SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: *Moore v. Moore*, 2013 NSSC 281

Date: 20130918
Docket: 1201-062239; SFH-D 055919
Registry: Halifax

Between:

Barry Allan Moore

Petitioner/ Respondent herein

v.

Christine Anne Moore

Respondent/Applicant herein

Judge:	The Honourable Justice Elizabeth Jollimore
Corrected Decision:	The text of the original decision has been corrected according to the attached erratum dated September 10, 2018
Submissions by Allan Moore:	September 6, 2013
Counsel:	Jane Lenehan, for Allan Moore Christine Anne Moore, on her own

By the Court:

Introduction

[1] This is a decision relating to Allan Moore's claim for costs of $23,750.00 following a variation application. In addition, he asks that I offset a costs award, at least in part, against his obligation to pay Christine Moore spousal support.

[2] In rendering my decision in the variation application (which is reported as *Moore*, 2013 NSSC 252), I said that if either party wished to be heard on costs, a brief must be filed by September 6, 2013. Mr. Moore has filed a brief. Ms. Moore has not.

The proceeding

[3] In broad terms, Christine Moore applied to vary the parenting terms of a 2009 Corollary Relief Judgment and a 2011 variation order. She also wanted me to order preparation of a child's wish report. In response, Allan Moore sought an interim variation of the same parenting provisions. He wanted the circumstances of his parenting to be determined as quickly as possible, without waiting for a full variation hearing. He also asked that if a professional opinion was required, it not take the form of a child's wish report, but be a complete custody and access assessment.

[4] I heard from Ms. Moore and from two of Mr. Moore's witnesses on January 30 and 31, 2013. At that time I also heard, and granted, Mr. Moore's motion to strike the affidavits of David Mensink and Susan Coldwell. In granting this motion, I said that I would deal with Mr. Moore's claim for costs in the context of the application overall. (This decision is reported as *Moore*, 2013 NSSC 175.)

[5] Mr. Moore objected to the late filing of Ms. Moore's brief. He asked that I ignore her brief or, alternately, that I award him costs of $250.00. He asked that I deal with this objection at the conclusion of the hearing. I dismissed this objection in my final decision.

[6] The hearing was adjourned for completion on June 17, 18 and 19, 2013.

[7] While the hearing was adjourned, a number of motions were filed. Mr. Moore requested leave to file a second supplementary affidavit, Ms. Moore moved to file additional affidavits after closing her case, and sought leave to bring a motion for an order for production and to bring a motion to strike portions of the affidavit of Mr. Moore's fiancée, Debbie Wright. These were heard on June 7, 2013 when I dismissed Mr. Moore's motion and Ms. Moore's motion for leave to bring a motion for a production order. I deferred Ms. Moore's motion to file additional affidavits until the conclusion of Mr. Moore's case (when I dismissed it) and granted her motion for leave to bring a motion to strike portions of Debbie Wright's affidavit.

[8] Specifically, Ms. Moore sought to vary terms contained in the parties' Corollary Relief Judgment and in their 2011 variation order, asking that:

a) Angeline live with her when Mr. Moore is away for work;

b) Angeline attend J.W. McLeod / Fleming Tower School;

c) Angeline be permitted to attend her extra-curricular activities (lessons and events) from both her homes and that either parent be able to take Angeline to her activities, even if they occurred during the other parent's time;

d) there be a review every two to three years;

e) Angeline have a child advocate in future proceedings; and

f) Angeline spend holiday time equally with each parent.

[9] Ms. Moore was only successful in her request that I order Angeline spend holiday time equally with each parent. With regard to Angeline's extra-curricular activities, I clarified the terms of the parties' Corollary Relief Judgment regarding each parent's attendance at her activities.

