**SUPREME COURT OF NOVA SCOTIA**
**Citation:** *Churchill-Keating v. Keating*, 2020 NSSC 332

**Date:** 20201118
**Docket:** 1204-006672
**Registry:** Kentville

**Between:**

Becky Lynn Churchill-Keating

Petitioner

v.

Irving Stanley Keating

Respondent

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| **Judge:** | The Honourable Justice John A. Keith |
| **Final Written Submissions:** | October 29, 2020 |
| **Counsel:** | Lynn Connors, Q.C., for the Petitioner<br>Irving Keating, self-represented |

**By the Court:**

## BACKGROUND

[1] On October 6, 2017, Dr. Churchill-Keating filed a Petition for Divorce. Mr. Keating filed his Answer on December 4, 2017 and an Amended Answer on July 31, 2018.

[2] Prior to trial, Mr. Keating and Dr. Churchill-Keating resolved all issues around custody and child support. Other potentially contentious issues also resolved when Dr. Churchill-Keating assumed responsibility for current Section 7 expenses and certain challenged matrimonial debts.

[3] As a result, the issues which remained for judicial determination at trial narrowed primarily to division of property and spousal support (entitlement and quantum). Nevertheless, the trial still took 6 days.

[4] My decision on these issues was released on July 24, 2020 as 2020 NSSC 205 (the "**Decision**").

[5] After I released my original Decision, a new issue arose regarding capital gains tax. By way of background, I directed that one of the matrimonial assets (an undeveloped parcel of land in Oakfield, Nova Scotia) be sold. The Oakfield property sold prior to the Corollary Relief Order being finalized. As such, the capital gains tax crystallized and the parties sought to both allocate responsibility for that tax and incorporate the allocation with the Corollary Relief Order.

[6] The parties' accountant, Harold Duffett, CPA, prepared the required capital gains tax calculations, and the parties quickly agreed on both the calculations themselves and how the liability would be allocated. A brief Court hearing was convened to ensure that the documents confirming the sale and the accountant's capital gains calculations were filed as Exhibits. The parties' resolution was then incorporated into the terms of a comprehensive Corollary Relief Order.

[7] The parties could not reach agreement on costs. Each filed written submissions. This is my decision on that final issue.

## DR. CHURCHILL-KEATING'S POSITION

[8] Counsel for Dr. Churchill-Keating begins with the proposition that she was the successful party and that, as such, is entitled to substantial indemnity in terms of reimbursement for the legal costs incurred in this proceeding. Dr. Churchill-Keating seeks an all-inclusive amount of $28,207.19 broken down as follows:

a. $12,000.00 representing $2,000.00 for each day of trial in accordance with Tariff A ($2,000/day x 6 days of trial = $12,000);

b. An additional $15,313.00 calculated under Tariff A, Scale 3. This figure assumes an "amount involved" of $120,000.00;

c. $894.19 for disbursements

[9] The first figure ($12,000.00) is plain arithmetic under Tariff A, assuming Dr. Churchill-Keating is the successful party. The third figure ($894.19) is equally

simple. It represents the disbursements (plus HST) billed to Dr. Churchill-Keating, again assuming Dr. Churchill-Keating is the successful party.[1]

[10] The second component of Dr. Churchill Keating's costs demand ($15,313.00) requires greater explanation. As indicated, it is based on Tariff A. Tariff A is a chart in which the costs payable in any civil proceeding are determined based on two main variables: the "amount involved" and the complexity of the proceeding. Obviously, the underlying presumptions are that the costs which a successful party will be required to spend on civil litigation are (or should be) driven, in the first instance, by the amounts at stake in the dispute and then the complexity of the dispute.

