

SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: *Zarczynski v. Niedzwiecka*, 2021 NSSC 364

ENDORSEMENT

August 31, 2021

1201-70017 (103542) - Jack Zarczynski v. Aleksandra Niedzwiecka

- January 25, 2021 (10:02:45 – 11:25:54; decision 12:01:21 – 12:30:27)

Ms. Niedzwiecka sought base costs of \$5000 to \$6000: based on Tariff A, \$4000 scale 2, and \$5000 based on scale 3 (+ 25%) for a half day hearing, with an additional amount of \$1000 for trial time, following a variation application type proceeding.

In addition, Ms. Niedzwiecka sought additional costs due to Mr. Zarczynski's conduct which she argued affected the speed and the expense of the proceeding and should result in the receipt of costs which would make a substantial contribution to her legal fees "not exceeding fifty percent of the appropriate base sum", and not approaching a "full indemnity of a solicitor and client award". She sought a 75% contribution, costs of \$10,348.50 with disbursements of \$257.03, based on total legal fees of \$13,798.00.

Decision:

Mr. Zarczynski shall pay Ms. Niedzwiecka costs of \$8,000 + disbursements of \$257.03 = \$8,257.03 forthwith.

Reasons:

1. At the end of May 2020, not long after parenting had been determined following a hearing in April 2018 and a Corollary Relief Order was issued in December 2018, Mr. Zarczynski applied to change the parenting arrangements for the parties' daughter. Ms. Niedzwiecka highlighted that this was the second "variation" Mr. Zarczynski had "attempted" since the issuance of the Corollary Relief Order in December 2018.

2. A hearing was scheduled in January 2021 to determine if there had been a change of circumstances since the three-day divorce hearing held in April 2018 (*A.N. v. J.Z.*, 2018 NSSC 146). The leading decision in interpreting the meaning of a change in circumstance, is *Gordon v. Goertz*, [1996] 2 S.C.R. 27. The Court found in part:

12 What suffices to establish a material change in the circumstances of the child? Change alone is not enough; the change must have altered the child's needs or the ability of the parents to meet those needs in a fundamental way: *Watson v. Watson* (1991), 1991 CanLII 839 (BC SC), 35 R.F.L. (3d) 169 (B.C.S.C.). The question is whether the previous order might have been different had the circumstances now existing prevailed earlier: *MacCallum v. MacCallum* (1976), 30 R.F.L. 32 (P.E.I.S.C.). Moreover, the change should represent a distinct departure from what the court could reasonably have anticipated in making the previous order. "What the court is seeking to isolate are those factors which were not likely to occur at the time the proceedings took place": J. G. McLeod, *Child Custody Law and Practice* (1992), at p. 11-5.

13 It follows that before entering on the merits of an application to vary a custody order the judge must be satisfied of: (1) a change in the condition, means, needs or circumstances of the child and/or the ability of the parents to meet the needs of the child; (2) which materially affects the child; and (3) which was either not foreseen or could not have been reasonably contemplated by the judge who made the initial order.

3. I determined there was no change of circumstances and I dismissed Mr. Zarczynski's application to vary. In fact, it appeared not much had changed since Beaton, J. as she was then, found Mr. Zarczynski had previously "challenged every aspect of the Petitioner's parenting, and yet unrealistically argued for shared parenting..." Except that in this case Mr. Zarczynski was arguing for an increase in parenting from 26% to 33%.
4. Ms. Niedzwiecka was entirely successful. Ms. Niedzwiecka filed costs submissions on February 22, 2021, and Mr. Zarczynski filed his submissions on February 26, 2021.
5. In his costs submissions Mr. Zarczynski argued "I was simply asking for a little bit of extra time (increase from 26% to 33%) for Natalie to spend with me, her father." With respect to Ms. Niedzwiecka's request for costs Mr. Zarczynski argued he should not have to pay legal costs sought by Ms. Niedzwiecka for the period between March 2020 and late July 2020. He stated that Ms. Niedzwiecka's legal counsel claimed they were retained in late July 2020 and

not prior to that date. Based on his claim that Ms. Niedzwiecka's legal counsel had made false statements regarding when she started representing Ms. Niedzwiecka, Mr. Zarczynski argued that the court should not rely on their representations about the costs of legal services rendered, and specifically the court should not rely on the billed hours chart attached to Ms. Niedzwiecka's submissions.

