

SUPREME COURT OF NOVA SCOTIA
Citation: *Ryan v Matheson*, 2020 NSSC 246

Date: 2020-09-23
Docket: 1204-006384
Registry: Kentville

Between:

Alisa Marie Ryan (formerly Matheson)

Applicant

v.

Kevin Marcus Matheson

Respondent

Judge: The Honourable Justice John A. Keith

**Final Written
Submissions:** February 25, 2020

Counsel: Maggie Shackleton, for the Applicant Alisa Ryan
Don Urquhart, for the Respondent Kevin Matheson

By the Court:

PROCEDURAL BACKGROUND AND ISSUE

[1] Alisa Ryan (formerly Matheson), represented by Maggie Shackleton, filed a Notice of Variation Application on April 24, 2019, supported by an Affidavit sworn February 14, 2019. The Applicant was seeking permission to relocate the children of the marriage, Jeremy Matheson, born 2004, and Jake Matheson, born 2008, from the Kingston / Greenwood area of Nova Scotia to Glace Bay, Nova Scotia.

[2] On May 16, 2019, Don Urquhart, appearing on behalf of the Respondent Kevin Matheson, objected to the late notice. After a discussion of the outstanding issues, it was agreed that the Application should be converted to a Notice of Application in Court, and an Order was issued on May 24, 2019 providing for filing timelines before the Motion for Directions on June 13, 2019.

[3] Ms. Ryan filed an Application in Court and the required Affidavit of Solicitor on May 24, 2019.

[4] On June 6, 2019, Ms. Ryan filed an Affidavit sworn on June 4, 2019, a brief and a draft order for a Voice of the Child Report (the “**Report**”).

[5] Mr. Matheson subsequently filed his Notice of Contest (Application in Court), as directed. He also filed an Affidavit sworn on June 7, 2019, opposing Ms. Ryan’s request for the Report.

[6] On June 13, 2019, counsel requested an adjournment of the Motion for Directions, and also requested that the Court schedule an interim hearing to determine the Applicant’s request for the Report, as the Respondent did not agree to the Report being prepared. The Court made an Order for Directions, which was issued on June 18, 2019, that set out filing deadlines for the interim motion scheduled for August 13, 2019.

[7] On August 13, 2019, counsel agreed that there was no requirement for cross-examination. Counsel made oral submissions. At the end of the hearing, I made an oral decision granting Ms. Ryan’s request for the Voice of the Children Report. I did not order the parties to pay the deposit as required under the *Costs and Fees Act*, 2004, c. 3, ss. 6-15, as amended (the “**Cost and Fees Act**”). Rather, I directed

that any cost award be made following my determination of Ms. Ryan's application to relocate.

[8] The Voice of the Child Report was filed by Mr. Neil Kennedy on November 5, 2019. Mr. Kennedy stated that the children of the marriage generally supported the proposed relocation to Cape Breton as indicated in my earlier decision.

[9] In addition to the Voice of the Child Report, each party filed sworn affidavit evidence for the mobility hearing.

[10] On December 13, 2019, the Respondent filed a Notice of Motion, seeking to terminate spousal support.

[11] During an organizational conference call on December 16, it was agreed that this motion would not be part of the two-day hearing. Counsel agreed with my observation that the child support, flowing from the parenting application, would be relevant to the spousal support motion. As such, that motion (and any costs related to that proceeding) are to be determined separately.

[12] Relevant to this cost determination from the December 16, 2019 call are:

- Each counsel raised a preliminary issue to strike portions of the other party's Affidavits.;
- Mr. Urquhart wished to question Mr. Kennedy regarding the Voice of the Child Report that he had prepared.
- Counsel agreed that the evidence would be completed on the first day, with submissions being heard on the second day.

[13] On December 18, 2019, I heard argument on the parties' reciprocal motions to strike portions of the other party's affidavits. I rendered an oral decision on that preliminary issue. There was mixed success. We then proceeded with Mr. Urquhart's questioning of Neil Kennedy followed by limited direct evidence due to recent changes that could not be included in the Affidavits. Cross-examination and redirect occurred and, finally, oral submissions.

[14] At the end of the hearing, I agreed to render an oral decision on January 23, 2020 at 3:00 p.m. At that time, I also directed that Ms. Ryan re-swear and re-file her affidavit due to certain concerns raised during the hearing. Ms. Ryan complied with my request on January 7, 2020. The concerns related to anomalies raised by

Mr. Urquhart as to certain exhibits which were attached to Ms. Ryan's affidavit but clearly prepared after the affidavit was sworn on February 14, 2019.