[11] Tariff A offers a consistent, predictable, principled, and objective approach to costs. As such, costs are normally determined by applying Tariff A. That said, the Court's primary goal in assessing costs is to do justice as between the parties and Tariff A is not always a suitable mechanism for achieving that goal (*Armoyan* v *Armoyan*, 2013 NSCA 136 ("***Armoyan***")). One reason is that Tariff A requires the Court to first establish an "amount involved", as indicated. However, that is not always a simple task. For example, it is difficult to establish the monetary "amount involved" in a dispute over custody. While the "amount involved" may be clear in most civil disputes, not every claim can be cleanly (or fairly) reduced to a single financial figure. I return to this issue below.

[12] Ms. Connors acknowledges that the underlying presumptions which inform Tariff A do not comfortably conform with the circumstances of this case. As a solution, Ms. Connors proposes an approach adopted by Justice McDonald in *Fermin* v *Yang*, 2009 NSSC 222 ("***Fermin***"). At paragraph 3 of *Fermin*, Justice Beryl McDonald offers twelve principles to guide Court's discretion when determining costs. The ninth principle states:

> 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 in order to determine the "amount involved".

[1] I note that the bulk of disbursements appears to relate to preparing Exhibit Books for trial and I was not provided any details regarding the number of pages which were copied or the basic photocopy charge per page. (see Practice Memorandum #10 which authorizes 10 cents per page as the allowable rate for photocopies)

[13] Using this formula, Ms. Connors multiplies this "rule of thumb" figure ($20,000.00) by the number of trial days in this case (6). Thus, the "amount involved" in this case becomes $120,000.00 [2]

[14] Accepting an "amount involved" of $120,000.00, the question becomes: which Scale should apply? Tariff A offers 3 options: Scale 1 (lowest with "basic" costs being reduced by 25%), Scale 2 (midrange or "basic" costs); and Scale 3 (highest with "basic" costs being increased by 25%).

[15] Ms. Connors cites Rule 77.02 and argues that Mr. Keating's actions throughout this proceeding justify an increased Scale 3 cost award in favour of Dr. Churchill-Keating. Ms. Connors submits that Mr. Keating refused reasonable settlement offers which were more favourable to Mr. Keating than the Court's ultimate award. She also maintains that Mr. Keating made late disclosure (in the middle of trial), engaged in inappropriate lines of questioning, and generally promoted unnecessary delay. Applying Scale 3 to an "amount involved" of $120,000.00 results in costs of $15,313.00.

[16] Ms. Connors concludes that a global cost award of $28,207.19 is a reasonable and substantial contribution towards actual costs which are said to have been $52,533.46.

## MR. KEATING'S POSITION

[17] Mr. Keating does not seek costs, but he largely opposes paying costs too. Subject to a few specific exceptions discussed below, he takes the position that all parties should generally pay their own costs. He opposes the notion of accepting personal responsibility for the legal costs of another party. He argues: "When I had my own lawyer, I never paid anywhere close to these numbers. I think it's pretty unfair to expect anyone to pay someone bills." And "I can't be responsible for [Dr. Churchill-Keating's lawyer] Lynn Connors actions."

[18] Mr. Keating also insists that he attempted to be fair and move on. He points out that all issues around parenting were resolved in advance of trial. He insists that he made good faith efforts to resolve any remaining issues but was rebuffed.

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[2] By way of comparison, Ms. Connors observed that the total value of matrimonial assets was $1,019,809. If that figure were adopted as the "amount involved", the basic amount owing under Tariff A, Scale 2 would be $79,181.82. Ms. Connors states that this amount would be impossible for Mr. Keating to pay and above Dr. Churchill-Keating's actual legal costs. I agree that using the total value of matrimonial assets as the "amount involved" is inappropriate. First, these assets were not at risk and so their value does not fairly reflect the amount involved. Second, the resulting costs would exceed solicitor and client costs. Mr. Keating's conduct in this case does not justify an award of solicitor and client costs, let alone an amount *beyond* solicitor and client costs. I return to this issue below.

He accuses Dr. Churchill-Keating of refusing to speak and constructively discuss a resolution.

