissions filed by counsel. I do apologize to the parties and to counsel for the delay in having done so.
24. Pursuant to Civil Procedure Rule 77.02(2) I have a general discretion to award costs so as to do justice between the parties.
25. Having regard to Tariff A, the amount involved (\$68,623.00) and taking into account the complexity of the matter Scale 3 costs of \$12,188.00, for the two days of hearing (\$4000.00), plus disbursements of \$4,332.46, I order Dr. Whitehead to pay Dr. Weilgart costs of \$20,520.46. This amount is inclusive of all disbursements.

Cindy G. Cormier, J.S.C.(F.D.)