[15] During my oral decision on January 23, 2020, I concluded that it was not in the children's best interests to disrupt the *status quo* and end the shared parenting arrangements. Accordingly, I dismissed Ms. Ryan's application. This is my decision on costs flowing from that determination.

SUBMISSIONS

Respondent's Submissions

[16] Mr. Matheson seeks solicitor and client costs in the amount of \$14,500.00, all inclusive. He attaches his legal invoices in support of this request.

[17] In support of his request, Mr. Matheson argues that he was successful in the application. He also makes the following additional observations:

- He refers to a letter dated December 6, 2019 where his counsel (Mr. Urquhart) wrote to Ms. Ryan's counsel (Ms. Shackleton) asking that Ms. Ryan withdraw her application on or before 4:00 p.m. on December 9, 2019, failing which he would seek solicitor and client costs;
- Ms. Shackleton improperly commenced this proceeding as an Application in Chambers; resulting in unnecessary costs and procedural complications when converting the matter to an Application in Court;
- Ms. Ryan's original affidavit lacked information regarding the children's lives. Mr. Matheson says that his responding affidavits had to be much longer and more detailed than is usually necessary to put relevant information before this Honourable Court.
- Mr. Urquhart contends that the brief filed on December 6, 2019 also required extensive preparation to respond to Ms. Shackleton's position and arguments in her brief filed November 16, 2019.

[18] Mr. Matheson relies on *Civil Procedure Rule 77.02(1)*, as applied by Justice MacDonald in *Gagnon v. Gagnon*, 2012 NSSC 137. In his submissions, Mr. Urquhart notes that the ability to pay was considered by Judge Dyer in *MQC v. PLT*, 2005 NSFC 27, at paragraph 10.

[19] Finally, in the event the Court does not grant solicitor and client costs, Mr. Urquhart suggests Tariff A be followed, using an “amount involved of less than \$25,000”, and applying the cost scale of plus \$2,000.00 per day to calculate a costs award in the range of \$5,000.00 to \$7,000.00.

Applicant’s Submissions

[20] The Applicant filed her submissions, agreeing to the timeline but “not with the assertions that Ms. Ryan’s application was poorly thought out nor that the expense incurred by Mr. Matheson was avoidable.” In her submission, the motion “was only avoidable if she conceded to the respondent’s wishes over the wishes of the children.”

[21] Ms. Matheson argues that a parent should not be penalized in costs for “litigating a *bona fide* parenting claim”. She relies upon *Armoyan v. Armoyan*, 2013 NSCA 135 (“*Armoyan*”), as summarized by Justice Muise in *Milligan v. Milligan*, 2019 NSSC 188 (“*Milligan*”). She also refers to the decision of Justice Gass in *S.N. v. I.F.*, 2009 NSSC 23 (“*S.N. v I.F.*”) where the Court refused to award costs to the successful party in an application that involved a potential relocation because there was a genuine issue to be tried and the reasons behind it were reasonable and so was the parties’ conduct.

[22] Ms. Matheson also notes that she was compelled to seek an Order allowing a Voice of the Child Report; and that this report revealed the children’s support for the proposed relocation to Cape Breton.

[23] Finally, in her submissions Ms. Shackleton states that Ms. Ryan has not, and will not, move without her children. And that she will continue “to make great personal sacrifice in her children’s best interest”.

[24] She ultimately submits that “a nominal cost award of \$2000.00 is appropriate in the circumstances and should be payable over 12 months not to commence until the subsequent proceeding between the parties, involving spousal support is resolved.”

ANALYSIS

[25] Mr. Matheson seeks what amounts to solicitor and client costs. In my view, solicitor and client costs are generally awarded only where there has been reprehensible, scandalous, or outrageous conduct on the part of one of the parties (*Young v. Young*, [1993] S.C.J. No. 112 (S.C.C.)). These types of awards are rare and exceptional (*Brown v. Metropolitan Authority*, 1996 NSCA 91).

[26] Ms. Ryan's conduct does not come close to justifying an award for solicitor and client costs, particularly having regard to the caution exercised in cases involving the welfare of children where the Courts seek to ensure that the good faith efforts of parents are focussed on the best interests of the children (*Milligan and S.N. v I.F.*).

