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IN THE FAMILY COURT FOR THE PROVINCE OF NOVA SCOTIA
[Cite as: D.M.C.T v. L.K.S, 2007 NSFC 35]

BETWEEN:

D. M. C. T.
-APPLICANT

AND

L. K. S.
-RESPONDENT

BEFORE THE HONOURABLE JUDGE BOB LEVY

HEARD AT: KENTVILLE

DATES OF APPEARANCES: March 20/06, Sept. 15/06, Jan. 17 &30/07, Mar. 1/07, and trial dates June 12, 13 & 14/07

DATE LAST SUBMISSION RECEIVED: August 2, 2007

DECISION DATE: AUGUST 29, 2007

APPEARANCES: BLAINE SCHUMACHER FOR THE APPLICANT
WILLIAM RYAN, Q.C. FOR THE RESPONDENT
-and COLIN PIERCEY IN PLACE OF MR. RYAN ON JANUARY 30, 2007

DECISION AS TO COSTS

By the Court:

1. This decision concerns costs in the cause of a child maintenance variation application. The proceeding has been before the court since March of 2006. There have been five appearances plus three days of trial, one appeal and cross appeal, (both dismissed), and another appeal pending. One scheduled appearance was resolved just prior to the date, and there was a discovery in the summer of 2006. Ultimately it was determined that the Respondent had unfettered assets worth over $27,000,000 and an annual 'Guideline income' of $1,111,160 was attributed to him. The applicant mother was awarded an increase from $5,000 per month in child support for the parties' one child to $8,125.35 per month and retroactive maintenance in the amount of $71,883.05; 'section 7' expenses were divided: (2007 NSFC 22, 2007 CarswellNS 318).

2. Each counsel has submitted a written brief on the question of costs, with counsel for the Applicant submitting a further brief in reply. The Applicant's counsel claims success all across or almost all across the board and seeks payment of the entirety of his client's legal fees which he states stand at $157,637.58 plus disbursements of (net) $8,239.81 for a total of $165,877.39, or, in the alternative, "a minimum of $15,000 per day plus disbursements". Counsel for the Respondent similarly claims his client was predominantly successful but agrees on his client's behalf to waive any award of costs to which he might be entitled, "...in the interest of moving forward for the benefit of (the child)".

DISCUSSION

3. The Family Court Act, section 13, grants authority to the court to award costs "...in any matter or proceeding in which it has jurisdiction...". Family Court Rule 17.01 (1) states simply: "...The amount of costs shall be in the discretion of the court". While Family Court Rule 1.04 provides that recourse can be had to both the Interpretation Act and the Civil Procedure Rules, at the discretion of the court, this recourse is limited to situations where "no provision" is made in the Family Court Rules for the point in issue. In this case the discretion to grant or refuse costs and to determine the amount of any costs is fully, if succinctly, covered in Rule 17.01 (1) and therefore Family Court Rule 1.04 does not apply in these respects. That said, a court's discretion is to be exercised judicially and the best way to do so is to take one's guidance from Civil Procedure Rule 63 and related case law.

4. Selected sections of Rule 63:

> 63.03. (1) Unless the court otherwise orders, the costs of a proceeding or of any issue of fact or law therein, shall follow the event.
>
> 63.02. (1) Notwithstanding the provisions of rules 63.03 to 63.15, the costs of any party, the amount thereof, the party by whom, or the fund or estate or portion of estate out of which they are to be paid, are in the discretion of the court, and the court may,
> (a) award a gross sum in lieu of, or in addition to any taxed costs;
> (b) allow a percentage of the taxed costs, or allow taxed costs from or up to a specific stage of a proceeding;
> (c) direct whether or not any costs are to be set off.
>
> (2) The court in exercising its discretion as to costs may take into account,
> (a) any payment into court and the amount of the payment;
> (b) any offer of contribution.
>
> 63.04. (1) Subject to rules 63.06 and 63.10, unless the court otherwise orders, the costs between parties shall be fixed by the court in accordance with the Tariffs and, in such cases, the "amount involved" shall be determined, for the purpose of the Tariffs, by the court.

(2) In fixing costs, the court may also consider
(a) the amount claimed;
(b) the apportionment of liability;
(c) the conduct of any party which tended to shorten or unnecessarily lengthen the duration of the proceeding;
(d) the manner in which the proceeding was conducted;
(e) any step in the proceeding which was improper, vexatious, prolix or unnecessary;
(f) any step in the proceeding which was taken through over-caution, negligence or mistake;
(g) the neglect or refusal of any party to make an admission which should have been made;
(h) n/a
(i) n/a
(j) any other matter relevant to the question of costs.

