FAMILY COURT OF NOVA SCOTIA
Citation: *D.L.M.. v. D.R.W.*, 2016 NSFC 28

Date: 2016-05-20
Docket: Antigonish No. 097303
Registry: Antigonish

Between:

D.L.M.

Applicant

v.

D.R.W.

Respondent

Judge:	The Honourable Judge Timothy G. Daley
Heard:	January 21 and March 4, 2016, in Pictou, Nova Scotia
Decision:	May 20, 2016
Counsel:	Karen Killawee, for the Applicant Adam Rodgers, for the Respondent

[1] This is a decision on costs in this matter following hearing that took one and a half days to complete. This consisted of one day trial time and one half day for an oral decision in the matter.

[2] The court's authority to award cost was summarized by Levy, J.F.C. in *D.M.T.C. v. L.K.S.* 2007 NSFC 35 at paragraph 3:

> 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.

[3] The relevant current *Civil Procedure Rule* is Rule 77 which states in part:

> **Scope of Rule 77**
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> **77.01 (1)** The court deals with each of the following kinds of costs:
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> (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.
>
> …
>
> **General discretion (party and party costs)**
>
> **77.02 (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.
>
> …

Assessment of costs under tariff at end of proceeding

77.06 (1) 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 77.

(2) Party and party costs of an application in court must, unless the judge who hears the application orders otherwise, be assessed by the judge in accordance with Tariff A as if the hearing were a trial.

(3) Party and party costs of a motion or application in chambers, a proceeding for judicial review, or an appeal to the Supreme Court of Nova Scotia must, unless the presiding judge orders otherwise, be assessed in accordance with Tariff C.

[4] In *Gomez v. Ahrens* 2015 NSSC 3, Justice Beryl MacDonald of the Family Division, summarized some of the applicable case law at paragraphs 16 and 17:

> [16] At one time it was generally considered inappropriate to grant costs in cases involving custody of or access to children. That no longer is accepted as a general rule. Costs have long been considered as a deterrent to those who would bring unmeritorious cases before the Court. Many parents want to have primary care or at the very least shared parenting of his or her children but that desire must be tempered by a realistic evaluation about whether his or her plan is in the best interest of the children. The potential for an unfavorable cost award has been suggested as a means by which those realities can be bought to bear upon the parent's circumstances. Nevertheless there will always be cases where a judge will exercise his or her discretion not to award costs.
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> [17] Some of the more common principles that guide decision making in cost applications are found in *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; *Urquhart v. Urquhart* (1998), 169 N.S.R. (2d) 134 (T.D.)); *Jachimowicz v. Jachimowicz* (2007), 258 N.S.R. (2d) 304 (T.D.). My summary of the principles relevant to this case are that:
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> 1. Costs are in the discretion of the Court.
>
> 2. A successful party is generally entitled to a cost award.
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> 3. A decision not to award costs must be for a "very good reason" and be based on principle.
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> 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".
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> 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.Q. v. P.L.T.* 2005 NSFC 27:
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> "Courts are also mindful 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". In such cases, fairness may dictate that the successful party's recovery of costs not be thwarted by later pleas of inability to pay. [See *Muir v. Lipon*, 2004 BCSC 65]."
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> 7. The Tariff of Costs and Fees is the first guide used by the Court in determining the appropriate quantum of the cost award.
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> 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 the 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".
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> 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".
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> 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.
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> 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.
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> 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.

[5] As with all decisions regarding costs, the necessary first step in the analysis is to determine whether there has been a successful party and, if so, which party that is. Determining success in any civil litigation matter is often a nuanced exercise. In family law cases, parties often contest various issues in including custody, access, child support and spousal support and within each of those issues the parties will take various positions. For example in a custody dispute one party may seek sole custody with supervised access. That party may be successful on the

sole custody claim but unsuccessful on the supervised access claim. Thus, overall success or failure of a party for purposes of determining costs usually and necessarily involves an analysis of all of the issues at play at the hearing and the relative level of success or failure of each party both on individual issues and in the overall context of the matters before the court.

[6] In this matter, the respondent D.R.W. took the position both before and throughout the hearing that all issues concerning spousal support, including entitlement, quantum and duration were contested. He maintained that he did not owe any spousal support to D.L.M. The applicant, D.L.M., maintained that she was entitled to spousal support, that it would be based on either or both of compensatory or non-compensatory principles, that it should be at the high end of the amount recommended under the *Spousal Support Advisory Guidelines* (*SSAG*) and that it should be of indefinite duration.

[7] On the issue of a retroactive spousal support, D.R.W. took the position that he should not have to pay any whatsoever both because he opposed any finding of entitlement to begin with and, secondarily, because he said he maintained that the matrimonial home at his own expense after separation and this should effectively set off any claim for such retroactive support.

[8] D.L.M. argued that she was entitled to a retroactive spousal support and that it should be effective as of the date of separation, which was agreed to be September 2013, through to the date of hearing.

[9] The final issue in dispute in the hearing was that of retroactive child support. D.R.W. denied that he owed any and opposed D.L.M.'s position that retroactive child support was due and owing. It was a not until the hearing was completed and before final submission that D.R.W. conceded that issue and an amount was agreed upon between the parties.

[10] At the end of the hearing, counsel for D.R.W .put on the record that he had changed his position with respect to spousal support entitlement and conceded that issue in submission. With that concession, D.R.W. argued that any claim for spousal support be based on non-compensatory principles and that the duration should be set at 12 1/2 years. D.R.W. argued that he should be credited with 2 1/2 years spousal support based on his maintenance of the matrimonial home since separation in September 2013. He further argued that the quantum of support should be at the lowest end of the recommended range under the *SSAG*.

