FAMILY COURT OF NOVA SCOTIA
Citation: *K.F. v. M.C.*, 2017 NSFC 3

Date: 20170209
Docket: FPICMCA-075854
Registry: Pictou

Between:

K.F.

Applicant

v.

M.C., E.L. & D.L.

Respondents

Editorial Note: Identifying Information has been removed from this electronic version of the judgment.

Judge:	The Honourable Judge Timothy G. Daley
Heard:	January 27, 2017 in Pictou, Nova Scotia
Decision:	February 9, 2017
Counsel:	K.F., for the Applicant, self-represented Jack Haller, for the Respondents, E.L & D.L.

[1] This is a decision on costs following an unusual hearing. The applicant father, K.F., was self-representing and applied to vary an order which had placed his child with a grandparent and that grandparent's spouse, E.L. and D.L., in Alberta after a child protection proceeding. K.F. sought primary care of the child in Nova Scotia. M.C. did not participate in the proceedings.

[2] The hearing commenced and was terminated when K.F., while being cross-examined by counsel for the respondents, sought to withdraw his application.

[3] Based upon this change, I dismissed the application and heard D.L. and E.L. on costs. Counsel for the respondents informed the court that he had cautioned K.F. about one week prior that if his clients were successful on the application, he would be seeking costs of $5,000 in the matter. K.F. agreed that he had been so cautioned.

[4] I allowed K.F. one week to make written submission on costs. He did so and explained that if costs of $5,000 were awarded it would impose a serious financial burden on him as the main provider in a household of four. He did not provide any evidence of his expenses but maintained that if such costs were imposed, he would not able to afford the child support he is ordered to pay until the costs were addressed.

Law on Costs

[5] The Family Court's authority to award costs was summarized by Levy, J.F.C. in *D.M.T.C. v. L.K.S.* 2007 NSFC 35 at paragraph 3 as follows:

> 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.

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

Scope of Rule 77

77.01 (1) The court deals with each of the following kinds of costs:

(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.

…

In these tariffs unless otherwise prescribed, the "amount involved" shall be

…

(c) where there is a substantial non-monetary issue involved and whether or not the proceeding is contested, an amount determined having regard to

(i) the complexity of the proceeding, and

(ii) the importance of the issues;

[7] In *Gomez v. Ahrens* 2015 NSSC 3, MacDonald J. 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.
>
> 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, 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".
>
> 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:

> 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].
>
> 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.
>
> 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] In the decision of *Moore v. Moore*, 2013 NSSC 281 Jollimore J. provided helpful comments on the consideration of the complexity of the proceeding and the importance of the issues when she wrote:

> [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.

[6] It is also important to note that though proceedings in Family Court are generally considered applications, I adopt the reasoning of Jollimore, J. in *Moore* supra at paragraph 14 when she addressed the applicability of Tariffs C or A to applications in the Family Division:

> [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.

[7] Fichaud, J.A. on behalf of our Court of Appeal in *Armoyan v. Armoyan*, 2013 NSCA 136 also noted and adopted the following:

> [20] Justices of the Family Division have stated that trial-like hearings in matrimonial matters are more appropriate for Tariff A than Tariff C: Hopkie v. Hopkie, 2010 NSSC 345, para 7, per Gass, J.; MacLean v. Boylan, 2011 NSSC 406, paras 29-30, per Jollimore, J.; Kozma v. Kozma, 2013 NSSC 20, para 2, per MacDonald, J.; Robinson v. Robinson, 2009 NSSC 409, para 10, per Campbell, J..

[8] I find that there is no difference in proceedings in the Supreme Court Family Division and the Family Court and I will apply Tariff A to such proceedings.

Analysis

[9] 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 this matter, the analysis in this case is simple; D.L. and E.L. were fully successful as K.F. sought to withdraw his application mid-hearing.

[10] Having determined this, costs will be awarded to D.L. and E.L. payable by K.F. as I find there is no good reason for such costs to be denied.

[22] I further find that there is nothing in the position of behaviour of either party that would suggest the costs should be denied or reduced. Each was timely in disclosure and filing obligations throughout and there is no evidence before me to suggest that either party unnecessarily increased costs.

[23] D.L. and E.L. seek costs and I infer from counsel's submission that they are seeking 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 the primary issue before me was the custodial and parenting arrangements for the child, determining the amount involved is difficult.

[24] I therefore begin with the "rule of thumb" identified by MacDonald J. in *Gomez* (supra) of $20,000 for each day of trial. I must also consider the complexity and importance of the matter. As noted in *Moores* supra, all family matters are important to some degree but matters involving custody and parenting arrangements as well as child maintenance are common. I find there was nothing particularly complex about this matter and, though it was important to the parties, it was not of such importance that it warrants a substantial award of costs for that reason.

[25] Taking all of this into account, I calculate costs contemplated in Tariff A based on the rule of thumb amount involved of $20,000. I will apply scale 2 (basic) and award $4,000. To this must be added an additional $2,000 based on the length of trial which I determine to be one day. Thus, the costs calculation is $6,000.

[26] Having calculated the costs in accordance with the tariff, I do find I have discretion in appropriate circumstances to vary that amount. In this case, K.F.

sought to withdraw his application during the hearing, reducing the actual hearing time required. He says that costs will be a burden to his family. He is paying child support. While costs should be and are awarded routinely in Family Court, I do find that, in all of the circumstances, a fair and reasonable award of costs in this matter is $4,000. I will allow K.F. to pay these costs in equal monthly installments of $125 until paid in full. Such payments shall commence on March 1, 2017 and continue to be paid on the first day of each month thereafter. If K.F. fails to make each payment in a timely fashion, the entire unpaid balance shall be due and payable forthwith.

[27] Counsel for D.L. and E.L. shall draw the costs order.

Timothy G. Daley, JFC