[19] Mr. Keating also says he felt compelled to address the personal attacks he perceived to be levelled against him at trial. He apologizes if, as a self-represented litigant, he was unable to completely respect every technical formality in a court proceeding but says that he did his best.

[20] Having said all that and notwithstanding a general denial of responsibility for costs, Mr. Keating does express a willingness to pay half of the following amounts:

a. The costs of preparing the Exhibit Books for trial ($777.56 plus HST);

b. "the charge on the 1st offer on July 9th, 2020." Mr. Keating then says that he "assume[s] that date would be 07/02/2019." I reviewed Dr. Churchill-Keating's settlement offer dated July 9, 2020 but was unable to determine with any precision what Mr. Keating meant by the term "charge" or the exact amount he was willing to pay (i.e. half the "charge"). I asked Mr. Keating for clarification. Based on Mr. Keating's email and letter of September 1, 2020, I understand the "charges" in question total $200.00 (excluding HST) and relate to Ms. Connor's legal fees on July 2, 2019. When I reviewed the undated letter, attached to his October 27, 2020 e-mail, the only charges associated with the dates: 07/02/2019, 07/22/2019 and 08/12/2019 on Schedule A are Ms. Connors' legal fees and HST, which he seems to attribute to the preparation of Dr. Churchill-Keating's offers. But, given his next comment that "Schedule A does not show that the costs represent. I can only assume what is on the paper. I we could get more clarification on these dates and cost it might help" suggests that he does not understand the expenses or provide a reason for his consent.

c. The legal fees associated with preparing the Order following my decision on the substantive issues. Again, I am uncertain as to what precise amount he is offering to pay, and I do not have sufficient information to determine this figure with any degree of certainty.

## ANALYSIS

### SOLICITOR AND CLIENT COSTS?

[21] In her written submissions, Ms. Connors mentions the possibility of solicitor and client costs but does not pursue the matter to any extent – justifiably so, in my view.

[22] 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).

[23] Solicitor and client costs are not appropriate in this case. While Mr. Keating's conduct was problematic at times, it was very clearly neither reprehensible nor scandalous nor outrageous. It certainly did not come close to justifying solicitor and client costs.

### GOVERNING LEGAL PRINCIPLES

[24] In assessing costs, the Court retains a wide discretion. However, that discretion is not exercised in a manner which is capricious or arbitrary.

[25] The Court's primary goal is to ensure a just result as between the parties. In *Armoyan*, Fichaud, J.A. wrote: "The Court's overall mandate, under Rule 77.02(1), is to "do justice between the parties" (at para 10). The goal of achieving justice between the parties remains present throughout the process of assessing costs and necessarily influences the issue of entitlement to costs and, if entitlement is proven, quantum (or "how much"?). I turn now to those two issues (entitlement to costs and quantum).

### Entitlement to Costs

[26] As to a party's entitlement to costs, the following factors, among others, help guide the inquiry:

a) The predominant factor in determining entitlement to costs is the question of "success" in litigation.

b) "Success" in litigation is typically measured against the result or outcome. Rule 77.03(3) states: "Costs of a proceeding follow the result, unless a judge orders or a Rule provides otherwise." Thus, the party whose position most closely aligns with the Court's ultimate disposition is normally

> deemed to have "succeeded" in the litigation. However, locating "success" in a legal proceeding can still prove difficult. And comparing the Court's findings at trial against the parties' respective positions can become complicated. By definition, the conflicting demands of two opposing parties in an adversarial process cannot be fulfilled. And the prayers of any one party are not always fully answered. There may be degrees of success. In some cases, a party may not be entirely victorious but will substantially achieve the relief sought. Or a party may prevail on one issue out of many, but overall "success" may have hinged on that single issue. Or that single issue predominated or consumed most of the Court's attention. In other cases, the parties might equally prevail on significant issues such that "success" is truly divided.

