

SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: Poirier v. Poirier, 2013 NSSC 366

Date: 2013-11-15

Docket: 1201-051365; 133109

Registry: Halifax

Between:

Catherine Jean Poirier

Petitioner

v.

John Robert Poirier

Respondent

Revised Decision:

The text of the original decision has been corrected according to the attached erratum dated November 19, 2013.

Judge:

The Honourable Justice Elizabeth Jollimore

Submissions:

October 18, 2013 from John Poirier
November 7, 2013 from Catherine Logan

Counsel:

Catherine Logan on her own
Diana M. Musgrave for John Poirier

By the court:**Introduction**

[1] I've rendered my decision in the competing applications by John Poirier and Catherine Logan to vary the child support terms of their 1997 Corollary Relief Judgment and a 2004 variation order. My decision is reported as *Poirier*, 2013 NSSC 314. Each former spouse also claimed costs.

The proceeding

[2] Initially, Mr. Poirier sought custody and child support for the couple's younger son, Troy, who had moved in with him. He also wanted to terminate child support payments for the couple's older son, Kyle, saying Kyle was now independent.

[3] Ms. Logan responded, claiming a contribution to Kyle's post-secondary education costs.

[4] As the parties exchanged materials, each parent advanced a claim for a retroactive variation of child support, arguing there'd been an underpayment or overpayment of child support since the last variation order in 2004.

[5] There was a pre-hearing conference in March 2012 when I set filing deadlines for the hearing, scheduled for November 2012.

[6] When Mr. Poirier failed to file his materials on time, Ms. Logan moved for an adjournment. Less than two weeks before the hearing was scheduled to start, it was adjourned with Mr. Poirier's consent. At that point, everything had been filed except Ms. Logan's brief which wasn't yet due.

[7] The next available hearing date was ten months later. Before this date both parties filed additional materials: Mr. Poirier filed two more affidavits, a Statement of Income, a Statement of Special or Extraordinary Expenses, various financial documents (paystubs and cheques), an affidavit from his counsel's assistant and another brief. Ms. Logan filed an affidavit, and Statements of Income, Expenses, Special or Extraordinary Expenses and Property, along with her brief.

[8] I heard three motions during the proceeding: Mr. Poirier's motion to strike portions of Ms. Logan's affidavit; Ms. Logan's motion to allow late filing and her motion to amend her response to variation. Mr. Poirier was substantially successful in his motion to strike portions of Ms. Logan's affidavit. Ms. Poirier succeeded in having one document admitted late and failed in having another one admitted, while a third was admitted by agreement. Ms. Logan's motion to amend her response was dismissed.

[9] With regard to the substantive issues, I terminated Mr. Poirier's obligation to support Kyle at a date earlier than that sought by either parent. Mr. Poirier was not ordered to contribute to Kyle's post-secondary education costs. I ordered Ms. Logan pay child support to Mr. Poirier

for Troy, starting when Troy moved in with his father. I dismissed both parents' applications to vary child support retroactively. Each parent was ordered to reimburse the other for certain special expenses. I allocated Troy's 2013 post-secondary expenses between the parents, ordering each to pay Troy directly for the upcoming costs. As a result of my decision, Ms. Logan was required to repay Mr. Poirier child support payments that had been garnished from him by the Director of Maintenance Enforcement.

Settlement offers

[10] Mr. Poirier and Ms. Logan each made two settlement offers.

[11] In October 2012, Mr. Poirier offered to settle the applications on the basis that Ms. Logan pay him \$25,000.00 to resolve his overpayment of child support from January 1, 2004 to December 31, 2010 and any arrears of child support she owed him. (There was no order for Ms. Logan to pay support, so there could be no arrears owed. I presume the reference to arrears was intended to mean the support Ms. Logan should have paid for Troy once Troy moved in with Mr. Poirier.) Mr. Poirier asked for ongoing monthly child support of \$742.00 for Troy: no date was set when these payments would start or end, which makes it difficult to know exactly how much Ms. Logan would pay Mr. Poirier. Mr. Poirier offered to contribute \$5,000.00 to Kyle's education costs. Each parent would pay a proportionate share of Troy's upcoming post-secondary education costs. The parents would annually disclose tax returns to each other while there was a child support obligation. Mr. Poirier would have custody of Troy and Ms. Logan would remove any impediments to Troy's completing his driver's education course. Each party would bear its own costs. For many months after Troy moved to his father's, the Director of Maintenance Enforcement collected child support payments from Mr. Poirier pursuant to a garnishee. In his offer, Mr. Poirier didn't seek repayment of these sums. Mr. Poirier's offer was open for acceptance at any time until the hearing began.

[12] Ms. Logan didn't accept this offer.

[13] She made a counter-offer on October 30, 2012. She offered "that we both walk away at this point": Troy would live with his father and Kyle would live with his mother and there would be no payment by either parent to the other until the Troy began his post-secondary education. Ms. Logan made no reference to repaying the sums that had been collected from Mr. Poirier pursuant to the garnishee.