63.08. The costs of an appeal and of the proceeding in the court below shall be as directed by the judgment of the Nova Scotia Court of Appeal, or in default of direction shall be in accordance with the applicable provisions of the Tariffs.

63.10A Unless the court otherwise orders, a party entitled to costs or a proportion of that party's costs is entitled on the same basis to that party's disbursements determined by a taxing officer in accordance with the applicable provisions of the Tariffs.

63.16 (1) A solicitor is entitled to such compensation from a client, who is a party, as is reasonable for the services performed, having regard to
(a) the nature, importance and urgency of the matters involved,
(b) the circumstances and interest of the person by whom the costs are payable,
(c) the fund out of which they are payable,
(d) the general conduct and costs of the proceeding,
(e) the skill, labour and responsibility involved, and
(f) all other circumstances, including, to the extent hereinafter authorized, the contingencies involved.

5. The primary issue in this proceeding has been establishing the quantum of child support that should be payable, prospectively and retroactively, integral to which was the necessity of establishing the Respondent's income for the purposes of the Child Maintenance Guidelines. This in turn generated the issue of full disclosure by the Respondent which dominated lengthy and difficult pre-trial

procedures. (Mr. Schumacher says that this accounts for 65% of his total fees).

6. At several appearances counsel for the Applicant requested an interim variation in the child maintenance. I declined the requests as I as yet had no clear understanding of the Respondent's finances. In addition there arose an issue of whether the child should be enrolled in/stay enrolled in the private school in Windsor or whether he and his mother should be obliged to return to take up residence again in the home town. (The Respondent came to acquiesce to the child remaining where he was.) There was also an issue of 'section 7' costs associated with the move to the valley to enable the child to attend the private school together with other costs associated with the attendance at the school.

7. Lastly, there were two applications dealing with suit costs, both of which were granted. One of these was appealed and cross-appealed, unsuccessfully, with the Appeal Court determining that each party should bear his or her own costs. The other interim order has also been appealed but the appeal has yet to be heard. Other than the two awards of suit costs, I made no award of costs on the interim applications, indicating that they would be dealt with in costs in the cause.

8. Sections 21 to 25 of the Child Maintenance Guidelines deal with the standard disclosure obligations of the parties. Sections 15 through 20 deal with determination of income. Sections 18 and 19 (e) and (h) in particular were in issue, and this required the complete disclosure of all assets and liabilities not only of the Respondent personally but of his wholly-owned and solely-controlled corporation. Ultimately the income of the Respondent was not determined pursuant to section

16 of the Guidelines but by reference to the reasonable income earning capacity of his, and his corporation's considerable assets.

9. In the 2006 Supreme Court of Canada case dealing with four appeals from Alberta, **D. B. S. v. S. R. G., T. A. R. v. L. J.W., Henry v. Henry, and Hiemstra v. Hiemstra**, 2006 SCC 37, a number of observations were made about the obligation of parents to ensure that the appropriate amount of child support is paid. These observations related to variations of court orders, rather than to an agreement which was in place here, and to the issue of 'retroactivity' and not costs. Nonetheless, in my view, they are germane to the costs issue as well. Several extracts from the majority decision are set forth below:

> As I concluded above, a payor parent always has the obligation to pay - and the dependent child always has the right to receive - child support that is commensurate to his/her income. Accordingly, even where the payor parent has made payments consistent with an existing court order, s(he) would not have been fulfilling his/her obligation to his/her children if these payments did not increase when they should have, according to the applicable law at the time. Thus, the support obligation of a payor parent, while *presumed* to be in an amount ordered by a court, will not necessarily be *frozen* to the amount ordered by the court. **It is the responsibility of both parents to ensure that the payor parent fulfils his/her actual obligation, tailored to the circumstances at the relevant time.** (Para. 68) (bold lettering is my emphasis)
>
> **However, the court order does not absolve the payor parent - or the recipient parent, for that matter - of the responsibility of continually ensuring that the children are receiving an appropriate amount of support.** As the circumstances underlying the original award change, the value of that award in defining parents' obligations necessarily diminishes. (Para. 74) (bold lettering is my emphasis)
>
> What is "reasonable" will be determined with reference to the *Guidelines*: s. 15.1 (8). Because of this, a payor parent who adheres to a separation agreement that has not been endorsed by a court should not have the same expectation that s(he) is fulfilling his/her obligations as does a payor parent acting pursuant to a court order. (Para. 77)
> *(Note - I had declined to register the parties' 1998 child support agreement,*

