

SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: *Henderson v. Henderson*, 2023 NSSC 22

Date: 2023-01-18

Docket: SFH1201-072584

Registry: Halifax

Between:

Heather Henderson

Petitioner

v

Douglas Henderson

Respondent

Judge: The Honourable Justice Theresa M Forgeron

Heard: Cost Submissions

Submissions Received: November 15 and 16, 2022

Decision: January 18, 2023

Counsel: Jennifer Reid, counsel for Heather Henderson
Charlotte Edwards, counsel for Douglas Henderson

Introduction

[1] Heather Henderson seeks \$6,117.76 in costs from her former spouse, Douglas Henderson for three reasons. First, given the divorce decision, Ms. Henderson states that she was the successful party. Second, she argues that Mr. Henderson's conduct unnecessarily prolonged the litigation and increased costs. Ms. Henderson states that Mr. Henderson was intractable and unreasonable. Third, Ms. Henderson notes that her settlement offer mirrored the court's ultimate decision.

[2] In contrast, while acknowledging that Ms. Henderson was the successful party, Mr. Henderson disputes any obligation to pay costs for two primary reasons. First, he states that his financial circumstances preclude the payment of costs. Further, he argues that an award of costs would not be in the children's best interests.

Issue

[3] What is the appropriate costs award?

Background Information

[4] The parties were married in October 2001 and separated in January 2019. They have three children, all of whom remain dependent. Before separation, Ms. Henderson was the primary caregiver while Mr. Henderson was the primary wage earner.

[5] Divorce proceedings were initiated in March 2020. The parties participated in two settlement conferences, during which they were able to resolve all issues except the parenting and child support arrangements for one of their children who has complex special needs. The issues concerning this child were litigated in the divorce trial held on August 29, 2022, with post-trial submissions being filed on September 20 and 23, 2022.

[6] On October 26, 2022, I rendered my oral decision. In my decision, I held that it was in the best interests of the child to be placed in Ms. Henderson's primary care with defined parenting time to Mr. Henderson. I also awarded Ms. Henderson child support, composed of the table amount and s. 7 special expenses, including the prorating of the cost of the psychoeducational assessment.

[7] Following the oral decision, the parties asked to file written submissions on costs. These submissions were received on November 15 and 16, 2022.

Position of Ms. Henderson

[8] Ms. Henderson seeks \$6,117.76 in costs for reasons which include the following:

- Ms. Henderson was successful. The court adopted Ms. Henderson’s position on all issues, save for a very slight difference in the parenting schedule. For example, the court denied Mr. Henderson’s request for shared parenting and instead, the court designated Ms. Henderson as the child’s primary care parent. Further, the court denied Mr. Henderson’s request to impute income to her and to exclude the cost of the psychoeducational assessment. These issues were also resolved in Ms. Henderson’s favour.
- The tariffs are not applicable because the primary contested matter concerned parenting with the ancillary issue being child support. Parenting and prospective child support are not easily quantified. Thus, a lump sum award is appropriate.
- The parenting and child support issues were significant and important issues.
- Ms. Henderson’s legal fees are more than reasonable because they are based on a discounted rate of \$187.50 per hour, and not counsel’s usual rate of \$300 per hour. Mr. Henderson indirectly benefits from the discount afforded to Ms. Henderson.
- Mr. Henderson was not reasonable. Mr. Henderson would not pay child support before litigation was commenced. Mr. Henderson would not contribute to the cost of the psychoeducational assessment even though he was willing to adopt its recommendations. Ms. Henderson had to “fight and push every step of the way to obtain relief”: para 27, Ms. Henderson’s costs submissions.

[9] In support of her costs submissions, Ms. Henderson relied on Rule 77, and *Armoyan v Armoyan*, 2013 NSCA 135; and *KG v HG*, 2021 NSSC 142.

Position of Mr. Henderon

[10] For his part, Mr. Henderson argues that no costs should be awarded. He states that he proved “very good reasons” to depart from the basic principle that a successful litigant should be awarded costs. He states that each party should bear

their own costs. In support of his submissions, Mr. Henderson asked me to consider the following arguments:

- He cannot afford to pay a costs award. He incurred legal fees in excess of \$17,000, which he has been unable to pay. His statement of expenses confirms that he is operating in a deficit. His financial circumstances are so difficult that his mother has come to his aid. In contrast, Ms. Henderson lives with a partner who earns in excess of \$100,000 per annum. Ms. Henderson's household operates on a monthly surplus.
- An award of costs would impair his ability to pay child support and to meet the needs of the children. Two of the parties' three children are in his care 50% of the time. Priority must be assigned to the children. Given his challenging financial circumstances, no costs should be awarded.
- Mr. Henderson acted reasonably throughout. All issues, except three were resolved through settlement conferencing because both parties assumed a reasonable stance. He should not be penalized because he sought shared parenting of all three children.
- Mr. Henderson should not be accountable for fees that were incurred because of mandatory pre-trial court appearances. Mr. Henderson notes that he has no control over scheduling policies and should not be responsible for costs associated with them.

[11] In support of his position, Mr. Henderson relies on Rule 77 and *Doucet v Doucet*, 2014 NSSC 196.

Decision

[12] I have reviewed the decisions provided by counsel and Rule 77. I find that a costs award of \$5,500 will do justice as between the parties for the following reasons:

- Ms. Henderson was the successful party given my parenting and child support rulings. There is no principled reason why Ms. Henderson should be deprived of costs.
- A lump sum costs award is appropriate since the amount involved is difficult to quantify because the primary contested issue involved parenting, and the ancillary issue concerned prospective, periodic child support.

- \$5,500 will provide a substantial contribution towards, but not a complete indemnity of, Ms. Henderson’s reasonable legal fees. I find that Ms. Henderson’s legal fees are reasonable because her fees were based on a discounted hourly rate and because each of the parties were charged about the same amount in legal fees. Ms. Henderson’s legal fees were not inflated.
- I cannot consider the settlement offer that was made during a settlement conference: Rules 10.03, 10.16 and 77.07(3); and *Perry v Keyplan Housing Cooperative Ltd*, [1997] NSJ No 201 and *Wolfson v Wolfson*, 2022 NSSC 263. Parties are encouraged to draft settlement offers independent of settlement conference materials so that they may be considered when the court assesses costs.
- The parties resolved many of the issues during two settlement conferences. Trial time was substantially reduced because of the agreements reached during the settlement conferences.
- Mr. Henderson’s position on the contested issues, especially the maintenance issues, was without merit.
- If Mr. Henderson wanted insulation from a costs award, he should have applied for relief pursuant to Rule 77.04. Such a motion must be made as “soon as possible” after the proceeding is commenced: *Illingworth v. Illingworth*, 2020 NSSC 371. Mr. Henderson made no such application.
- An award of costs will not interfere with Mr. Henderson’s ability to pay child support or to care for the children. Rather, Mr. Henderson will have to adjust his budget and lifestyle accordingly.

Conclusion

[13] Mr. Henderson must pay costs to Ms. Henderson in the amount of \$5,500 which is payable by June 1, 2023. Counsel for Ms. Henderson will draft the CRO which will include this costs award.

Forgeron, J