Mr. Moore's request

[10] In his submissions, Mr. Moore outlines how he would like me to approach his claim for costs. First, he wants to be awarded costs of $500.00 for his success in striking the affidavits of Dr. Mensink and Susan Coldwell. Second, he withdraws his request for costs of $250.00 with regard to his objection to the late

filing of Ms. Moore's pre-hearing brief. (I dismissed this objection.) Third, he says that success was mixed on the motions heard on June 7, 2013 and that no costs should be awarded to either party for those motions. Fourth, he argues that he was substantially successful and should be awarded costs of $23,250.00, an amount inclusive of fees and disbursements.

[11] Mr. Moore calculates his claim for costs as follows: the amount involved on Tariff A is $110,000.00. Scale 2 results in $12,250.00. Five and one-half days of hearing at $2,000.00 each day results in an additional $11,000.00. This totals $23,250.00 and he adds $500.00 as costs from his January 2013 motion to strike.

The law regarding costs

[12] Costs are governed by Rule 77. Justice B. MacDonald provided a helpful outline of the general principles applicable to costs awards in *Fermin v. Yang* 2009 NSSC 222, at paragraph 3. Costs are in my discretion. A successful party is generally entitled to costs and a decision not to award costs must be principled. Her Ladyship identified a number of circumstances which might justify a decision not to award costs or to award a reduced amount to a successful party: deference to a child's best interests, misconduct, oppressive and vexatious conduct, misuse of the court's time, unnecessarily increasing a party's costs and failure to disclose information. Costs, awarded on a party and party basis, are to represent a substantial contribution to the successful party's reasonable expenses, but not a complete indemnification.

[13] I may consider a party's ability to pay costs in making a costs award. In *M.C.Q.* [*sic M.Q.C.*] *v. P.L.T.*, 2005 NSFC 27, Judge Dyer reminded me that some litigants may "consciously drag out court cases at little or no actual cost to themselves (because of public or third party funding) but at a large expense to others who must "pay their own way"." If this happens, he said, "Fairness may dictate that the successful party's recovery of costs not be thwarted by later pleas of inability to pay. [See *A.E.M. v. R.G.L.*, 2004 BCSC 65]." There has been no motion for an order relieving Ms. Moore from the liability to pay costs pursuant to Rule 77.04.

Analysis

[14] Initial guidance in determining costs is the tariff of costs and fees. The proceeding before me was a variation application. Formally, Tariff C applies to

applications. As I said in *MacLean v. Boylan*, 2011 NSSC 406 at paragraph 30, applications in the Family Division are, in practice, trials. Rule 77's Tariffs have not changed from the Tariffs of Rule 63 of the *Nova Scotia Civil Procedure Rules* (1972). Despite the distinction between an action and application created in our current Rules, the Tariffs have not been revised. My view has not changed since I decided *MacLean v. Boylan*, 2011 NSSC 406: I don't intend to give effect to the current Rules and their incorporation of the pre-existing Tariffs where this routinely results in lesser awards of costs for the majority of proceedings in the Family Division, such as corollary relief applications, variation applications and applications under the *Maintenance and Custody Act* or the *Matrimonial Property Act*. In these situations I intend to apply Tariff A as has been done by others in the Family Division: Justice Gass' decision in *Hopkie*, 2010 NSSC 345 and Justice MacDonald in *Kozma*, 2013 NSSC 20.

[15] To apply Tariff A, I must know the amount involved in the case. According to Tariff A, where there's a substantial non-monetary issue involved, the amount involved is determined having regard to the complexity of the proceeding and the importance of the issues.

[16] The proceeding was not complex. Determining where a child spends her time, where she attends school, where she spends her holidays and her parents' attendance at her extra-curricular activities are common and uncomplicated applications. So, too, are motions for a child's wish report or a custody and access assessment. The requests for a review order and for the appointment of a child advocate are less common, but virtually no time was spent on these requests and they were addressed barely, if at all, by Mr. Moore's evidence and submissions.

[17] It is difficult to say that any parenting application is not important. There are, however, degrees of importance. For example, an application to terminate a child's access to a parent is of utmost importance. An application to relocate a child's primary residence to a distant country where access would be restricted is of considerable, but lesser importance. Here, Ms. Moore's requests for relief are not of utmost importance in the range of parenting decisions we are asked to make, but they are clearly important.