> *(which replaced my 1995 order), as I had no financial disclosure from which to determine whether it was in accordance with the Guidelines.*)
>
> Courts should not hesitate to take into account a payor parent's blameworthy conduct in considering the propriety of a retroactive award. Further, I believe courts should take an expansive view of what constitutes blameworthy conduct in this context. **I would characterize as blameworthy conduct anything that privileges the payor parent's own interests over his/her children's right to an appropriate amount of support.** A similar approach was taken by the Ontario Court of Appeal in *Horner v. Horner* (2004), 72 O.R. (3d) 561, at para. 85, where children's broad "interests" - rather than their "right to an appropriate amount of support" - were said to require precedence; however, I have used the latter wording to keep the focus specifically on parents' support obligations. Thus, a payor parent cannot hide his/her income increases from the recipient parent in the hopes of avoiding larger child support payments: see *Hess v. Hess* (1994), 2 R.F.L. (4th) 22 (Ont. Ct. (Gen. Div.); *Whitton v. Shippelt* (2001), 293 A.R. 317, 2001 ABCA 307; *S. (L.).* A payor parent cannot intimidate a recipient parent in order to dissuade him/her from bringing an application for child support: see *Dahl v. Dahl* (1995), 178 A.R. 119 (C.A.). And a payor parent cannot mislead a recipient parent into believing that his/her support obligations are being met when s(he) knows that they are not. (Para. 106) (bold lettering is my emphasis)
>
> No level of blameworthy behaviour by payor parents should be encouraged. Even where a payor does nothing active to avoid his/her obligations, s(he) might still be acting in a blameworthy manner if s(he) consciously chooses to ignore them. Put simply, a payor parent who knowingly avoids or diminishes his/her support obligation to his/her children should not be allowed to profit from such conduct: see *A. (J.) V. A. (P.)* (1997), 37 R.F.L. (4th) 197 (Ont. Ct. (Gen. Div.)), at pp. 208-9... (Para. 107)

10. The Maintenance and Custody Act establishes that there is a duty in law, enforceable on application but existing independently of that application, for a payor parent to be paying an appropriate amount of child support. Thus, sections 8 (a) and 2 (k) read:

> 8 Everyone
> (a) who is a parent of a child who is under the age of majority...is under a legal duty to provide reasonable needs for the child except where there is a lawful excuse for not providing the same.
>
> 2 (k) "reasonable needs" means whatever is reasonably suitable for the

> maintenance of the person in question, having regard to the ability, means, needs and circumstances of that person and of any person obliged to contribute to such reasonable needs;

11. It is in the context of these legal obligations that the court should view what transpired in this proceeding.

12. In my opinion the Respondent adopted a siege mentality and did his best to drag this proceeding out, doing nothing, or next to nothing, without an order or imminent threat of an order, to facilitate the enquiry that had to occur. He used the immense disparity in their finances in an oppressive manner, making it as difficult and expensive on the Applicant as he could. He knew, or at least his counsel surely knew, that the barriers to disclosure that were being erected would almost certainly be breached, albeit only after a long and costly struggle, and only if the Applicant could summon the wherewithal and maintain the resolve to keep up the fight. He knew, or came to know early in the proceeding, that she was sinking under the weight of debt, with her house under foreclosure, tens of thousands of dollars in credit card debt accumulating interest at a crippling rate, and legal fees rising. He was, it seems, just waiting her out.

13. The Applicant was, in pursuing the application, shouldering the "responsibility" that the Supreme Court held to lie on her as well as on the Respondent to ensure that the maintenance being paid for their son was appropriate. This however did not induce the Respondent to accommodate her in any way. That she was still on her feet at the end of the struggle is a testament to her courage or maybe, simply, just a measure of her desperation. She was fortunate to have had counsel who would see her through what can, with only a

little hyperbole, be called a war of attrition.

14. The Applicant was by far the more successful party, certainly on the main and most complex issues. I do not agree with the Respondent's counsel's submission that his client should be regarded as having been, on the whole, the more successful. The Applicant did not receive as much as she had perhaps hoped for, but that is not the same as saying she was not successful. She made a number of offers to settle in excess, some considerably in excess, of what was eventually awarded, but that can hardly be held against her when, because of the Respondent's strong resistance to disclosure, she could not readily get a handle on his true circumstances. (It is not insignificant that the Respondent made no settlement offer at any time or in any amount and that his position throughout was that he was already paying too much.) In any event, child maintenance was increased by over $37,000 per year in addition to over $70,000 in a retroactive award, and this can hardly be described as a lack of success.