[11] In my decision I found that entitlement was clearly made out and that spousal support was founded on both compensatory and non-compensatory grounds. I went on to find that spousal support in the amount of $1000 would be payable on an indefinite basis, subject to review. Retroactive support was awarded in the total amount of $12,000 which, based on the monthly award, meant that it will be for a period predating the date of the application but after the date of separation.

[12] Given those findings, it is clear that D.L.M. is the successful party in this matter. While she did not obtain the full relief sought, she was successful in almost every respect. The only reason which she failed to achieve full result was her request for a quantum of support at the highest end of the range under the *SSAG* and her request for retroactive support back to the date of separation.

[13] Having determined the successful party, costs will be awarded to D.L.M. and payable by D.R.W.as there is no good reason for such costs to be denied.

[14] I further find that there is nothing in the position or behavior of D.L.M. that would suggest that costs should be denied or reduced. She was timely in her disclosure and filing obligations throughout and there is no evidence before me to suggest that she unnecessarily increased cost to either party.

[15] On the other hand, D.R.W. did, at times, conduct himself in ways that unnecessarily delayed and increased the costs of these proceedings. Specifically, the initial hearing date for this matter was scheduled for November 3, 2015. Deadlines for disclosure were provided by the court to the parties in an appearance on September 15, 2015. At that time, D.R.W. was directed to file his full financial disclosure as well as further clarification of the disclosure already provided. His initial disclosure indicated an income of the approximately $76,000 per year and later it was determined that his income was over $100,000 that year and the previous year.

[16] Despite the filing deadlines having been set, D.R.W. failed to meet the deadline as of the date of hearing and the hearing had to be postponed as a result.

[17] A conference call was arranged between counsel and the court on October 28, 2015 at which time a new hearing date was set for January 18, 2016 and counsel for D.R.W. was informed that his client’s updated and sworn financial statement was due to be filed by November 12, 2015. Further, his affidavit was to be filed by December 10, 2015. It was clarified with D.R.W.’s counsel that certain

other financial information was to be obtained and disclosed as part of his filings. This telephone conference was reduced to writing in the form of the pretrial memorandum and, pursuant to Family Court Rule 11.01, became an order of the court.

[18] Despite the clarity of that order, D.R.W. again failed to meet the deadline for his filings. As a result, a further adjournment of the hearing was required. Another pretrial conference call was required the matter was scheduled for January 21, 2016. The reply affidavit of D.L.M. was rescheduled for filing by January 20, 2016.

[19] As well, it is relevant that D.R.W. maintained his position opposing entitlement to spousal support both before and during the hearing and only conceded the issue after the hearing and before summation. While I cannot say that maintaining that position, which I find was unreasonable in all of the circumstances, added to the hearing time required, it is relevant to the assessment of costs. I have no doubt that by failing to concede that issue, D.R.W. increased D.L.M.'s legal costs by some amount as her counsel had to prepare to address that issue at the hearing.

[20] D.R.W.' position on the issue of retroactive child support would have added cost to D.L.M. in preparation for addressing the issue at hearing as well. I find that the issue was clearly before the court and should have reasonably been conceded without the use of a hearing time to address the issue well before the hearing took place. D.R.W. only conceded the after the hearing and before summation.

[21] D.L.M. seeks party and party costs. As a result, I must refer to the tariff of costs and fees contained within the *Civil Procedure Rules* and in doing so must determine the "amount involved". Given that a component of this claim was ongoing spousal support which I determined to be for an indefinite period, determining the amount involved is difficult notwithstanding the other awards of retroactive child and spousal support made.

[22] I therefore find it reasonable and necessary to apply the "rule of thumb" identified by Justice McDonald in *Gomez* supra of $20,000 for each day of trial.

[23] The determination of days of trial is discretionary as well. The matter was set for and took one half day of hearing time. In addition, the parties returned for final submission for a one half day. I find it reasonable and necessary to also account for the additional time taken to deal with D.R.W.'s failure to disclose and

file his financial information and affidavit in a timely fashion, the resulting two adjournments of the hearing and the time it took to deal with those delays and necessary rescheduling on two occasions. I will therefore add an additional one half day to my assessment of the amount involved in the matter for a total of 1 1/2 days.

[24] Applying the rule of thumb amount of $20,000 per day, the total over the amount involved I find to be $30,000.

[25] I therefore apply Tariff A from the *Civil Procedure Rules* to the amount involved of $30,000 and determine the basic scale cost amount of $6,250. Given that I have already taken into account the behavior of D.R.W.in assessing an additional one half day to the analysis of the amount involved, I will not increase costs further. The total cost were will therefore be $6,250 and will be payable forthwith by D.R.W.to D.L.M.

[26] I had asked counsel to discuss an appropriate arrangement for the payment of the retroactive spousal support, child support and medical costs and if they were unable to agree to terms for payment of same, they were to provide written submission to the court on the issue. Counsel for D.L.M. has done so. Counsel for D.R.W. has not

[27] In the event the parties have not agreed on the payment schedule for these amounts, which total $18,894, I further order that any tax refund obtained for the taxation year 2015 by D.R.W. will be applied forthwith to these amounts and will therefore be payable directly to D.L.M.. Any remaining amount will be payable in equal instalments over a 12 month period commencing June 1, 2016.

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Daley, J.