6. Mr. Zarczynski also stated that the hearing lasted less than 2.5 hours and the bulk of Ms. Niedzwiecka's time "66 hours was incurred on other matters generically described as Notice of Variation". He described the hearing as a "simple matter". He asked the court to "disregard both the inapplicable and excessive costs" and to find \$3000 to be a reasonable amount to cover Ms. Niedzwiecka's costs.
7. Ms. Niedzwiecka suggested the court find costs of \$5000 to \$6000 -- based on Tariff A \$4000 scale 2, and \$5000 based on scale 3 (+ 25%), based on a hearing of a half day, with an additional amount of \$1000 for trial time, following a variation application type proceeding. Ms. Niedzwiecka sought additional costs, arguing that Mr. Zarczynski's conduct affected the speed and the expense of the proceeding and should result in the receipt of costs which would make a "substantial contribution to her legal fees" "not exceeding fifty percent of the appropriate base sum", and not approaching a "full indemnity of a solicitor and client award". She sought a 75% contribution of \$10,348.50 with disbursements of \$257.03.
8. In support of her claim that Mr. Zarczynski's conduct contributed to costs, Ms. Niedzwiecka asked the court to consider that Mr. Zarczynski's affidavit supporting his application to vary was 106 pages long including attached exhibits. She argued she had no choice but to respond to each allegation he made about her parenting, resulting in her responding by affidavit which contained 120 pages.
9. Ms. Niedzwiecka reminded this court that Mr. Zarczynski filed his rebuttal affidavit late, on January 5, 2021 rather than on the deadline of December 28, 2020. Mr. Zarczynski's conduct resulted in the court allowing an extension for Ms. Niedzwiecka to file her written submissions, with costs to be dealt with after the hearing.

10. In the previous costs decision following the parties' divorce trial in 2018: *A.N. v. J. Z.*, 2019 NSSC 38, Beaton, J., as she was then, found at paragraph 8 that Mr. Zarczynski's:

[8] ...overall approach to the litigation required additional steps and effort on the part of the Petitioner and increased the Petitioner's costs, which justifies a "substantial contribution" toward them by the Respondent (*Chipman v. Chipman*, 2017 NSSC 293).

...

11. I note that Justice Beaton was...

[10] not persuaded by the Respondent's argument that there was a genuine issue to be tried concerning the parenting plan that could only have been resolved by a trial. Rather, there was nothing, down to the most minute or routine of details concerning the parties' child, that was agreed upon without adjudication, except that there should be a joint custodial designation." The Respondent challenged every aspect of the Petitioner's parenting, and yet unrealistically argued for shared parenting contrary to the numerous precedent cases in this jurisdiction that discuss the need for an integrated and cooperative approach in shared parenting.

12. I agree with Justice Beaton, that:

[11] "Parties do indeed have the right to a hearing to determine what parenting arrangements are in the best interests of a child (*McNeil v. Christie*, 2017 NSSC 247). That said, such a right must be balanced against a recognition that costs are intended to promote the rational conduct of litigation...

13. In the costs decision *A.N. v. J. Z.*, *supra*, Justice Beaton went on to quote paragraphs 10 and 11 from *Ibrahim v. Murphy*, 2017 NSSC 264, and she ordered Mr. Zarczynski to pay a lump sum award of \$30,000 in costs, inclusive of disbursements, no later than June 4, 2019. In her costs submissions for the hearing in January 2021 Ms. Niedzwiecka relied on the cases of *Irwin v. Irwin*, 2020 NSSC 27 and *Armoyan v. Armoyan*, 2013 NSCA 136. I have considered the above noted cases when making my decision.

14. *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. *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."

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. Ms. Niedzwiecka requested \$10,348.50 in costs. I am not prepared to grant costs as high 75%. I was left with questions about whether services for the period before Mr. Zarczynski made his application at the end of May 2020, might have been related to his other efforts to vary the court order.
16. Having regard to Tariff A, Scale 2 and 3; allowing \$1000 for a half day hearing; considering Mr. Zarczynski once again “challenged every aspect of Ms. Niedzwiecka’s parenting” with Ms. Niedzwiecka having no option but to respond; considering that Mr. Zarczynski was unsuccessful in convincing the court that any of his concerns about Ms. Niedzwiecka’s parenting amounted to a change of circumstances; and finally considering costs are intended to promote the rational conduct of litigation, I order Mr. Zarczynski to pay Ms. Niedzwiecka costs of \$8,000 + disbursements of \$257.03 = \$8,257.03 forthwith.

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