15. The Respondent, both in 1995 when the matter was before me and still, seems genuinely motivated by his distress that some of the money he is or may be obliged to pay for his son would wind up benefitting the Applicant. His perspective is that the Applicant should be working outside the home and earning an income, not only for her own support, but perhaps to defray some of his maintenance obligation. He believes that he lives a modest lifestyle, (which is true in some respects), and that therefore so too should his son. He asserts, by implication, that the Applicant cannot manage finances and that the Applicant will soon be over her head in debt again no matter how much maintenance he is obliged to pay.

16. It is well established that even if some of the money comes to benefit the Applicant, (and the evidence shows that the expenditures she made for her own benefit were very modest), that was not regarded in **Francis v. Baker** [1999] 3 S.C.R. 250, para. 41**,** to *per se* render a child maintenance award inappropriate. Additionally, any money the Applicant was to earn by way of an income would, given her circumstances, certainly be modest and come with some increased expenses. It is highly unlikely that it would affect the Respondent's obligation in any event. Similarly, there is case law, cited in the decision on the merits, that the Respondent cannot impose his lifestyle on the child. Lastly, while the Applicant has in the past overspent the money coming in, to her detriment and that of the child, she did so in trying to give the child a lifestyle commensurate with his father's circumstances and the child's future prospects, an objective that might should be more easily met or approached now given the increase in the level of support ordered.

17. At the end of the day the Respondent's essential position and arguments were neither persuasive or particularly relevant. This proceeding simply didn't need to take as long, or to be so complex and adversarial as it was, if indeed it was necessary in the first place.

18. I don't want to be distracted by any debate as to whether costs in this instance should be considered party and party or solicitor and client. I appreciate the difference, which, in short, might be described as the difference between "substantial contribution" for in the usual course, versus full compensation in situations where the court perceives that there has been "blameworthy conduct"

that should be sanctioned with an award of full compensation for legal fees and disbursements. I am not sure if the phrase ‘blameworthy conduct’ is to have the same meaning in costs issues as was ascribed to it in the **D. B. S.** case referred to earlier. What I choose to focus on is simply, to be blunt, the dollar figure and the amount the Applicant may wind up owing her lawyer when all of this is over.

19. I have considered Civil Procedure Rule 63.04 including the factors enumerated in sub-section (2). Recourse to the “amount involved” and the Tariffs is unhelpful. As to some of the individual sub-sections I make the following comments:

> (c) The Respondent, I think, did what he could to ensure that this case was dragged out as much as possible.
>
> (d) Far from being forthcoming with financial information the Respondent put the Applicant’s counsel through his paces before ceding anything.
>
> (e) The whole case was made unnecessarily complicated and lengthened by the conduct of the Respondent.
>
> (f) It can be said that at least in the beginning the Applicant’s counsel’s approach seemed to have been somewhat ‘shotgun” in nature, featuring multi-pronged applications. Perhaps some fault should be attributed to him, and some reflection of the excess should be found in the cost award. However, I am reluctant to be too harsh given the reasonableness of what counsel was after, the urgency of his client’s tightened circumstances and the tenacity with which all his efforts were being resisted. Ultimately too I accept that just because it

is clear now what needed to be done or did not need to be done it does not mean that it was clear at the time.

(g) as to admissions that should have been made - see above

(j) any other matter relevant to the question of costs - I will deal with this below

20. Sub-sections (a), (b), (c), (d) and (e) of Civil Procedure Rule 63:16 are pertinent here. I make these comments:

(a) The application(s) were important and urgent to the Applicant and there is also a legitimate public interest that appropriate child support be paid.

(b) The Respondent simply resisted the Applicant's efforts. He could afford to do so, and he can just as easily afford the consequences of his oppressive strategy.

(c) see (b)

(d) The general conduct was quintessentially adversarial and I believe that the Respondent made it so. The costs were exorbitant and the Respondent made it so.

(e) Counsel for the Applicant demonstrated skill, hard work and tenacity. It is evident that he expended considerable effort and that he had, and discharged, a heavy duty to his client who was in extreme financial circumstances and up against a determined opposing party.

