

SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Klefenz v. Klefenz, 2018 NSSC 354

ENDORSEMENT

February 5, 2018

Byron Kees Klefenz v. Dawn Marie Klefenz: SFH No. 1201-066790

October 13, 2017 10:52am - 12:24 and 1:42- 3:43pm. Almost a full day

Request for costs of Tariff A, scale 3 (\$5000.00), based on a hearing of slightly less than 1 day, with an additional amount of \$2000.00 for trial time and \$464.90 for disbursements, following a variation hearing. Mr. Klefenz also asks Ms. Klefenz to pay HST of \$1,119.76. Total costs requested: \$8,584.66.

Decision:

Dawn Marie Klefenz shall pay Byron Kees Klefenz costs of \$5000.00 on or before by February 1, 2021.

Reasons:

1. This matter involved a request to vary child support and spousal support. Questions were raised about both parties' physical health and about imputing income to both. Ms. Klefenz agreed child support should end but requested the court order Mr. Klefenz pay child support if the child attended post secondary school in the future. A question was also raised about Ms. Klefenz failure to pay the costs award arising from the decision of Justice MacDonald in 2015.
2. The hearing required a little less than a full day.
3. The most significant issue at the hearing was spousal support. Mr. Klefenz was ordered to pay child support of \$1,361.00 and spousal support of \$2,600.00 for a total of \$3,961.00 per month to Ms. Klefenz following a contested hearing in 2015.
4. The parties agreed child support should end.
5. Mr. Klefenz argued that due to a change in his circumstances, spousal support should be lowered to \$1,742.00. Ms. Klefenz argued there would be a significant reduction for Mr. Klefenz as child support was eliminated and

spousal support would be tax deductible. Ms. Klefenz asked the court to order Mr. Klefenz to pay spousal support of \$3,009.48. The court ordered spousal support in the amount of \$2,083.33 per month or \$25,000.00 per year.

6. Mr. Klefenz was successful in having spousal support reduced.
7. 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.
8. I may consider a party's ability to pay costs in making a costs award. In *M.Q.C. v. P.L.T.*, 2005 NSFC 27, Judge Dyer reminded me 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’”. If this happens, he said, “Fairness may dictate that the successful party's recovery of costs not be thwarted by later pleas of inability to pay. [See *Muir v. Lipon.*, 2004 BCSC 65].” Mr. Klefenz decided not to avail himself of an emergency hearing date. There is no evidence Ms. Klefenz “dragged” the case on at no cost to herself. There was a real question with respect to how much spousal support Mr. Klefenz would pay once child support ended.
9. To apply Tariff A, I must know the amount involved in the case. 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.
10. Ms. Klefenz argued she should not have to pay costs as she has no capacity to do so. In the alternative, Ms. Klefenz argued costs should be based on Scale 1 of Tariff A (\$3000), plus \$2000.00 for one day of trial.
11. Mr. Klefenz argued the “rule of thumb” of \$20,000.00 applies, however, that costs should be determined based on Scale 3 of Tariff A (\$5000) plus \$2000.00 + disbursements+ HST, for one day. He acknowledged Ms. Klefenz' lack of ability to pay must be considered.
12. The parties agreed child support should end. The request for Mr. Klefenz to pay child support if the child returned to or decided to attend a post-secondary program was easily dealt with when Mr. Klefenz did not agree to such a provision being added to an order. Evidence of Mr. Klefenz’ change of circumstances was accepted by Ms. Klefenz without need to call experts, thereby limiting the number of witnesses. The question of Mr. Klefenz’ income was more complex but expert reports existed to assist the court and Ms.

Klevenz' counsel consider the question of imputing income.

13. 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.”

14. Pursuant to Civil Procedure Rule 77.02(2) I have a general discretion to award costs so as to do justice between the parties.

15. Having regard to tariff A, scale 1, a variation hearing of less than one full day, I order Ms. Klevenz to pay Mr. Klevenz costs of \$5000.00 by February 1, 2021. This amount is inclusive of all disbursements. I decline to award any amount for HST.

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