

SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION

Citation: *KG v. HG*, 2021 NSSC 142

Date: 2021-04-29

Docket: SFH No. 1201-071597

Registry: Halifax

Between:

K. G.

Petitioner

v.

H. G.

Respondent

Judge: The Honourable Justice Theresa M. Forgeron

Submissions: March 9 and 30, 2021

Decision: April 29, 2021

Counsel: Kerri-Ann Robson for the Petitioner, KG
Tanya Nicholson for the Respondent, HG

By the Court:

Introduction

[1] This decision concerns the amount of costs that should be awarded following my decision reported as *KG v HG*, 2021 NSSC 43.

[2] The mother, HG, seeks costs from the father, KG, in the amount of \$51,471.10. This sum is derived from two calculations. First, the mother seeks 50% of the legal fees she incurred before she sent the settlement offer to the father. Second, the mother seeks full indemnity of the legal fees incurred after her settlement offer was made.

[3] In contrast, the father states that costs should not exceed \$17,000. He relies on the rule of thumb approach. In addition, he states that he acted in good faith and in what he believed to be in the children's best interests. Further, as a review hearing was ordered, the final parenting outcome is as yet unknown. The father also notes that his position on property division, inclusive of a division of the mother's pension, was reasonable and ultimately accepted.

Issue

[4] What is the appropriate award of costs?

Background Information

[5] The father filed a divorce petition and a motion for an interim parenting order on December 18, 2018. Thereafter, the parties attended various court conferences, including a settlement conference where the property matters were resolved. A trial was necessary to determine parenting and child support issues.

[6] The contested issues were the subject of a lengthy in-person divorce hearing on October 26, 27, 28, and 30 and November 3 and 6, 2020. In addition to the parties, other witnesses included experts, professionals, police officers, a coach, and family members. Evidence was also entered by consent.

[7] On November 6, 2020, the court on its own motion varied the interim parenting order pending the release of my trial decision. A supplemental appearance was held on December 17, 2020 to resolve issues surrounding the interim variation order.

[8] The trial decision was released on February 16, 2021. The parties were invited to file written submissions on costs. The mother filed her submissions on March 9, 2021 with the father responding on March 30, 2021.

Analysis

[9] **What is the appropriate award of costs?**

Position of the Mother

[10] The mother seeks substantial costs for reasons which include the following:

- She incurred legal fees and disbursements of \$61,766.15, inclusive of her share of the cost of the parental capacity assessment.
- Her legal fees were reduced because she was self-represented during a portion of the divorce proceeding.
- She was the successful party on all issues before the court. The mother was granted primary care, decision-making, and retroactive and prospective child support. The father's parenting time was subject to restrictions.
- A lump sum award is appropriate because the parenting issues cannot be assigned a dollar value as noted in *Illingworth v Illingworth*, 2020 NSSC 371.
- A major hurdle throughout the proceeding was the father's belief that he was the victim of parental alienation perpetrated by the mother. The father also believed that there were limited experts available to assist the family because few if any experts were qualified to address parental alienation in Nova Scotia. The court dismissed the father's theory of the case.
- Despite overwhelming evidence that the children should remain in her primary care, the father persisted in seeking primary care or shared parenting. The father's arrogance and refusal to accept professional judgement when it differed from his own not only impeded settlement, but also lengthened and unnecessarily complicated the trial.
- The mother offered to accept \$12,866.44 to resolve the retroactive child support issue. The father refused. The court ordered in excess of \$13,220.44.
- The mother offered to resolve the parenting issues in 2019 on terms in keeping with or more favourable than the court's decision.
- Throughout the proceeding, the mother acted reasonably by attempting to resolve all issues. For example, the mother arranged for a home appraisal

conducted by Shawn Best with the consent and urging of the father. Further, the mother tried to resolve all matters as early as September 2019 by presenting the father with Minutes of Settlement. When it became apparent that the father held a fixed position on parenting issues, the mother then presented the father with Partial Minutes to resolve the financial matters. The father neither accepted nor negotiated the financial matters at that time.

