

SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION

Citation: *Nova Scotia (Community Services) v. KM*, 2021 NSSC 10

Date: 2021-01-15

Docket: SFHCFSA No. 113966

SFH No. 1201-062352

Registry: Halifax

Between:

SFHCFSA No. 113966

MINISTER OF COMMUNITY SERVICES

Applicant

v.

KM and SH

Respondents

v.

EH

(by Guardian *ad litem*, Susan Sly)

Third Party

v.

BH

(by Guardian *ad litem*, Beth Archibald)

Third Party

And Between:

SFH No. 1201-062352

KM

Applicant

v.

SH

Respondent

Decision on Costs

Restriction on Publication: Restriction on Publication

Pursuant to subsection 94(1) of the *Children and Family Services Act*, S.N.S. 1990, c. 5, there is a ban on disclosing information that has the effect of identifying a child who is a witness at or a participant in a hearing or the subject of a proceeding pursuant to this Act, or a parent or guardian, a foster parent or a relative of the child.

Judge: The Honourable Justice Theresa Forgeron

Submissions: November 20 and December 15, 2020

Decision: January 15, 2021

Counsel: Peter McVey, Q.C., counsel for the Minister of Community Services
Margo Fulmer, counsel for the mother, KM
SH, the father, appearing self-represented
Kelsey Hudson, counsel for the *Guardian ad litem*, Susan Sly for the child, EH
Hannah Rubenstein, counsel for the *Guardian ad litem*, Beth Archibald for the child, BH

By the Court:

Introduction

[1] The mother, KM, seeks costs from the father, SH, as a result of my decision reported as *Nova Scotia (Community Services) v. KM*, 2020 NSSC 318. The mother states that she was the successful party and should be granted costs even though she was represented by Nova Scotia Legal Aid. In contrast, the father wants each party to bear their own costs, and in the alternative, states that credit should be provided because he overpaid maintenance once the mother stopped incurring childcare expenses. Neither the Minister nor the litigation guardians takes a position on the mother's costs application.

Issue

[2] Should costs be payable to the mother?

Background

[3] The parties are divorced. They have two children – a son who is 15 years old and a daughter who is 13 years old.

[4] In 2019, the mother filed an application to vary the parenting provisions of the 2017 order which varied the 2009 Corollary Relief Judgement. The mother sought sole decision-making and a reduction in the father's parenting time. In May 2020, the mother filed an amended application to address travel and child support issues.

[5] In April 2019, the Minister of Community Services filed a child protection application because of concerns of emotional abuse. The protection application was processed during various hearings in 2019 and 2020. The final protection review hearing was held in conjunction with the divorce variation application on parenting issues. The hearing was held on September 1, 2 and 22, 2020. The variation concerning the maintenance issues was adjourned to another date in 2021.

[6] My written decision on the protection and parenting issues was released on November 17, 2020. Following the release, the mother sought costs through

written submissions received on November 20, 2020. The father's written response was filed on December 15, 2020.

Analysis

Position of the Mother

[7] The mother seeks costs of \$12,250 for the following reasons:

- She was the successful party: *L.(N.D.) v. L.(M.S.)*, 2010 NSSC 159. The mother sought and obtained a variation of the custodial and parenting provisions of the last divorce order. Her position was supported by the Minister and both litigation guardians because of protection concerns related to a continued risk of emotional abuse.
- The father did not succeed on any of the contested parenting issues. The father's claims met with "resolute failure."
- There is no principled reason why the mother should be deprived of costs. A costs award will fulfill the court's mandate to do justice between the parties.
- Costs should be awarded as a caution for advancing claims that have little chance of success: *Qu v. Calvesbert*, 2020 NSSC 115, para 18. The father's claim had little chance of success because of his lack of insight and lack of engagement in services.
- Tariff A should be applied: *Moore v. Moore*, 2013 NSSC 281. Further, the court should resort to the \$20,000 per day rule of thumb when assessing "the amount involved" because the most significant issue centered on parenting: *L.(N.D.) v. L.(M.S.)*, *supra*. The trial was not focused on monetary issues. Therefore, the amount involved should be set at \$50,000 because the trial took 2.5 days. Applying basic scale 2, costs of \$7,250 should be awarded together with an additional \$2,000 for each day of trial. This calculation will result in costs of \$12,250.

