

SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION

Citation: *Hayden v. Stone*, 2014 NSSC 386

Date: 2014 10 24

Docket: No. 1201-067529 (SFHD-089076)

Registry: Halifax

Between:

Gweneth Hayden

Petitioner

v.

John Stone

Respondent

Judge: The Honourable Justice Beryl MacDonald

Heard: Written Submissions by Counsel

Counsel: Michelle J. Cleary for the Petitioner
G. Michael Owen for the Respondent

By the Court:

BACKGROUND

[1] On December 5, 2013 Gweneth Hayden filed a petition for divorce from John Stone. Their marital relationship had lasted 17 years and they separated in the fall of 2012. They have two children both of whom remain dependents and are in the primary care of Ms. Hayden.

[2] The parties signed a Separation Agreement dated October 1, 2012. The Agreement was not extensively reviewed by counsel for either party although there was evidence to indicate that Ms. Hayden had consulted with a lawyer prior to her signing the agreement. Whether this Separation Agreement would be incorporated into a Corollary Relief Order became the subject of a hearing before me on September 26, 2014. Ms. Hayden requested that the Agreement be set aside. After hearing the evidence, I delivered an oral decision setting aside the Separation Agreement.

[3] The parties had previously been involved in an interim hearing that had been scheduled to determine custody, child support, spousal support and costs. On the day of the interim hearing the parties informed the court that a settlement had been reached. Ms. Hayden did not request costs at that time. She now is seeking costs as the successful party on the appearance before me to determine the validity of the Separation Agreement. I consider this to be a motion before the court of an interlocutory nature. It may be that some of the cost amounts included in Ms. Hayden's counsel's account relate to the interim hearing. Given my reference to the tariff and the difficulty counsel may have in separating out work performed solely for one motion from the other, I do not consider this a significant issue in my assessment of this cost request.

[4] Civil Procedure Rule 77.03(1) provides as follows:

Party and party costs of a proceeding must, unless a judge orders otherwise, be fixed by the judge in accordance with tariffs of costs and fees determined under the *Costs and Fees Act*, a copy of which is reproduced at the end of this Rule.

[5] The relevant portions of Rule 77.03 state:

(3) Costs of a proceeding follow the result, unless a judge orders or a Rule provides otherwise.

(4) A judge who awards party and party costs of a motion that does not result in the final determination of the proceeding may order payment in any of the following ways:

(a) in the cause, in which case the party who succeeds in the proceeding receives the costs of the motion at the end of the proceeding;

(b) to a party in the cause, in which case the party receives the costs of the motion at the end of the proceeding if the party succeeds;

(c) to a party in any event of the cause and to be paid immediately or at the end of the proceeding, in which case the party receives the costs of the motion regardless of success in the proceeding and the judge directs when the costs are payable;

(d) any other way the judge sees fit.

[6] Rule 77.05 (1) states that:

The provisions of Tariff C apply to a motion, unless the judge hearing the motion orders otherwise.

[7] Paragraph (3) of Tariff C states “ In the exercise of discretion to award costs following an application, a Judge presiding in Chambers, notwithstanding this Tariff C, may award costs that are just and appropriate in the circumstances of the application.

[8] Tariff C provides a range for costs from \$750.00 to \$1,000.00 for a motion hearing lasting more than one hour but less than ½ day. The motion I heard lasted ½ day and still would be in the \$1,000.00 range. It did not result in a “final determination” of the proceeding but it did result in a final determination about a critical issue - whether or not the separation agreement was to be considered at the final hearing to determine issues relating to child and spousal support and property division.

[9] The costs of interim motions and occasionally interlocutory proceedings were often left as costs in the cause. However there appears to be a movement away from this practice.

[10] In *Smith v. Haley*, 2006 NSSC 182 Justice Hood commented:

[14] The defendant has been successful in this application and the court is encouraged to make an award of costs at the time of the chambers application rather than leaving it for the trial judge who, in all likelihood, will not have been the chambers judge and some substantial period of time may pass before this matter gets to trial, if it goes to trial. It is difficult for the trial judge to go back and determine what should have been awarded on a chambers application held some time ago. The practice of the court is that we are encouraged to award the costs at the time of the chambers application. I award costs in the amount of \$750.00 in any event of the cause.

[11] In *National Bank Financial Ltd. v. Potter*, 2008 NSSC 213, Justice Warner said:

13 While at one time it may have been usual to defer costs of interlocutory applications to the end of the case, the length and complexity of modern litigation has led to a reversal of that trend except in those circumstances where the primary issue in the interim application is the same as that intended in the ultimate hearing, or where to award costs at an interim stage may prevent the matter from being determined on its merits at a later date. Generally the parties are better able to argue and the Court is better able to make the appropriate costs determination at the time of the application. Unless the costs award may be improved with the benefit of hindsight (after trial), the award should be paid when ordered....

[12] Several principles emerge from an analysis of the Civil Procedure Rules and the case law about cost awards that apply as equally as well to cost requests following motions as they do to cost requests following trials - (Civil Procedure Rule 77, *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 CarswellNS 487;

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, impecuniosity of the parties, 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 or reduce a cost award to an otherwise successful party.
5. Offers exchanged prior to a hearing may affect the quantum of a cost award.
6. The amount of a party and party cost award should “represent a substantial contribution towards the reasonable expenses of presenting or defending the proceeding, but should not amount to a complete indemnity”.
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 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.

[13] The proceeding before me was determinative of a substantive issue in this proceeding. Ms. Hayden was clearly the successful party. The issue before me will not be relitigated at the final hearing. I have no information about the content of any offers exchanged between the parties that may affect this cost award. While Mr. Stone’s failure to file financial information in a timely manner was of concern to Ms. Hayden this was not a factor contributing to an increase of costs in respect to the motion before me.

[14] There is no good reason to refuse costs to Ms. Hayden . Mr. Stone shall pay costs to Ms. Hayden in the amount of \$1,000.00 in any event of the cause payable immediately.

MacDonald, J.