FAMILY COURT OF NOVA SCOTIA
Citation: *A.J. v. K.M.*, 2017 NSFC 20

Date: 2017-08-01
Docket: Pictou No. FPICMCA98586
Registry: Pictou

Between:

A.J.

Applicant

v.

K.M.

Respondent

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

Judge: The Honourable Judge Timothy G. Daley

Heard: February 1, 8 and 15, 2017 in Pictou, Nova Scotia

Final Written Submissions: March 9 and 31, 2017

Counsel: Ellen Burke, for the Applicant
Dianne Paquet, for the Respondent

INTRODUCTION

[1] This is a decision on costs following an initial emergency hearing and a three-day final hearing. The final hearing was the last step in a lengthy process that took approximately 14 months to complete.

[2] This matter began when the mother permanently relocated with the child from Nova Scotia to Ontario without the father's consent. The father brought an emergency application before this court, with notice to the mother, seeking the return of the child to Nova Scotia pending a final hearing. The mother did not participate in that hearing. This Court heard the evidence and rendered a written decision ordering the child to be returned to Nova Scotia, finding that Nova Scotia was the appropriate jurisdiction for determination of matters concerning the child and setting out terms of a parenting arrangement on an interim basis pending final disposition.

[3] The mother made two applications in Ontario seeking an order that the child remained in Ontario with her and in her sole custody. Initially, the mother's Ontario application was granted on an *ex-parte* basis but, after this Court's written decision on the emergency application was released, further process in Ontario ensued. This included videoconference appearances by this court with the Ontario court, a settlement conference in Ontario and a hearing in that jurisdiction. That resulted in the original Ontario order being set aside and the mother being ordered to return the child to Nova Scotia which she did. The Ontario court also awarded costs against the mother in the amount of $3,000.

[4] At the first subsequent appearance in Nova Scotia an interim order of joint custody and shared parenting was put in place and it remained in place until the final hearing.

[5] Throughout this matter, the core issue was mobility, that is the mother's request to permanently relocate the child with her to Ontario. Related to this were issues of custody, parenting time, imputation of income, prospective and retroactive child support and prospective and retroactive spousal support. Each issue was resolved in the written decision of this Court.

[6] Each party is now seeking costs against the other. The mother seeks costs of $15,000 plus disbursements of $3,214.31 plus HST. The father seeks costs of $10,000.

Law on Costs

[7] The Family Court's authority to award costs is found in the Family Court Rules, N.S. Reg 20/93 and specifically rule 21.01 which reads:

> **(1)** The amount of costs is awarded at the discretion of the judge.
>
> **(2)** Costs may be collected in accordance with the procedure provided for collection of support or in any other manner that the court directs.
>
> **(3)** Costs, at the discretion of the court, may be payable to the court, the party, the party's counsel or any other person that the court directs.
>
> **(4)** Costs, at the discretion of the judge, may be payable to the court, the party, the party's counsel or any other person that the judge directs.

[8] This authority was summarized by Levy, J.F.C. in *D.M.T.C. v. L.K.S.* 2007 NSFC 35 at paragraph 3 (where he was referring to the prior provisions of the rules) 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...". … 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) *(now Rule 21.01)* 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.

[9] 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;

[10] 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.

[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:

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.

> 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".
>
> 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".
>
> 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.
>
> 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.

[11] 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.

[12] 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 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.

[13] Fichaud, J. 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..

[14] I find that there is no difference in proceedings in the Supreme Court Family Division and the Family Court.

Analysis

[15] 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 including custody, access, child support and spousal support. 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 the issues in 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.

[16] In this matter, the father was successful on the issue of mobility, both at the interim emergency stage and in the final hearing. Though I expressed some empathy for the mother's motivation in seeking relocation, including her concern regarding a history of family violence, I ultimately concluded that it would not be in the child's best interests to permit the permanent relocation.

[17] As to custody, the mother sought sole custody and the father sought joint custody. I concluded that it was in the child's best interest to put in place an order of joint custody. The father was therefore successful on this issue.

[18] Respecting primary care and residence, the father sought to continue the shared parenting arrangement that was put in place on an interim basis and the mother sought primary care and residence of the child with her. I granted the mother primary care and residence of the child. The mother was therefore successful on this issue.