[27] Settlement offers may also bear upon the issue of "success" and entitlement to costs. The Courts encourage and promote reasonable, good faith attempts to resolve legal disputes through negotiation. As Scanlan, J.A. wrote in *Marson* v *Nova Scotia*, 2017 NSCA 17: "Courts have repeatedly emphasized the benefits of early resolution of matters. Early settlement minimizes the expense to the parties, both the victors and the vanquished." (at para 53). At first glance, the Court's ultimate conclusions at trial may compare favourably with the relief sought and suggest that one party achieved considerable success. However, when discussing costs, settlement offers that were previously considered privileged are now revealed. At that point, initial appearances of "success" may fade, and the "successful" party may, in fact, have secured a more favourable outcome by accepting an earlier settlement offer. In those circumstances, an apparently "successful" party may be denied costs or receive a reduced cost award. Alternatively, a party that initially appeared "unsuccessful" but actually received a "favourable judgement" when compared against an earlier settlement offer, may now claim an entitlement to costs. This is particularly true in the context of formal settlement offers under Rule 10.

[28] Setting aside settlement offers, there may be other circumstances where a party's conduct during litigation bears upon entitlement to costs. However, those circumstances would be exceptional and limited to the cases where, like a settlement offer, the conduct is directly and inextricably linked to evaluating the question of "success" (or outcome) in the litigation. Otherwise, the costs consequences associated with a party's conduct during litigation are more commonly relevant to the question of quantum – i.e. the extent to which costs awards should be increased or decreased on the basis of a party's conduct. See, for example, the various factors enumerated in Rule 77.07(2).

**Quantum (How much?)**

[29] In *Armoyan*, Fichaud, J.A. confirmed: "The basic principle is that a costs award should afford substantial contribution to the party's reasonable fees and expenses." (at para 16). Quantifying party and party costs (or determining a "substantial contribution" to a party's reasonable fees and expenses) normally involves the application of the Tariffs which are expressly incorporated into the Rules of Civil Procedure. For example, Rule 77.06(1) states:

> Party and party costs of a proceeding must, unless a judge orders otherwise, be fixed by the judge in accordance with tariffs of costs and fees determined under the *Costs and Fees Act*, a copy of which is reproduced at the end of this Rule 77.

In *Armoyan*, Fichaud, J.A. confirmed that the Tariffs are the "norm" (at para 15) and explained that:

> The tariffs deliver the benefit of predictability by limiting the use of subjective discretion. This works well in a conventional case whose circumstances conform generally to the parameters assumed by the tariffs. The remaining discretion is a mechanism for constructive adjustment that tailors the tariffs' model to the features of the case. (at para 17).

[30] While the Tariffs serve as the primary default mechanism for determining costs, rigid adherence to the Tariffs will not always achieve the ends of justice. Among other things, "some cases bear no resemblance to the tariffs' assumptions" (*Armoyan*, at para 18). This is particularly true in cases where the remedies sought are not strictly monetary in nature. The key, preliminary variable which then drives cost awards under Tariff A is the "amount involved". However, in many cases, the "amount involved" is elusive. The numerical inputs needed (e.g. an "amount involved") simply do not exist or cannot be easily determined. For example, as indicated above, what is the monetary "amount involved" when two parties cannot agree on custody or parenting arrangements? Similarly, what happens when complex legal issues or the underlying effort to prosecute/defend a case reasonably exceed the presumptions which inform the Tariff? In these situations, artificially developing an "amount involved" simply to engage the Tariff may become exceedingly subjective to the point where the Tariff no longer serves the ends of justice.

[31] Where the unique circumstances of a particular case overtake the assumptions embedded in the Tariff and the Tariff fails to achieve a fair and just result, a lump sum cost award may be appropriate. However, the Court should not

routinely abandon the Tariff. There must be a reason to depart from the norm (*Armoyan*, at para 15).