21. Sub-section (j) of Rule 63.04 (2) entitles the court to have regard to "any other matter relevant to the question of costs" and it is this sub-section that I

particularly want to address. Essentially, I believe that the Respondent's conduct was the very antithesis of what one would want to find or encourage in family litigation, and a far cry from the expectations of parents articulated in the **D. B. S.** case. He should bear the consequences for his course of action. Equally, any parents tempted to adopt his strategy might find it valuable to know what might await them by way of costs at the end of the day.

22. The reality is that either the Respondent pick up the bulk of the costs of this proceeding or it will come out of the child maintenance as that is, essentially, the sole income of the Applicant's household. There is little to commend the proposition that children should for pay for their parents' litigation.

23. It is very important too that courts should not create or condone a situation where a successful applicant who has been put through such arduous and protracted litigation winds up no further ahead because of an outstanding account for legal fees. The Applicant was, after all, discharging her "responsibility" to ensure appropriate maintenance for their child. If she is left to pay any great sum for legal fees then a clear message will be sent to any other parents similarly situated that there is no point whatever, maybe there is even a strong disincentive, to pursue appropriate maintenance for one's child. You may not only not be any better off, you, (and your child), may even be worse off for your troubles. That concern cannot, in my opinion, be easily over-stated, particularly where, as here, the Applicant's conduct was exemplary.

24. In circumstances such as this, an applicant certainly needs, but may have

trouble finding, counsel willing to put in the time and undertake the risk. Counsel will need some basis to believe that, in the end, having served their client well and successfully, they will be reasonably remunerated for their endeavours. Applicants for child maintenance can often be, as here, financially vulnerable and up against a respondent who is better able to finance protracted litigation. No decision should be made that might compromise these applicants' prospects for competent and committed representation.

25. I acknowledge that costs in family cases should not, as a rule, be too generous lest this tends to lead to even higher fees and costs generally. That said, it is not too often that one is dealing with a Respondent with a $27,000,000 in assets seemingly willing to spend what it takes to thwart a full examination of his circumstances and a possible variation in child support. I repeat that it is simply unacceptable to countenance the Applicant having gone through all of this only to see it disappear or substantially disappear in legal fees. This concern outweighs any remote chance that an award in this unique circumstance might put upward pressure on legal costs in family matters.

DECISION

26. The Applicant is to be reimbursed for all of her reasonable, actual costs for legal fees and disbursements, with some exceptions:

-Firstly, the Applicant enrolled the child in the private school even though I had cautioned her that in a joint custody situation she did not have the right to do so over the objection of the other parent. It turns out that this probably was the

right decision for the child, and the Respondent ultimately agreed. However, in my opinion the parties should bear their own costs in the matter of the Respondent's application to have the child returned to his home town. The Respondent has paid for the child to be assessed in relation to that application and I will let that stand.

-Secondly, as success was mixed on the subject of 'section 7' expenses, the parties should bear their own costs on this issue.

-Thirdly, costs related to the appeals of the suit costs orders, per Civil Procedure Rule 63:08, either have been or will be dealt with by the Court of Appeal.

-Fourthly, I will order that the Applicant be awarded full reimbursement for disbursements, but discount the $8,000 previously awarded with respect to the expert evidence.

-The final exception is that the initial award of $6,000 in suit costs, which has been paid, is to be deducted from any costs award.

27. The problem is that only the bare bones total figure presented by counsel for the Applicant is before the court. I can't tell if the account is reasonable although I am not surprised, given the history, that it is high. I don't know Mr. Schumacher's hourly rate, or what portion of the total might be attributable to the items I have excluded from what should be reimbursed. I am loathe to protract this thing any longer but I simply can't make a costs award on the basis of the information before me. Justice Saunders, then of the Supreme Court, in **Landymore et al v. Hardy et al** (1992), 112 N.S.R. (2d) 41, wrote, in paragraph 18, that the solicitor seeking costs, (in that case party and party costs), should file an affidavit detailing the fees and what they were for in order for him to be able to determine and amount for

"substantial contribution". I would refer counsel as well to Civil Procedure Rule 63.27 which requires the filing of a copy of the bill for costs.

28. I direct that the solicitor for the Applicant, within two weeks from the date hereof, to submit a detailed accounting of his bill deleting any claims for areas that I have identified in paragraph 26 as not being recoverable. Counsel for the Respondent shall have two weeks after that to respond, and I'll give a further week for a reply from counsel for the Applicant. I will then make an order the intent of which will be to have the Respondent pay for the reasonable fees and disbursements for the areas not exempted.

29. Order accordingly.

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Bob Levy, J.F.C.