[18] Twenty years ago, in both *Collins v. Speight* 1993 CanLII 4668 (NS SC) and in *Wyatt v. Franklin* 1993 CanLII 4580 (NS SC), Justice Goodfellow concluded that the amount involved in two and one-half day trials was $45,000.00. *Collins v. Speight* 1993 CanLII 4668 (NS SC) was a case involving a dispute over an

entitlement to a right of way and *Wyatt v. Franklin* 1993 CanLII 4580 (NS SC) was a land dispute. He described both as not complex. Later, in *Toronto Dominion Bank v. Lienaux*, 1997 CanLII 15017 (NS SC) Justice Goodfellow suggested a general rule for cases where a substantial non-monetary issue was involved. He said that he treated each day or part day of the trial as equivalent to $15,000.00 for the purpose of determining the "amount involved".

[19] In 2007, Justice Lynch reviewed this general rule in *Jachimowicz*, 2007 NSSC 303 (CanLII) at paragraph 26. There, the parenting trial took approximately thirteen days: six days of evidence from the initial trial, five days of review evidence and numerous other appearances which added approximately two more days. She adjusted the daily equivalent amount from $15,000.00 to $20,000.00 "to reflect the increased costs of litigation."

[20] I am prepared to exercise my discretion and to find that the amount involved in this case was $110,000.00. The basic scale (Scale 2) for a case involving this amount is $12,250.00.

[21] Tariff A provides that the length of trial is another factor to be included in calculating costs and $2,000.00 is to be added to the amount calculated under Tariff A for each day of trial. Inclusive of mid-hearing motions, the application lasted five and one-half days, which adds $11,000.00 to the basic scale of $12,250.00 for a total of $23,250.00.

[22] Mr. Moore says that Ms. Moore's "constant disorganization and lack of preparedness significantly increased the time involved to hear this matter."

[23] The hearing was originally scheduled over two days. The first half day was spent addressing Mr. Moore's motion to strike the affidavits of Dr. Mensink and Susan Coldwell. Slightly less than one day was spent in cross-examination of Ms. Moore and slightly more than a half-day in the direct and cross-examination of Mr. Moore's witnesses, Dr. Humphreys and Ms. Lefort. Ms. Moore's cross-examination was extended by the manner in which she responded to questions. However, even if her responses were more focused, there was no way that the application could have been completed in the two days allotted.

[24] The mid-hearing motions were handled efficiently, though neither party had filed exactly the right documents in support of the relief being sought.

[25] The final three days of the application were dedicated to Ms. Moore's partially successful motion to strike portions of Debbie Wright's affidavit and her unsuccessful motion to offer further evidence, and hearing the evidence of Mr. Moore and Ms. Wright. There was some confusion about sufficient copies of exhibits, but this is not unusual. Once the parameters of relevance were established, Ms. Moore's cross-examination was focused and effective.

[26] As I've described in paragraph 10, Mr. Moore has approached the various motions on an almost individual basis in his claim. For my part, I and do not isolate them from the overall application in determining the amount involved and the days consumed by the hearing. I do not award costs for them on an individual basis.

[27] I see no reason to add any amount to the costs calculated using the Tariffs.

[28] As Justice MacDonald noted in *Fermin v. Yang*, 2008 party and party costs are to represent a substantial contribution to the successful party's reasonable expenses. According to his brief, Mr. Moore incurred legal fees of $32,025.75, disbursements of $905.89 and HST of $4,939.76. His total costs were $37,871.40.

[29] The hearing lasted five days, with an additional half day of mid-hearing motions. There were two conferences before the hearing began. Mr. Moore filed a pre-hearing brief and a post-hearing brief. His expenses were reasonable.

[30] A costs award of $23,250.00 comprises approximately sixty percent of Mr. Moore's expenses. This is a substantial contribution and far from complete indemnification.