[32] Regardless of whether costs are quantified under the Tariff or, for example, as a lump sum award, there are additional factors which may influence the Court's final costs award. Rule 77.07(2) could bear upon the issue of entitlement and quantum:

> i) the amount claimed in relation to the amount recovered;
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> ii) a written offer of settlement, whether made formally under Rule 10 - Settlement or otherwise, that is not accepted;
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> iii) an offer of contribution;
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> iv) a payment into court;
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> v) conduct of a party affecting the speed or expense of the proceeding;
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> vi) a step in the proceeding that is taken improperly, abusively, through excessive caution, by neglect or mistake, or unnecessarily;
>
> vii) a step in the proceeding a party was required to take because the other party unreasonably withheld consent; and
>
> viii) a failure to admit something that should have been admitted;

[33] On this and if a party is entitled to costs, the factors identified in Rule 77.07(2) may also bear upon the issue of quantum. The degree of overlap is informed by the Court's discretion and overall mandate to achieve justice in the circumstances.

## DECISION

[34] On the issue of entitlement, neither side can reasonably declare a complete victory. However, I am similarly unable to conclude that all parties should bear their own costs on the basis that success was divided. Although Dr. Churchill-Keating did not fully prevail, on balance, she achieved sufficient success to warrant a cost award. My reasons include:

> a) If "success" is measured against the formal positions taken by the parties either in the pleadings or at trial:

i) The main point of contention on the issue of property division was the value of the matrimonial home. On that specific issue, my determination was somewhat closer to the expert valuation offered by Mr. Keating (see paras 12 to 16 of the Decision). However, the difference was relatively marginal;

ii) My determination with respect to spousal support revealed differences between the parties. Dr. Churchill-Keating's alternate position at trial was that Mr. Keating receive minimal spousal support. During final oral submissions, I pressed counsel for Dr. Churchill-Keating (Ms. Connors) for a precise figure. Ms. Connors proposed a range of $812.00 - $856.00/month with a deduction for section 7 expenses over a two-year period. Mr. Keating sought spousal support between $1,100.00 - $1,200.00/month for a period of 10 years plus retroactive support dating back to January 2018. In the Decision, I awarded Mr. Keating spousal support in the monthly amount of $1,119.00 for five years. My ultimate determination was greater than the minimal amounts conceded by Ms. Connors during final submissions. However, Dr. Churchill-Keating's alternative proposal proved significantly closer to the relief granted than the amounts proposed by Mr. Keating;

b) If "success" is measured by reference to the parties' settlement offers[3], the assessment is complicated by the fact that parties are free to develop creative solutions involving terms and conditions unrelated to the narrow legal issues raised by the pleadings. The Court does not enjoy the same wide-ranging discretion to develop (or impose) whatever solution might appear fair. The judicial decision-making process upholds (and is constrained by) the rule of law. Established legal principles and procedures are applied to specific claims. In this case, the settlement communications between the parties reveal the kinds of issues that differentiate litigation and negotiation. In particular, the parties exchanged offers that floated ideas designed to promote resolution but, from a strictly legal perspective, were either irrelevant or untenable. For example, there were two relatively narrow legal issues to be decided at trial: property division and spousal support. However, settlement negotiations were driven by five key financial variables: spousal support; the value and ownership of an undeveloped

[3] The settlement offers in this case do not comply with the technical requirements of Rule 10 and, to be fair, Ms. Connors does not seek relief under Rule 10. At the same time, Rule 77.07(2)(b) identifies as a relevant factor any "written offer of settlement, whether made formally under Rule 10 - Settlement or otherwise, that is not accepted"

parcel of land in Oakfield, Nova Scotia that was otherwise jointly owned (the "**Oakfield Property**"); the value and ownership of an RV travel trailer (the "**RV**") that was otherwise jointly owned; the parties' respective RRSP's; and Section 7 expenses. The parties sought to divide these assets and obligations in a way which reveal the "give and take" of settlement even though, legally speaking, they were all matrimonial property subject to equal division. Nevertheless, on balance, Dr. Churchill-Keating's settlement offers came much closer to the determinations confirmed in the Decision – primarily because Mr. Keating insisted upon retaining the Oakfield Property and receiving much greater spousal support (prospective and retrospective) than was awarded.