- The father received a greater equalization payment than the mother offered because unexpected market conditions increased the value of the matrimonial home after the parties separated. This was not anticipated at the time the mother's settlement offers were made.
- The father did not act reasonably. For example, the father initially refused to reschedule the settlement conference which was cancelled because of Covid. The father eventually participated in a settlement conference after receiving the Parental Capacity Assessment and just days before the hearing. The father refused to follow the assessor's recommendations.
- Maintenance issues were not resolved. The father did not readily disclose relevant income information. Income information remained outstanding as of trial in that the father did not supply proof of his current income after he secured a new job. The father also underpaid child support.

[11] The mother seeks costs because she was the successful litigant. She wants full indemnification from the date of her settlement offer and a substantial indemnification for the period before the settlement offer was made. In addition, the mother seeks costs so that the father is deterred from proceeding with his appeal and contempt application.

Position of the Father

[12] Although the father acknowledges that the mother was the successful party, he disputes the amount of costs that she seeks. In support of his position, the father asks the court to consider the circumstances, including the following:

- The February 2001 decision provides for a review date. Because the order is subject to review, the final parenting outcome may be closer to the father's position at trial once services are utilized.
- The father's decision to appeal the interim variation order and to pursue his contempt application are not matters that can be considered when assessing costs for the purposes of this decision.

- Although draft Minutes of Settlement were provided to the mother by her counsel, there is no evidence that the mother provided this draft to the father. Further, it was not a formal offer in accord with Rule 10.
- The formal offer that was sent to the father's legal counsel is dated December 4, 2019. This is the appropriate date to consider for costs purposes.
- The settlement offer differs significantly from the eventual property division. The final property division includes the division of the mother's pension. The settlement offer does not.
- The father did attempt to resolve the property division issues before trial. In fact, the parties ultimately settled the property issues in a manner more favorable to the father than the mother's settlement proposal.
- In *C.M. v. C.M.P.*, 2021 NSSC 96, Muise J. held at para 30 that the 66% and 80% costs awards granted in *Armoyan v. Armoyan*, 2013 NSCA 136 emanated from misconduct and other special circumstances; these percentages are not the standard in the absence of misconduct or special circumstances.
- Although the father's parenting claims were denied, there is no evidence to suggest that the father did not have the children's best interests at heart. The father's position was entirely premised on what he believed to be best for the children.
- The father did not take any actions that prolonged the proceedings. For example, the father consented to an agreed statement of facts for Dr. McAfee and an order to produce from the Department of Community Services.
- The comments of MacDonald J. at para. 17 of *Gomez v. Ahrens*, 2015 NSSC 3 are appropriate considerations.
- When calculating the "amount involved", case law references a rule of thumb equating each day of trial to \$20,000. Given the 5.5 days of trial, the amount involved equals \$110,000. Tariff A would indicate costs of \$9,188 (Scale 1), \$12,250 (Scale 2), and \$15,313 (Scale 3) plus \$2,000 for each day of trial.
- The father incurred disbursements of \$2,026.05 for the updated property appraisal. The father also paid his share of the parental capacity assessment.

- Legal fees are only one factor to be considered and it is unclear which legal fees are associated with property matters.

[13] The father states that a lump sum representing 83% of the mother's legal fees is not an appropriate approach in this case. From his perspective, costs should not exceed \$17,000.

Decision on Costs

Law

[14] Rule 77 governs awards of costs in matters before the Supreme Court of Nova Scotia. In *Armoyan v. Armoyan*, *supra*, 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 and Rule 77.07.
- 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.": para 17. Some cases, however, "bear no resemblance to the tariffs' assumptions.": para 18. 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"; "[t]he amount claimed may vary widely from the amount awarded"; "[t]he 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"; "[t]here may be rejected settlement offers, formal or informal, that would have saved everyone significant expense": para 18.

- When “subjectivity exceeds a critical level, the tariff may be more distracting than useful” para 18. In such a situation, “it is more realistic to circumvent the tariffs, and channel that discretion directly to the principled 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.

[15] I order the father to pay the mother costs of \$40,882 inclusive of disbursements. There is no principled reason why the mother, as the successful party, should be deprived of an award that amounts to a substantial indemnity of her reasonable legal fees. I will now explain my reasons by referencing the following topics: amount involved, reasonable legal fees, settlement offers, conduct, unnecessary steps, and lump sum calculation.