[19] Respecting parenting time, the father was awarded a familiar pattern of time with the child. This is a mixed result as the mother sought relocation and the father sought a shared parenting arrangement.

[20] Regarding the income of the father, the mother argued that his income should be imputed at an amount greater than he was receiving. I declined to impute additional income to the father. This decision applied to income for the father for child and spousal support. Therefore, the father was successful on this issue.

[21] This determination on income led to a child support order based on the income claimed by the father which was less than the child support sought by the mother based on the higher imputed income. Therefore, the father was successful on this issue.

[22] Respecting the mother's claim for retroactive child support, this was declined.

[23] Respecting spousal support, both parties agreed it was payable. The dispute was the quantum and duration of such support. The father argued that appropriate spousal support would be at between $698 and $857 per month for a limited period of time. The mother sought spousal support of between $2,000 and $2,600 per month for between 3.5 and 14 years. I ordered spousal support of $1,050 per month on an indefinite basis and subject to review based on a material change in circumstances. This represents a mixed result for both parties. The quantum is closer to that argued by the father and the duration is more favorable to the mother's position.

[24] I declined the mother's claim for retroactive spousal support.

[25] As with many cases before the Family Court, the overall results are mixed as each party succeeded on some claims and failed on others. As well, there was mixed result respecting spousal support.

[26] That said, I find that the father was more successful than the mother with respect to his various positions, particularly on the primary issue with mobility. He was likewise successful on issues of custody, imputation of income, prospective and retroactive child support and prospective and retroactive spousal support.

[27] The mother was successful regarding the parenting arrangement which provide a primary care of the child with her. She was somewhat successful on the claim for prospective spousal support with respect to the duration of that payment.

[28] Having determined that the father was largely the successful party, I further find that there is nothing in the behaviour of the father that would suggest the costs should be denied or reduced. He was timely in filing obligations throughout the process and there is no evidence before me to suggest that he unnecessarily increased cost to either party.

[29] On the other hand, the mother did, at times, conduct herself in ways that unnecessarily delayed and increased the cost of these proceedings. Specifically, her removal of the child from Nova Scotia without the father’s consent, her failure to participate in the initial emergency hearing and her subsequent applications in Ontario significantly delayed the proceedings. That said, costs have already been awarded against her in the Ontario Court in the amount of $3000 which, in part, addresses those delay issues.

[30] In this circumstance, I find it appropriate and necessary to award costs to the father, payable by the mother, based on his greater level of success on the issues before the court and I can find no "very good reason" to not award such costs based on any principal.

[31] The father seeks party and party costs. I find it necessary to refer to the tariff of costs and fees contained within the *Civil Procedure Rules* and in doing so I must determine the "amount involved". I find that determining the amount involved is difficult in this case given the nature of the issues at play, including mobility, custody and parenting time. As well, the financial components of the claims, specifically child and spousal support, are payable over time and impossible to fully quantify as a result.

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

[33] The determination of days of trial is discretionary as well. The initial emergency application took 1 to 2 hours of hearing time. The final hearing took between two and three days and final written submissions followed. Considering these factors, I find that the total time involved to deal with the matter was three full days and applying the rule of thumb amount of $20,000 per day, the total amount involved I find to be $60,000.

[34] Applying tariff A from the Civil Procedure Rules to the amount involved of $60,000, I determine the basic scale cost of $7,250. To this must be added $2,000 per day of trial for a total of $13,250.

[35] I consider two further factors. First, the mother is subject to a cost award from Ontario of $3,000 which I have found addresses some of the delay issues.

[36] Second, the mother has modest income and, though she is responsible for some delay in the matter, I have considered her financial circumstances and the effect a cost award will have on her ability to provide for the child. Considering all of this, I award costs payable by the mother to the father in the amount of $6,000. These costs are payable in monthly installments of $250 due on the first of each month commencing September 1, 2017 until the cost award is satisfied. If the mother fails to pay in accordance with this schedule, the full amount of costs remaining will be due and payable forthwith and will be an amount collectable and enforceable through the Maintenance Enforcement Program.

[37] Counsel for the father will draw the costs order.

Daley, JFC