[35] As to quantum and although Dr. Churchill-Keating emerged as the "successful" party, her successes were qualified for the reasons given above. In my view, she is not entitled to the sort of substantial indemnity contemplated under the Tariffs. Rather, and in accordance with *Armoyan*, an appropriate lump sum award better ensures a just result between the parties. My reasons include:

a. The assumptions embedded within the Tariffs do not reasonably apply in the circumstances of this case. It is exceedingly difficult to develop an appropriate "amount involved". The various relevant factors such as the parties' respective positions, the disproportionate effort expended, the financial implications of property division and spousal support are interwoven and not reasonably reduced to a single figure. A forced application of the Tariff would require imposing a level of artificiality and subjectively would, in turn, undermine the overarching need to achieve justice; and

b. A lump sum better serves to balance Dr. Churchill-Keating's qualified successes against Mr. Keating's actions which, among other things, unreasonably delayed the proceeding.

[36] That said, I am compelled to consider Mr. Keating's conduct under Rule 77.07(2)(e) and the extent to which it affects the cost award. During trial, Mr. Keating frequently descended into issues which were clearly of emotional importance but lacked legal significance. The problems became particularly acute when Mr. Keating was compelled to confront the reality of the loss of his relationship with Dr. Churchill-Keating and, as well, when dealing with issues surrounding the matrimonial home. The parties separated within weeks of completing a brand-new matrimonial home. Mr. Keating was physically engaged in construction and he poured a good deal of himself into building the home. His

continuing sense of grievance over the manner in which the marriage ended so soon after occupancy was palpable. In my view, these issues often overwhelmed Mr. Keating in a manner which was unproductive. The proceeding suffered as a result.

[37] I appreciate Mr. Keating's sentiment that "it's pretty unfair to expect anyone to pay someone bills". At the same time, he cannot escape responsibility for his own actions and the extent to which he unnecessarily increased the costs associated with a proceeding.

[38] I recognize that Mr. Keating is a self-represented litigant, and I tempered my concerns and my assessment of costs accordingly. In attempting to achieve justice and balance, I have weighed issues around access to justice and Mr. Keating's relative lack of experience and expertise. Similarly, I weighed Dr. Churchill-Keating's expectations around an efficient and cost-effective process. I also took into account Rule 34.06(1) which was designed to, among other things, ensure that a self-represented litigant will "make best efforts to understand these Rules and to comply with them". In the end, Dr. Churchill-Keating cannot reasonably be expected to shoulder all of the expenses associated with the delays and inefficiencies associated with Mr. Keating's actions.

[39] Overall, justice is achieved as between the parties with Mr. Keating paying costs in the amount of $11,200.00, all in. Mr. Keating shall pay this total cost award in equal monthly installments beginning January 1, 2021. More specifically, Mr. Keating is to pay to Dr. Churchill-Keating payments in the amount of $200.00 per month, commencing on the 1st day of January, 2021 and the first day of each and every consecutive month thereafter until August 1, 2025.

[40] Finally, Ms. Connors cites Rule 77.17 and asks that this cost award be set off against Dr. Churchill-Keating's spousal support obligations.

[41] There is authority which permits setting off costs against an equalization payment (*Bethune* v *Bethune*, 2015 NSSC 95; aff'd 2016 NSCA 66). I was not provided with any case authority which would permit offsetting a cost award against spousal support payments. There is authority, however, declining this form of relief. In *Moore v. Moore*, 2013 NSSC 281, Jollimore, J. declined to grant this form of set off referring, in part, to potential complications under the *Income Tax Act*. I agree with Jollimore, J. and do not order set off.

Keith, J.