

SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: *Even-har v. Even-har*, 2024 NSSC 193

Date: 20240703
Docket: 132339
Registry: Halifax

Between:

Mayan Even-har

Applicant

v.

Nadav Even-har

Respondent

COSTS DECISION

Judge: The Honourable Justice Moira Legere Sers
Heard: January 29, 2024, March 19, 2024, April 18, 2024, May 23, 2024 and June 12, 2024, in Antigonish, Nova Scotia
Written Release: July 3, 2024
Counsel: Kerri-Ann Robson and Ann Levangie, for the Applicant
Nadav Even-har, for the self represented Respondent

By the Court:

- [1] On June 25, 2024, the Decision relation to the above noted case was released. The deadline for the Respondent's cost submissions was Friday, June 27, 2024.
- [2] Nothing has been filed on behalf of the Respondent.
- [3] The Respondent was in receipt of the principal submissions on costs at the conclusion of the hearing. He was sent an update related to costs associated with the final day of the hearing on June 12, 2024.
- [4] This is the Decision related to costs.
- [5] There have been five appearances in this matter.
- [6] The evidence that was eventually submitted by affidavit, and oral testimony from three witnesses could have been heard in one day.
- [7] Counsel for the Applicant appeared in person on five separate occasions.
- [8] The Decision itemizes the number of adjournments the Respondent asked for and received.
- [9] Counsel for the Applicant, seek and have identified reasonable solicitor and client costs. The lawyers' fees are \$12,327.92. They are seeking full recovery.
- [10] I have reviewed the solicitors bill relating to hourly fees etc. and consider these fees reasonable. I was informed by counsel, they have not charged the Applicant for each of their hourly rate. Nor are any other costs associated with this proceeding being claimed, such as transportation or loss of wages for the Applicant for Court attendance etc.
- [11] In *Caterpillar Inc. v Secunda Marine Services Ltd.* 2010 NSCA 105, the Court identified the proper approach to assessing untimely or unreasonable requests for adjournment; that is by an Order directing indemnification for reasonable costs and expenses on a solicitor and client basis.

[12] This approach would address the cost of efforts made to respond to the requests and the wasted, and duplicative efforts associated with other steps in the proceeding.

[13] In this case these adjournments required counsel from Shubenacadie to appear in Antigonish each time the Respondent delayed or failed to appear.

[14] With each request the Respondent was given the benefit of the doubt, and successfully obtained an adjournment when he asked for one.

[15] There is no evidence to verify the validity of these requests. Although ordered to do so, he filed no supporting documentation in a timely fashion or at all to support his requests.

[16] The adjournments have escalated the costs for the Appellant.

[17] Counsel prepared an estimate of costs calculated according to Tariff “A,” as of May 31, 2024. This estimate was ordered by the Court and copied to the Respondent to keep him informed.

[18] Since then, the hearing was concluded after a further day of hearing. The Respondent failed to appear and offered no excuse or admissions.

[19] There is ample case authority on this subject matter.

[20] Haley J. in *Slater v Slater* 2013NSSC 17 reviewed this issue, citing Macdonald J.’s decision in *Lubin v Lubin* 2012 NSSC 93 wherein MacDonald J. at paragraphs 2 and 3 as follows:

I have reviewed the Civil Procedure Rules and several decisions commenting on cost, including *Landymore v Hardy* (1992), 112 N.S.R. (2d) 410 (T.D.); *Campbell v Jones et al.* (2001), 197 N.S.R. (2d) 212 (T.D.); *Grant v Grant* (2000), 200 N.S.R. (2d) 173 (T.D.); *Bennett v Bennett* (1981), 45 N.S.R. (2d) 683 (T.D.); *Kaye v Campbell* (1984), 65 N.S.R. (2d) 173 (T.D.); *Kennedy-Dowell v Dowell*, [2002] N.S.J. No. 499, 2002 CarswellNS 487; *Urquhart v Urquhart* (1998), 169 N.S.R. (2d) 134 (T.D.); *Jachimowicz v Jachimowicz* (2007), 258 N.S.R. (2d) 304 (T.D.)
[3]

[21] MacDonald J. set out several principles which emerge from the Rules and the case law:

- 1 Costs are in the discretion of the Court.
- 2 A successful party is generally entitled to a cost award.
- 3 A decision not to award costs must be for a "very good reason" and be based on principle.
- 4 Deference to the best interests of a child, misconduct, oppressive and vexatious conduct, misuse of the Court's time, unnecessarily increasing costs to a party, and failure to disclose information may justify a decision not to award costs to an otherwise successful party or to reduce a cost award.
- 5 The amount of a party and party cost award should "represent a substantial contribution towards the parties' reasonable expenses in presenting or defending the proceeding but should not amount to a complete indemnity.
- 6 The ability of a party to pay a cost award is a factor that can be considered but as noted by Judge Dyer in *M.C.Z. v P.L.T.* 2005 NSFC 27.
- 7 The tariff of costs and fees is the first guide used by the Court in determining the appropriate quantum of the cost award.
- 8 In the first analysis the "amount involved", required for the application of the tariffs and for the general consideration of quantum, is the dollar amount awarded to the successful party at trial. If the trial did not involve a money amount other factors apply. The nature of matrimonial proceedings may complicate or preclude the determination of the "amount involved".
- 9 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 \$20,000.00 in order to determine the "amount involved".
- 10 If the award determined by the tariff does not represent a substantial contribution towards the parties' reasonable expenses "it is preferable not to increase artificially the "amount involved", but rather, to award a lump sum". However, departure from the tariff should be infrequent.
- 11 In determining what are "reasonable expenses", the fees billed to a successful party may be considered but this is only one factor among many to be reviewed.
- 12 When offers to settle have been exchanged, consider the provisions of the *Civil Procedure Rules* in relation to offers and also examine the reasonableness of the offer compared to the parties' position at trial and the ultimate decision of the Court.

[22] The scope of the Rule on Costs is set out in Rule 77.1 of the Civil Procedure Rules of Nova Scotia.

- (1) The Court deals with each of the following kinds of costs:
 - (a) party and party costs by which one party compensates another party for part of the compensated party's expenses of litigation.
 - (b) solicitor and client costs, which may be awarded in exceptional circumstances to compensate a party fully for the expenses of litigation.
 - (c) fees and disbursements counsel charges to a client for representing the client in a proceeding.
- (2) Costs may be ordered, the amount of costs may be assessed, and counsel's fees and disbursements may be charged, in accordance with this Rule.

77.02 General discretion (party and party costs)

- (1) A presiding judge may, at any time, make any order about costs as the judge is satisfied will do justice between the parties.
- (2) *Nothing in these Rules limits the general discretion of a judge to make any order about costs, except costs that are awarded after acceptance of a formal offer to settle under Rule 10.05, of Rule 10 - Settlement.*

[23] Guidance from the Supreme Court of Canada comes from the former Chief Justice McLachlin (as she then was), in the seminal case of *Young v Young*, [1993] 4 S.C.R. 3 at paragraph 66. The former Chief Justice concludes that solicitor and client costs are generally awarded only where there has been reprehensible, scandalous, and outrageous conduct on the part of one of the parties.

[24] Justice Jollimore in *Lockerby v Lockerby* 2011 NSSC 103 at paragraph 27: addressed solicitor and client costs. She noted as follows:

"Costs are awarded on a solicitor and client basis in rare and exceptional circumstances only where there has been reprehensible, scandalous or outrageous conduct by one of the parties. To justify an award of solicitor and client costs, Mr. Lockerby must show that the conduct he has identified achieves that level which warrants such a rare award."

[25] 77.16 When considering client costs.

- (1) Counsel is entitled to reasonable compensation for services performed, and recovery of disbursements necessarily and reasonably made, for a client who is involved in a proceeding.
- (2) The reasonableness of counsel's compensation must be assessed in light of all the relevant circumstances, and the following are examples of subjects and circumstances that may be relevant on the assessment:
 - (a) counsel's efforts to secure speed and avoid expense for the client.
 - (b) the nature, importance, and urgency of the case.
 - (c) the circumstances of the person who is to pay counsel, or of the fund out of which counsel is to be paid.
 - (d) the general conduct and expense of the proceeding.
 - (e) the skill, labour, and responsibility involved.
 - (f) NA

[26] Rule 77.07 gives the Court discretion to increase or decrease a cost award calculated under the Tariff:

77.07 - Increasing or decreasing tariff amount:

- (1) A judge who fixes costs may add an amount to, or subtract an amount from, tariff costs.
- (2) The following are examples of factors that may be relevant on a request that tariff costs be increased or decreased after the trial of an action, or hearing of an application:
 - (d) Conduct of a party affecting the speed or expense of the proceeding.
 - (e) A step in the proceeding that is taken improperly, abusively, through excessive caution, by neglect or mistake, or unnecessarily.
 - (f) A step in the proceeding a party was required to take because the other party unreasonably withheld consent.
 - (g) A failure to admit something that should have been admitted." 30

77.08 A judge may award lump sum costs instead of tariff costs.

[27] MacDonald J. in *Lubin v Lubin* 2012 NSSC 935. draws from *Landymore v Hardy* (1992) the direction that the amount of a party and party cost award should.