[14] Mr. Poirier didn't accept this offer.

[15] Mr. Poirier amended his offer in July 2013. He said he would accept \$25,000.00 from Ms. Logan to resolve his overpayment child support from January 1, 2004 until March 31, 2012 and any arrears of child support Ms. Logan owed him until February 28, 2013. (Again, I presume the reference to arrears was intended to mean support for Troy.) He offered that there would be no order for Troy's custody and child support as of March 1, 2013. Ms. Logan wouldn't be required to do anything about Troy's driver education and Troy's future education costs would be dealt with by each parent, directly with Troy when the time came. Mr. Poirier would pay \$5,000.00 toward Kyle's post-secondary education costs. There would be no ongoing

financial disclosure and no costs. This offer was open for acceptance until the hearing began. Again, Mr. Poirier didn't seek repayment of the garnisheed payments.

[16] Ms. Logan didn't accept this offer.

[17] She made a counter-offer on July 21, 2013. This offer was that "no money change hands, Mr. Poirier would withdraw his action, we would go our separate ways, and we would each cover our own legal fees."

[18] Ms. Logan's offer wasn't accepted.

[19] Following the hearing, Ms. Logan was ordered to pay Mr. Poirier \$15,866.64 (this amount is net of his reimbursement of insurance premiums to Ms. Logan). As well, she would reimburse him the amounts garnisheed by the Director of Maintenance Enforcement for Troy's support, which Mr. Poirier estimates are "at least \$8,721.00". In the result, he receives \$24,587.64. Each parent was ordered to pay a lump sum directly to Troy for his post-secondary educational costs.

[20] Mr. Poirier claims he was "substantially successful" and is entitled to costs.

[21] Ms. Logan contends that she was the more successful party and she should be awarded costs. She says that she was "fully accepting of her responsibility to pay child support" for Troy and that this was reflected in both her offers and in negotiations relating to the adjournment. In her offers, Ms. Logan considered child support for Troy and offset it against what she believed Mr. Poirier should pay her for Kyle's support. She calculated that Mr. Poirier still owed her money, and she was prepared to forgo it.

[22] As a result of my decision, Mr. Poirier wasn't required to make any payments for Kyle, beyond reimbursing Ms. Logan approximately \$450.00 for his proportionate share of health insurance premiums.

[23] Neither party achieved the result that he or she desired. Ms. Logan did not achieve a result that was better than her offers: she offered to forgo any payment and she was awarded approximately \$450.00, however she asked Mr. Poirier to forgo any payment and he was awarded approximately \$24,500.00. The result was superior to Mr. Poirier's second offer. If I consider the entirety of the lump sum child support payment I ordered Mr. Poirier to make and his reimbursement of health insurance premiums, he still achieved a result better than his second offer.

[24] Mr. Poirier's total expenses in this litigation were \$15,484.27.

Costs

[25] Unless I order otherwise, costs should follow the result in a proceeding, according to Civil Procedure 77.03(3). Mr. Poirier was the successful party.

[26] Mr. Poirier seeks costs of \$11,000.00. He calculates one and one-half days of hearing using Tariff A (\$7,000.00) and says that Civil Procedure Rule 10.09(2)(c) applies because he made formal settlement offers. He adds \$500.00 for his substantially successful motion to strike portions of Ms. Logan's affidavit.

Applying Tariff A

[27] The proceeding was a variation application. Formally, Tariff C applies to applications. It has been my practise (in *MacLean v. Boylan*, 2011 NSSC 406 and *Moore*, 2013 NSSC 281) to apply Tariff A to applications and both parties applied Tariff A in their submissions.

[28] The amount involved is less than \$25,000.00.

[29] Rule 77.07(1) says that I may add an amount to, or subtract an amount from tariff costs and Rule 77.07(2) offers examples of factors that may be relevant in deciding whether to do this. The factors include settlement offers and a party's conduct that affects the speed or cost of the proceeding.

[30] Mr. Poirier says that Ms. Logan's rejection of his settlement offers added significant expense in continuing the proceeding.

[31] With regard to Mr. Poirier's settlement offers, his second offer was close to the trial result, but his earlier offer was not. In his first offer, Mr. Poirier didn't specify how long Ms. Logan would pay monthly child support of \$742.00: he didn't state a start or end date. Assuming the start date was March 2011 (when Troy moved in) and the end date was February 28, 2013 (the date used in his second offer), Ms. Logan would be required to pay Mr. Poirier \$17,808.00, in addition to the \$25,000.00 he sought for retroactive support. This would be offset against the \$5,000.00 Mr. Poirier would pay her for Kyle, for a net payment by Ms. Logan to Mr. Poirier of \$37,808.00. Rejecting this offer did prolong the proceeding, but litigation provided Ms. Logan with a better result.

[32] For her part, Ms. Logan points to the adjournment which resulted from Mr. Poirier's failure to file his affidavit and financial statements within the deadlines fixed at a pre-hearing conference.