[27] At the same time, I am mindful of the fact that this proceeding threatened the shared parenting arrangement with his children and the consequences were serious. I am also mindful of the fact that the evidence before me suggested that the motivation for relocating was, at least originally, prompted by Ms. Ryan's engagement to a new partner. She was not pursuing, for example, employment opportunities. I acknowledge that pursuing this personal relationship might not fairly be described as Ms. Ryan's sole focus. I recognize that she is unconditionally devoted to her children. She remains steadfastly committed to her children and will not leave without them. Her ongoing, significant sacrifices demonstrate her devotion. Nevertheless, for the purposes of this cost award, it is difficult to conclude on the circumstances before me that her motivations were entirely driven by considerations surrounding her children's best interests.

[28] In my view, a cost award is merited but tempered by the need to ensure that a parent's good faith efforts to advance a child's best interests not be punished.

[29] I agree with and adopt the following statements by our Court of Appeal at paragraphs 10, 12, 13 and 16 of *Armoyan* and summarized by Muise, J. at paragraph 7 of *Milligan*:

1. "The Court's overall mandate" and the "supervening criterion" under Rule 77.02(1) is to "do justice between the parties".
2. By operation of Rule 77.06, "unless otherwise ordered, party and party costs" of a trial "are quantified according to" Tariff A.
3. Rule 77.07 gives the Court "discretion to raise or lower the tariff costs" taking into consideration factors such as "an unaccepted written settlement offer, whether or not the offer was made formally under Rule 10, and the parties' conduct that affected the speed or expense of the proceeding".
4. "The basic principle is that a costs award should afford substantial contribution to the party's reasonable fees and expenses." "Substantial contribution" now appears to mean a proportion of reasonable legal expenses that is much less than two thirds to three quarters.

[30] Tariff "A" would normally result in a range of costs award from \$5,000.00 - \$7,000.00, depending on the Scale.

[31] Taking into account Mr. Matheson's attempts to avoid this proceeding at an early stage but also the countervailing need to temper any cost awards in matters such as this one, I have concluded that an award of \$3,500.00 is appropriate in the circumstances but subject to the following additional adjustments:

- I would increase the costs award by \$1,500.00 having regard to the troubling irregularities associated with the affidavit which Ms. Ryan originally placed before the Court. As indicated, Ms. Ryan was required to re-swear and re-file this affidavit to address these concerns;
- I would deduct \$500.00 from the costs in recognition of the fact that Ms. Ryan was successful in her motion for a Voice of Child Report.

[32] In total, I grant Mr. Matheson costs in the amount of \$4,500.00 which sums are payable in four equal monthly installments (\$1,125.00/month); with each monthly installment due on the first business day of each month, beginning on November 1, 2020.

[33] Finally, there is the issue of the costs associated with Mr. Kennedy's Voice of the Child Report. That issue should be determined in accordance with the *Cost and Fees Act*.

[34] The invoice from Neil Kennedy shows an amount outstanding of \$318.75 plus HST of \$47.81, for a total of \$366.56.

[35] Section 2, Supreme Court and Court of Appeal Court Fees, clause 20 (a) of the *Fees and Allowances under Part I and II of the Act Regulations*, N.S. Reg. 86/2017, effective May 26, 2017, states as follows:

For the research for and preparation of a Court-ordered custody/access assessment report in the Supreme Court, Family Court or Supreme Court (Family Division), ..., all parties shall pay fees in accordance with their income as follows:

Income	Deposit	Percentage of Cost of Report Payable
Up to \$20 000	\$0.00	0.00%
\$20 001-\$25 000	\$62.90	6.64%
\$25 001-\$30 000	\$125.80	13.27%
\$30 001-\$35 000	\$188.70	19.91%
\$35 001-\$40 000	\$251.65	26.55%
\$40 001-\$45 000	\$377.45	39.81%

\$45 001–\$50 000	\$503.25	53.07%
\$50 001–\$55 000	\$629.05	66.34%
\$55 001–\$60 000	\$754.90	92.88%
\$60 001–\$65 000	\$1069.40	100.00%
\$65 001–over	\$1258.15	100.00%

[36] Based on the financial information before the Court, Ms. Ryan has a Line 150 income of \$35,202.64. According to the chart above, under the *Regulations*, she would be responsible to pay 26.55% of the Report, which equals \$97.32. That said, Ms. Ryan requested this Report for her own purposes. In the circumstances, I exercise my discretion and determine that she and Mr. Ryan shall equally divide Mr. Kennedy’s outstanding invoice (i.e. they shall each pay \$183.28)

Keith, J.