"Represent a substantial contribution towards the parties' reasonable expenses in presenting or defending the proceeding but should not amount to a complete indemnity".

Sanders J; the trial judge in that proceeding, in 1992, spoke to the Courts conclusion regarding the question of limiting full recovery of litigation costs. In addressing *party and party* cost he referred to the rules committee discussion that said:

17. The underlying principle by which costs ought to be measured was expressed by the Statutory Costs and Fees Committee in these words: "... the recovery of costs should represent a substantial contribution towards the parties' reasonable expenses in presenting or defending the proceeding but should not amount to a complete indemnity".

The Court is and has always been concerned with the reasonableness of expenditures incurred in either advancing or defending a claim. The ever-increasing cost of litigation is a challenge which faces everyone touched by the adversary process, whether litigant, lawyer, or witness.

18. Costs are intended to reward success. Their deprivation will also penalize the unsuccessful litigant. One recognizes the link between the rising cost of litigation and the adequacy of recoverable expenses. Parties who sue one another do so at their peril. Failure carries a cost. There are good reasons for this approach. Doubtful actions may be postponed for a sober second thought. Frivolous actions should be abandoned. Settlement is encouraged. Winning counsel's fees will not be entirely reimbursed, but ordinarily the losing side will be obliged to make a sizeable contribution.

[28] While recognizing *Sanders J.* was speaking to *party and party costs*, I am not certain he intended those committee deliberations and decisions to bind us in an entirely different context some 30 years hence to such a restriction on full compensation in all circumstances.

[29] The distinction in this case (if any must be made) is that counsel is asking for *solicitor - client costs*. There is a separate body of case law that references what is required to award full costs on a solicitor-client basis.

[30] I have considered the concerns expressed that costs might limit access to Courts to resolve wrongs. This concern remains valid today. The potential for full cost recovery must not prevent access to Justice.

[31] There are many reasons and factual circumstances that distinguish this case that may justify full recovery of *solicitor-client* costs.

[32] These include references from higher courts and additions to the Civil Procedure Rules arising out of the creation of the Supreme Court Family Division and associated Rules, incorporated into the Civil Procedure rules, as amended.

[33] We are concerned in this case with the parent-child dynamic, the power imbalance, and the fiduciary relationship between the parties herein.

[34] If I err in placing the comments of the Learned Trial Judge in *Landymore v Hardy* (1992) in historical context by suggesting there is room for a careful and nuanced approach today; I rely on the Family Division Rules and the facts of this case to support full indemnity on a solicitor client basis (litigation costs) for this young Applicant in relation to this proceeding ,complicated by the Respondents unconscionable behavior.

[35] The Current Nova Scotia Civil Procedure Rules aim to promote the just, speedy, and inexpensive determination of every proceeding.

[36] Part 13 of the Rules relating to *Supreme Court Family Division* did not exist in 1992.

[37] It is frequently acknowledged that family matters do not always fit easily into a calculation of costs in accordance with the Tariff as set out in the Rules.

[38] A foundation of the Family Division rules is full disclosure designed to promote full and fair settlement and reduce the need for contested matters.

[39] When voluntary disclosure does not occur as expected and directed, flowing from an application relating to a family support matter ; *Part 13, In Rule 59.26* permits a court to issue on its own motion or on application, an Order to appear and disclose and an Order to disclose.

[40] In addition to the remedies in Rule 59.26(8), a judge who is satisfied that a party fails to comply with an Order to appear and disclose, or an Order to disclose, may do any of the following:

- (a) make an order for costs against the party so as to fully or substantially indemnify the other party.

(b) grant an application or motion, in whole or in part, if it is the respondent who fails to appear or disclose.

(c) start contempt proceedings under Rule 89.

(d) make any other order the Judge considers will achieve justice in the circumstance.

[41] We see a similar movement in Ontario Rules permitting full compensation for costs *in the right circumstances*. Rule 24: COSTS: O. Reg. 114/99: Family Law Rules.