[33] The initial delay from the conference to the hearing date was eight months. An additional ten months followed as a result of the adjournment. I've noted that all materials except Ms. Logan's brief were filed for the initial hearing. When the matter was adjourned, each party was put to the expense and effort of filing the additional materials outlined in paragraph 7. This additional expense and effort resulted from the adjournment, which arose because of Mr. Poirier's failure to meet his filing deadline.

[34] The factors listed in Rule 77.07(2) aren't exhaustive. There may be other factors that are relevant to increasing or decreasing the tariff. Here, I consider the fact that Ms. Logan contested Mr. Poirier's entitlement to child support for Troy until two weeks before the hearing began and, in any event, she paid no child support for Troy prior to the hearing in September 2013, though Troy had been living with Mr. Poirier since March 2011. When Troy moved to his father's home, Troy was 16 and attending high school.

[35] In reviewing these factors, I do not see Mr. Poirier's offers as a reason to increase the amount under Tariff A. His initial offer was best rejected by Ms. Logan and his second offer was not significantly better for her than the hearing result. Mr. Poirier's failure to file his materials as directed for the November 2012 hearing resulted in the adjournment and, based on his later filings, considerable extra effort and expense for both parties to prepare for the adjourned date. This suggests reducing the tariff amount. I am persuaded against this by Ms. Logan's failure to admit that Troy remained entitled to support and her failure to make any payments, even on a "without prejudice" basis, for his support.

[36] The amount calculated under Tariff A is \$7,000.00: Scale 2 for a hearing which lasted one and one-half days.

Applying Rule 10.09

[37] Mr. Poirier says that Civil Procedure Rule 10.09 applies because of his settlement offers.

[38] According to Civil Procedure Rule 10.09(1), there is a favourable judgment where: (a) the party delivers a settlement offer more than one week before the trial; (b) the offer isn't withdrawn or accepted; and (c) the judgment gives the other party a result that is no better than what they would have achieved by accepting the offer.

[39] Where Rule 10 refers to a "trial" and this was an application, I attach no significance to the different words.

[40] There is no question that Mr. Poirier delivered his offers in time to satisfy Rule 10.09(1)(a) and that the offers were neither withdrawn nor accepted, as required by Rule 10.09(1)(b). Did my judgment give Ms. Logan a result that was no better than what she would have achieved by accepting one of Mr. Poirier's offers?

[41] My judgment gave Ms. Logan a result that was better than Mr. Poirier's October 2012 offer.

[42] In his second offer, Mr. Poirier offered to resolve all claims for his overpayment of child support and his underpayment of Kyle's post-secondary education expenses, and Ms. Logan's non-payment of child support during the period from January 1, 2004 to February 28, 2013 for \$20,000.00 (this amount is net of what Mr. Poirier would pay Ms. Logan for Kyle's post-secondary expenses). My decision resulted in Ms. Logan paying him \$24,036.64. My judgment gave Ms. Logan a result that was worse than what she would have achieved by accepting Mr. Poirier's second offer.

[43] Where Mr. Poirier has achieved a favourable result, I may award costs which attach a multiplier to the Tariff amount. The multiplier depends on how early the offer was made. Mr. Poirier says that his offer falls within Rule 10.09(2)(c) because it was made after setting down and before the finish date. For offers made during this timeframe, the multiplier is fifty percent.

[44] Family Division procedure doesn't include "setting down" or "finish dates" but I am able to calculate these dates. According to Rule 4.16(6), the finish date is no less than twenty days before the date of the trial readiness conference. A trial readiness conference is no less than forty days before the first day of trial. All "days" are counted in accordance with Rule 94.02(1), which means that the finish day for a hearing starting on September 11, 2013 was in late June 2013. Mr. Poirier's second offer was made on July 10, 2013: it was made after the finish date. Accordingly, it is governed by Rule 10.09(2)(d). Offers made after the finish date may be increased by twenty-five percent.

[45] I am prepared to increase the tariff amount of \$7,000.00 by twenty-five percent to recognize the second offer Mr. Poirier made. I am mindful of the recommendation in the Final Report of the Family Justice Working Group of the Action Committee on Access to Justice in Civil and Family Matters, "Meaningful Change for Family Justice: Beyond Wise Words" (April 2013) at 54 (Recommendation 26), that "judges should use costs awards more freely and more assertively to contain process and encourage reasonable behaviour". Litigants should be encouraged to make settlement offers and to consider them carefully. The best way to promote this behaviour is by employing those Civil Procedure Rules which reward it.

[46] In these circumstances, I am not awarding costs on a piecemeal basis for each motion in the proceeding. Ms. Logan shall pay Mr. Poirier costs of \$8,750.00 forthwith. Mr. Poirier's counsel shall prepare the order.

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

Halifax, Nova Scotia

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Erratum:

Paragraph [1] should read as follows: “My decision is reported as *Poirier*, 2013 NSSC 314.”