[16] In this decision, I did not consider matters related to the father’s appeal or contempt application. Any costs flowing from the appeal or contempt proceedings will be decided by the judges determining those issues.

Amount Involved

[17] Tariff A requires a determination of the amount involved. In this case, the amount involved is not easily ascertained for two reasons. First, child support was ordered retroactively and prospectively. Prospective child support is not amenable to quantification because it can be increased or decreased based on changing circumstances, such as the payor’s income. Second, the most significant litigated issue concerned parenting and the father’s concurrent alienation claim. Neither of these issues are monetary ones.

[18] In his submissions, the father urges me to equate \$20,000 for each day of trial based on the rule of thumb discussed in *Gomez v. Ahren, supra*. The mother objects based on the comments of Fichaud, JA in *Armoyan v. Armoyan, supra*, and my decision of *Illingworth v. Illingworth, supra*.

[19] I agree with the mother’s position. Fichaud, JA did not employ a rule of thumb when calculating costs in *Armoyan v Armoyan, supra*. Further, I note that the rule of thumb was rejected in *Veinot v Veinot Estate*, 1998 NSCA 164, wherein Pugsley, J.A. held that the rule of thumb employed by the trial judge was not “an appropriate yardstick.” Rather, it was, in his view, “an arbitrary classification which in most cases, except by happenstance, would be of little relevance.”.

[20] Further, the rule of thumb is dated. The initial rule of thumb equated every day of trial to \$15,000: *Urquhart v. Urquhart* [1998], N.S.J. No. 310 relying on *Venoit v Venoit* [1998], SBW No. 4053. Nine years later, it was increased by Lynch, J. in *Jachimowicz v. Jachimowicz*, 2007 NSSC 303 to \$20,000 per day. Fourteen years have since past. If a rule of thumb is to be used, it should be updated to \$30,000 per day. I find, however, that such arbitrary assignments do not assist in the principled calculation mandated by Rule 77 and endorsed by Fichaud, JA in *Armoyan v. Armoyan*, *supra*.

[21] Instead, according to the tariffs, I am to assess the proceeding's complexity and importance when determining the amount involved in a non-monetary case. In this case, the parenting issues were both complex and important. Complexity was proven by the following:

- Evidence was obtained from two experts - a parental capacity assessor and a psychiatrist. Further evidence was admitted from two other psychologists, two counsellors, police officers, a coach, the parties, family members, and the protection file of the Minister of Community Services.
- The father raised serious issues of parental alienation and submitted scholarly articles in support of his position. The father was singularly focused on and relentlessly pursued his theory of the case by filing large volumes of written materials with the Court and with the parental capacity assessor.
- Although many witnesses filed affidavits or reports to reduce the amount of time spent on direct evidence, the hearing was nevertheless protracted.

[22] Further, I find that the litigated issues were important because both issues related to the children. The most contentious issue concerned the parenting plan while the second issue related to child support.

[23] Despite finding that the proceeding was both complex and important, I remain unable to quantify the amount involved. Contrary to the father's submission, a principled calculation is not derived by employing a rule of thumb. I therefore must circumvent the tariffs and channel my discretion in arriving at a principled calculation of a lump sum based on the successful party's reasonable legal fees and other relevant factors.

Reasonable Legal Fees

[24] The mother will incur legal fees and disbursements of \$61,766.15 which includes out of pocket expenses and her portion of the parental capacity

assessment. The mother's legal fees were less than they otherwise would have been because the mother represented herself during various times in the proceeding. While she was self-representing, the mother occasionally sought and received legal advice from Ms. Nicholson.