Successful party presumed entitled to costs.

(1) There is a presumption that a successful party is entitled to the costs of a motion, enforcement, case or appeal. O. Reg. 114/99, r. 24 (1).

Successful party who has behaved unreasonably.

(4) Despite subrule (1), a successful party who has behaved unreasonably during a case may be deprived of all or part of the party's own costs or ordered to pay all or part of the unsuccessful party's costs. O. Reg. 114/99, r. 24

Decision on reasonableness

(5) In deciding whether a party has behaved reasonably or unreasonably, the court shall examine,
(a) the party's behaviour in relation to the issues from the time they arose, including whether the party made an offer to settle.
(b) the reasonableness of any offer the party made; and
(c) any offer the party withdrew or failed to accept. O. Reg. 114/99, r. 24 (5).

Absent or unprepared party

(7) If a party does not appear at a step in the case or appears but is not properly prepared to deal with the issues at that step or otherwise contributes to that step being unproductive, the court shall award costs against the party unless the court orders otherwise in the interests of justice. O. Reg. 114/99, r. 24 (7); O. Reg. 235/16, s. 4 (1).

Bad faith

(8) If a party has acted in bad faith, the court shall decide costs on a full recovery basis and shall order the party to pay them immediately. O. Reg. 114/99, r. 24 (8).

[42] In this case in addition to rights arising from a contract of life insurance and the duties of trustee, we have a court order requiring payment pursuant to an application under the *Parenting and Support Order Act 2015*, c. 44, s. 2.; a subsequent Order to preserve the ordered lump sum payment and subsequent orders of like nature.

[43] We have a failure to disclose.

[44] We have a dependant child/adult having lost her mother suddenly at 15 while living with extended family.

[45] Her lack of financial resources as a student in university is known, her financial needs urgent. She advised her father of these needs.

[46] Her mother bequeaths to her, her sister and father a (40%/40%/20% respectively) of her life insurance policy to address her children's needs, once they attain the age of 18.

[47] Her father directly receives his share and in trust the Applicant's and her sisters share. For the purpose of this Application, the evidence shows he covertly the Applicant's share to his own use without her consent.

[48] The Applicant has not enjoyed the financial support of her father for some time prior to her mother's death, nor since her mother's death.

[49] He has not been responsible to support her by payment of table amount or contribute to her Section 7 expenses.

[50] Neither has he contributed to her living expenses, or disbursed the funds he received in her favour since her mother's death.

[51] The Applicant makes him aware of her need and ask for the financial gift her mother left her.

[52] The Respondent refuses to give her entitlement to her and takes her on a convoluted process of pretence to convince her the money is there, and he just cannot access it.

[53] He deceives her for the better part of a year, deceitfully implying the funds are still in the account.

[54] For reasons stated in the Decision, there is no defence, justification, or mitigation for his failure to abide by his duty as a parent and trustee.

[55] He misled the Court. He used the Court's general duty to accommodate litigants when faced with self represented or ill litigants unable to attend Court. He was prepared to and did inconvenience all other participants in the proceeding.

[56] He submitted a brief letter and affidavit alleging a dishonest reason why the funds were not currently available and made representations without apology, or justification to the Court to purposefully delay the proceedings.

[57] When required by Court Order, he failed to respond, to provide his financial particulars and chose not to respond to the proceeding by absenting himself, despite the opportunities to be present given him at his request.

[58] He failed to justify his absence, by failing to provide the medical and financial disclosure ordered by the Court.

[59] After multiple out of Court requests, his dependant child was forced finally to hire a lawyer.

[60] She provided a comprehensive affidavit, and presented herself at every appearance, despite the cost to her. Her counsel attended every appearance and were prepared to proceed in a timely fashion.

[61] The issue was not complicated other than by the Respondents refusal to disclose fully and truthfully. This resulted in multiple appearances and Orders that were required to discover, disclose and expose the transactions employed by the Respondent with the Applicants funds.

[62] The added costs to her included preparing subpoenas required to get banking records, Orders for Disclosure to provide foundational evidence for the Court, not to mention or understate the emotional costs.

[63] I have reviewed the Rules and the Decision to determine whether there were factors that would diminish the father's responsibility, such as a contribution to her welfare, accommodation of witnesses, provision of documents that would have verified where the money was, admissions of obvious facts or offers of settlement.