[31] Rule 77.11 allows that I may "order a set-off against another award of costs or any other amount." Mr. Moore urges me to offset costs against his spousal support payments to Ms. Moore, and he offers Justice Fichaud's decision in *Myatt*, 2004 NSCA 124 at paragraph 11 as authority for the proposition that this may be done. At paragraph 11 of his reasons, Justice Fichaud said, "In any case, there would be an option of setoff against Mr. Myatt's ongoing spousal support payments." This is the sentence which Mr. Moore argues supports offsetting costs against spousal support.

[32] I disagree with this characterization of His Lordship's statement. The trial decision from which Mr. Myatt appealed is reported as *Myatt*, 2004 NSSC 119 (CanLII)). In it, Justice Nathanson resolved corollary relief claims by ordering

Mr. Myatt to pay periodic child support, periodic spousal support, a lump sum for past spousal support and to effect the property division. Mr. Myatt appealed from the decision relating to the division of assets and prospective spousal support. With regard to spousal support, he didn't dispute entitlement. He argued his payments were too high. He applied to Justice Fichaud for a stay.

[33] Justice Fichaud's comment about a setoff option was not an endorsement that costs could be paid by ordering the recipient of spousal support to forgo support payments. His Lordship was addressing the second element of the test of granting a stay, found in *Purdy v. Fulton Insurance Agencies Ltd*., 1990 CanLII 2357 (NS CA). Mr. Myatt had argued that if he paid his former wife the property division and spousal support ordered by Justice Nathanson, there was a risk he might not recover these amounts if he succeeded in his appeal. After noting that there was no evidence to support this assertion, Justice Fichaud said, "In any case, there would be an option of setoff against Mr. Myatt's ongoing spousal support payments." In other words, an overpayment of spousal support or of the property division could be offset against Ms. Myatt's ongoing spousal support payments.

[34] Even though *Myatt*, 2004 NSCA 124 doesn't support Mr. Moore's argument, Rule 77.11 does permit that an award of costs may be offset against another costs award or "any other amount".

[35] It appears no other Canadian jurisdiction has a similar rule. Some jurisdictions, such as British Columbia, Prince Edward Island and Yukon, allow one costs award to be set off against another. The Northwest Territories allows a costs award to be set off against another costs award or against an award of damages. I can find no support for the claim that costs may be set off against a spousal support obligation in Mark M. Orkin's *The Law of Costs*, (2nd ed., looseleaf, Toronto, ON: Canada Law Book, 2013).

[36] In his submissions, Allan Moore outlines his obligation to pay spousal support to Christine Moore. He asks that until Ms. Moore has paid the costs in full, he not be required to make any spousal support payments to her, and that he be credited with paying (and she with receiving) spousal support payments as if they had been made. This would include recognizing the offset as spousal support under the *Income Tax Act*, R.S.C. 1985, (5th Supp.), c. 1.

[37] Mr. Moore has offered no reason why I should fashion a costs award in this way.

[38] I am mindful of the frequent admonition that I cannot re-write the *Income Tax Act*. As Justice Iacobucci wrote in *Ludco Enterprises Ltd. v. Canada*, 2001 SCC 62, at paragraph 38, "In the absence of clear statutory language, judicial innovation is undesirable. Rather, the promulgation of new rules of tax law must be left to Parliament."

[39] Mr. Moore has offered no authority for how the order he seeks might satisfy the *Income Tax Act*.

[40] A costs award is in my discretion. That discretion must be exercised on a principled basis. The absence of a reason to set off the costs award and the unproven jurisdiction for such relief do not support the exercise of my discretion.

[41] I dismiss the request that costs be set off against Mr. Moore's spousal support payments.

[42] I order Ms. Moore to pay Mr. Moore costs of $23,250.00.

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Elizabeth Jollimore, J.S.C. (F.D.)

Halifax, Nova Scotia

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ERRATUM

Judge:	The Honourable Justice Elizabeth Jollimore
Erratum Date:	September 10, 2018
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Paragraph 35, sentence 3 – The word “so” has been changed to the word “no”