Position of the Father

[8] The father objects to paying costs to the mother. He asks me to consider the following points:

- His relationship with the children is fractured.
- During the course of the proceeding, the mother made vexatious allegations which he proved were not true.

- The mother did not incur any legal fees because she is represented by legal aid. The mother would not have to pay his expenses if he won. It would be unjust to require him to pay costs in such circumstances. Such a result would create a “heads I lose, tails you win scenario.”
- No detailed breakdown of legal expenses was provided by the mother’s counsel.
- He did not act in a manner that needlessly delayed or caused undue delay.
- The mother will owe him money because he overpaid child support when he continued to pay for childcare expenses which were no longer being incurred.
- The court must act in a principled fashion when crafting a costs award: *MacDonald v. Christian*, 2018 NSSC 72.

Law

[9] Rule 77 governs costs awards in matters before the Supreme Court of Nova Scotia. In *Armoyan v. Armoyan*, 2013 NSCA 136, Fichaud, J.A., reviewed relevant principles, as follows:

- The court's overall mandate is to "do justice between the parties": para. 10.
- Unless otherwise ordered, party and party costs are quantified according to the tariffs. The court has discretion to raise or lower the tariffs applying listed factors, which include unaccepted written settlement offers and the conduct of the parties insofar as it affects the speed or expense of the proceeding: paras. 12 and 13.
- The Rule permits the court to award lump sum costs and depart from the tariffs in specified circumstances. Tariffs are the norm and there must be a reason to consider a lump sum: paras. 14 and 15.
- The basic principle is that costs should afford a substantial contribution to the party's reasonable fees and expenses which means not a complete indemnity, but rather more than 50 and less than 100% of a lawyer's reasonable bill for services: para. 16.
- 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. Some cases, however, bear no resemblance to the tariffs’

assumptions. For example, a proceeding begun nominally as a chambers motion may assume trial functions; a case may have no "amount involved"; efforts may be substantially lessened by the efficiencies of capable counsel, or handicapped by obstructionism; the amount claimed may vary widely from the amount awarded; the case may assume a complexity with a corresponding work load that is far disproportionate to the court time by which costs are assessed under the tariffs; there may be rejected settlement offers, formal or informal, that would have saved everyone significant expense: paras. 17 and 18.

- When subjectivity exceeds a critical level, the tariffs may be more distracting than useful. In such a situation, it is more realistic to circumvent the tariffs and channel that discretion directly to the calculation of a lump sum. A principled calculation should turn on the objective criteria that are accepted by the *Rules* or case law: para. 18.

[10] Furthermore, the mere fact that the successful party is represented by Nova Scotia Legal Aid does not prevent a costs order from being made: **McNeil v. Christie**, 2017 NSSC 247 per Macleod-Archer, J.

Decision

[11] I conditionally award costs of \$3,000, inclusive of disbursements, to Nova Scotia Legal Aid on behalf of the mother. This award is subject to the outcome of the maintenance variation application. I will now explain my reasons for granting this costs award:

- The variation was originally scheduled to deal with two issues – parenting and maintenance. Ultimately, the variation application issues were separated because of the child protection proceeding. The parenting issues were resolved in conjunction with the child protection proceeding; however, the maintenance variation is yet to be litigated. The outcome may indeed favour the father and if so, he may be entitled to costs and a repayment of maintenance. Therefore, no costs are payable until the maintenance variation is determined.
- The parenting variation application was heard in conjunction with the child protection proceedings. Costs are not ordinarily awarded in child protection proceedings.
- The mother was the successful party on the parenting variation. She, in fact, was entirely successful. The father was not.

- Although the September 2020 variation was not complicated, the outcome was important to the parties.
- I do not follow the “rule of thumb” given the comments of Fichaud, JA in *Armoyan v. Armoyan*, *supra*.
- I was not provided with a break-down of the legal fees of the mother’s counsel, although the effort that was expended can be gleaned by the documents filed, including legal research.
- A lump sum award is the most appropriate award in the circumstances of this case.

Conclusion

[12] In the circumstances, a conditional lump sum of \$3,000 is ordered to do justice between the parties.

Forgeron, J.