[25] I find that the mother's projected legal fees are reasonable given the nature and complexity of the proceeding as previously described. The following court appearances were held to resolve this high conflict parenting dispute:

- February 21, 2019 court conference to discuss interim motion and filing deadlines.
- April 1, 2019 court conference to discuss evidentiary issues and rule on adjournment request.
- May 6, 2019 court conference to discuss issues related to interim hearing.
- June 6, 2019 court conference to discuss availability of psychiatrist to testify at the interim hearing.
- July 3, 2019 court conference to register interim parenting agreement.
- October 7, 2019 court conference to review interim parenting order.
- December 2, 2019 court conference to discuss parental capacity assessment and Christmas parenting schedule.
- December 20, 2019 interim hearing to determine Christmas parenting schedule. Both parties self-represented.
- June 12, 2020 case management conference. Both parties self-represented.
- October 1, 2020 court conference in advance of trial and to schedule settlement conference filing dates. Father represented. Mother self-represented.
- October 21, 2020 settlement conference. Father represented. Mother self-represented.
- October 21, 2020 court conference. Both parties represented.
- October 26, 27, 28, and 30, 2020; November 3 and 6, 2020 contested hearing. Both parties represented.
- December 17, 2020 court conference to resolve issues surrounding the interim variation order. Both parties represented.

[26] These multiple court appearances are indicative of the intensity of the dispute. The intensity of the dispute is also confirmed by the amount of evidence presented during the hearing and the volume of materials reviewed by counsel and the court.

[27] In many family matters, only the parties provide evidence. In contrast, this case involved evidence from many people of various backgrounds, including expert evidence from Dr. Uher, a psychiatrist, and from Shelia Bower-Jacquard, the psychologist who prepared the 123-page parental capacity assessment. Other evidence was provided from Dr. Potter, the children's psychologist; Martin Whitzman, a counsellor; police officers who intervened because of the family conflict; Wendy Green, a counsellor retained by the father; a coach; two family members; the parties; business records from the Department of Community Services; and an agreed statement of facts about the involvement of Dr. McAfee, a psychologist.

[28] In these circumstances, there is nothing surprising about the amount of legal fees to be incurred by the mother. Therefore, legal fees of \$61,766.15 will form a base line from which the lump sum cost award will be determined.

Settlement Offers

[29] Settlement offers play a significant role when calculating costs. For example, in *Armoyan v Armoyan*, *supra*, Fichaud, JA increased the costs award from 66% to 80% of the wife's reasonable legal fees after the wife filed her settlement offer. Fichaud, JA explained his reasoning at para 37 which provides as follows:

[37] As noted in *Williamson*, with which I agree, generally speaking the "substantial contribution" should exceed fifty percent of the appropriate base sum, but should not approach the full indemnity of a solicitor and client award. The percentage should vary, in a principled manner, according to the circumstances of the case. Considering Mr. Armoyan's conduct, as discussed, and the rejected settlement offer of October 2011, a substantial contribution here should represent: (a) 66% of the \$100,000 base sum before the settlement offer of October 2011 for the *forum conveniens* proceeding in the Family Division (*i.e.* \$66,000); plus (b) 80% of the \$200,000 base sum after that settlement offer for the *forum conveniens* proceeding in the Family Division (*i.e.* \$160,000); plus (c) 80% of the \$100,000 base sum in the Court of Appeal for both appeals (*i.e.* \$80,000). This totals \$306,000, including disbursements.

[30] Settlement offers do not have to be formal offers for the purposes of a costs calculation: *Armoyan v Armoyan*, *supra*, at paras 18, 27, and 28. The mother

conveyed her settlement position on three occasions, only one of which was a formal offer to settle.

[31] On September 19, 2019, at the direction of the mother, her counsel drafted Minutes of Settlement. On September 17, 2019, the father's previous counsel advised that she was on a limited retainer and that negotiations should be directed to the father. Ms. Nicholson states that to avoid ethical issues, she provided the Minutes to the mother who then presented them to the father. The draft Minutes proposed a parenting plan that was more favourable to the father than that decided by the court. The draft Minutes also proposed a retroactive child support payment that was accepted by the court for the period prior to May 2019. The draft Minutes contained a property division proposal that was less favourable than the one ultimately reached through settlement negotiations.

[32] On December 4, 2019, Partial Minutes of Settlement were sent to the father's lawyer who was now re-engaged. The Partial Minutes offered a resolution of the child support issues in keeping with my decision. The Partial Minutes suggested the continuation of the interim parenting order until further order or agreement was reached. The proposed property division was not the same as the parties' eventual agreement.