[64] He had an opportunity to provide his statement of income and statement of property, and to plead diminished financial capacity. He did not do so.

[65] There was before me no real fact dispute, except the one that arose when he lied about the whereabouts of the funds.

[66] There was no obvious legal argument advanced, that would diminish her entitlement. There was no argument as to why he should have a set off in payment.

[67] He could have simply paid her the funds and there would be no legal costs.

[68] If I attribute his conduct as justifying a substantial award, yet not fully cover her costs, the Applicant will bear the financial burden. That would be an unreasonable and unjust conclusion.

[69] If history is any indication of the Respondents compliance with Court Order, the Applicant will likely encounter more delay and costs in an effort to collect what she was entitled to before this proceeding.

[70] If she absorbs a percentage of the costs, that ultimately diminishes her clear entitlement under the insurance contract. She should not have to pay one cent to recover that which was her entitlement.

[71] She is a student and dependant young adult, still entitled to not only the insurance proceeds and interest but support from her father.

[72] In *Liu v Atlantic Composites Ltd.*, 2014 NSCA 58 the Court set out the principles in the *Law of Costs, Orkin*,² p2-144-146. The rarity of an award of full compensation for solicitor and client costs is acknowledged. Notably:

“There is as well a factor frequently underlying such an award...that the circumstances of the case may be such that the successful party ought not to have been put to any expense for costs”

[73] This is such a case.

[74] There are no redeeming factors favouring the Respondent.

[75] I can think of no other where there has been reprehensible, scandalous, and outrageous conduct on the part of one of the parties.

[76] The Respondent clearly evidenced no respect for Court Orders, and the Rule of Law. That however, in and of itself, may not justify a costs award in this instance.

[77] His outright misrepresentations to the Court, did call upon the Applicant to provide precise proof of every action associated with her entitlement and the movement of funds from financial institution to financial institution.

[78] The victim of his outrageous and reprehensible behavior is his daughter.

[79] She ought not to have been put to the proof of her entitlement. He recovered his 20 percent and was not financially diminished by any responsibility for her care.

[80] Her entitlement was obvious, and she was entirely successful in this proceeding.

[81] This did not come without diligence, preparation, presentation, and persistence on her behalf by her and her counsel.

[82] In the face of this behavior, she and her counsel remained civil.

Conclusion

[83] In examining the methods of calculating costs I am satisfied that a lump sum award would be the most reasonable approach.

[84] The Applicant's claim was for recovery of \$40,041.16, plus interest.

[85] Party and Party costs would be wholly inadequate and would not indemnify the Applicant. The Respondent would bear the fruits of his deception at her cost.

[86] The Applicant is asking for Solicitor Client costs.

[87] I find that the behavior required to justify such an award have been proven and she should be entitled to full recovery of her costs.

[88] If I err in that approach, the Family Division Rules permit the court to fully compensate her as a result of the Respondent's failure to disclose and his conduct .

[89] There is also justification to award costs fully as a lump sum as the most reasonable method of compensating the Applicant in her quite justified pursuit to get that which she was entitled to receive without diminishment as a result of costs.

[90] I am satisfied this is one of those rare cases that merit full solicitor and client costs, by way of lump sum. I am aware that there are other costs of her own attendance that have not been included in this award.

[91] I conclude the Respondent's conduct was reprehensible, scandalous, and outrageous.

[92] The youth and life stage of the Applicant, the breach of trust, the parent child relationship are factors in my assessment.

[93] I have seen account activity in the properly admitted documentation that suggests the Respondent is not impecunious. He has also suggested, he is able to travel internationally and interprovincially.

[94] The Respondent could have submitted a statement of property, and statement of income to support his inability to pay. He did not respond as ordered. He held himself above the law.

[95] He defied the law, and his responsibilities as a parent.

[96] His conduct is a strident rejection of the duty we all bear to follow the directions of the Court.

[97] Given the discretion given to this Court, I assess costs at \$12,327.92, payable in a lump sum immediately.

[98] Costs as assessed are enforceable as part of the Final Order, subject to what enforcement measures the Applicant continues to have flowing from Rule 80.

[99] This is intended to be enforceable through the Director of Maintenance Enforcement pursuant to section 2(e)(e) viii of the Maintenance Enforcement Act 1994-95, c. 6, and Part 16, Rule 80 of the Nova Scotia Civil Procedure Rules.

[100] Without prior Court Order this award is not to be reduced other than by full payment.

Moira Legere Sers, J.