[33] The mother's position on parenting was finalized after the 123-page parental capacity assessment was received around October 15, 2020. The mother re-engaged her counsel and outlined her position on October 23, 2020 when she filed her pre-trial brief. In her pre-trial brief, the mother stated as follows about the contested parenting issues:

The recommendations do not speak to the exact language of custody but the structure implies that the children will remain in HG's primary care. Although she does not necessarily agree with all of the statements contained in the report, HG is prepared to agree to the recommendations. She will look to the Court to assist with the mechanics of the implementation of these recommendations, if the court supports what Ms. Bower-Jacquard has set out.

[34] My decision incorporated many of the Bower-Jacquard recommendations and when I did not do so, my findings were less favourable to the father. The father should have accepted the mother's position.

[35] In summary, the mother is entitled to a higher costs award because of the nature of her settlement offers and trial position. The mother's child support offer was more beneficial to the father than the outcome of my decision. Further, the parenting proposal of September 19, 2019 was more advantageous to the father

than my decision. However, this proposal was not incorporated into the December 2019 Minutes nor did the mother provide a stand-alone position on the parenting issues until receipt of the parental capacity assessment around October 15, 2020. The mother's pretrial materials outlined her trial position on parenting. The mother's position was ultimately adopted by the court. The father's claims and positions were rejected.

Conduct Affecting Speed or Expense of Proceeding

[36] The father's conduct strengthens the mother's claim for a substantial award of costs. My reasons for reaching this conclusion are as follows:

- The father's position on primary care and shared parenting lacked merit. For example, no professional who worked with the children or who were involved with the family supported the father's claims. The evidence overwhelmingly supported the mother's position. The father refused to accept the overwhelming evidence. Instead, the father arrogantly dismissed all professional opinion by stating that the professionals were not qualified, skilled, or knowledgeable.
- The father's position on parental alienation was likewise devoid of merit. The father persisted in his claim despite the evidence to the contrary. The father's persistence unnecessarily increased the length and complexity of the trial. The father's unfounded beliefs caused the trial to be unnecessarily polarized and protracted.
- The fact that the father may have believed that he was acting in the children's best interests is not a mitigating factor because the father's belief was not reasonably based. Indeed, it was the father's lack of insight and inability to accept responsibility for his past conduct that caused most of the parenting difficulties in the first place. The father's lack of insight cannot act as a shield against a costs award in such circumstances.
- The father was not always forthcoming with income information. For example, the father did not supply proof of income arising from his new employment.
- The father should not have disputed the maintenance issue. He should have paid the correct amount of child support from the outset or reached agreement about the retroactive award at the time of the settlement conference.

Steps Unnecessarily Taken

[37] The father increased costs by taking steps unnecessarily to promote his theory of parental alienation. The alienation claim rested on the inadmissible belief of the father. The father did not provide expert opinion on parental alienation as mandated by Rule 55. Instead, the father inappropriately put forth his inadmissible lay opinion based on social science literature and expert evidence that was accepted in other cases. Neither of these attempts met with success. The extensive social science materials filed by the father unnecessarily increased the cost of litigation.

Lump Sum Calculation

[38] In arriving at a principled lump sum, I award the mother 80% of her projected legal fees and disbursements incurred after the mother's pretrial brief was filed as follows: $\$19,113 \times 80\% = \mathbf{\$15,290.40}$. I award the mother 60% of her legal fees and disbursements incurred before October 25, 2020 as follows: $\$42,653.15 \times 60\% = \mathbf{\$25,591.89}$. Thus, the total cost award equals $\$15,290.40 + \$25,591.89 = \mathbf{\$40,882.29}$.

Conclusion

[39] In the circumstances, a lump sum of **\$40,882** is ordered to do justice between the parties. Ms. Nicholson is to draft the CRO which will include this costs award.

[40] Ms. Nicholson is directed to have the CRO delivered to the court by May 14, 2021. Ms. Robson is to indicate any concerns by May 21, 2021. Counsel are thanked in advance for their adherence to these filing deadlines.

Forgeron, J.