SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: Tamlyn v. Wilcox, 2010 NSSC 363

Date: 2010 10 07
Docket: SFHMCA-064146
Registry: Halifax

Between:

Matthew Tamlyn

Applicant

v.

Jennifer Wilcox

Respondent

Judge:	The Honourable Justice Leslie J. Dellapinna
Heard:	Written Submissions received on behalf of the Applicant on July 12, 2010 and on behalf of the Respondent on August 10, 2010.
Counsel:	Deborah Conrad, for the Applicant Alfred Seaman, for the Respondent

By the Court:

[1] The Applicant, Matthew Tamlyn seeks costs from the Respondent, Jennifer Wilcox, following a three day trial which took place in May 2010. The Respondent opposes the application.

[2] The trial involved an application by the Applicant pursuant to the *Maintenance and Custody Act* for custody of the parties' daughter, D.A.C., as well as an order for child maintenance. The Respondent also sought primary care of D.A.C. as well as permission to relocate the child to St. Thomas, Ontario. The application was heard over three days and had been preceded by three interim hearings on May 27, 2009, July 3, 2009 and October 15, 2009, as well as a settlement conference on February 10, 2010 and an organizational pre-trial conference on March 4, 2010.

[3] At the conclusion of the trial I reserved my decision and released a written decision on July 5, 2010. Custody and primary care of D.A.C. was granted to the Applicant subject to the Respondent having access at specified times based on the expectation that she would return to Ontario. No child maintenance was ordered because the Respondent's income was comprised of social assistance and was below the minimal amount required by the Child Maintenance Guidelines before any table amount could be ordered.

[4] The Applicant requests costs in the sum of $22,250.00 and has referred to the decision of Goodfellow, J. in *Urquhart v. Urquhart* (1998), 169 N.S.R. (2d) 134 (N.S.S.C.) and the decision of the Honourable Justice Lynch of this Court in *Jachimowicz v. Jachimowicz,* 2007 NSSC 303 (N.S.S.C. Fam. Div.).

[5] On behalf of the Respondent it is submitted that although costs are generally awarded in favour of the successful party the Court has the discretion to deny costs and it is submitted that this is an appropriate case for costs not to be awarded because:

1. The Respondent raised genuine issues to be tried;
2. The Respondent explored settlement in good faith;
3. Both parties presented a reasonable position and were motivated by their daughter's best interest; and

4. An award of costs would create financial hardship for the Respondent.

[6] The *Nova Scotia Civil Procedure Rules*, with the exception of the rules that relate to family proceedings, came into effect on January 1, 2009 replacing the *Nova Scotia Civil Procedure Rules* (1972). The new rules relating to family proceedings came into effect on June 30, 2010. Rules 92.01 and 92.02 state:

> 92.01 (1) These Rules take effect on June 30, 2010 for a family proceeding and on January 1, 2009 for all other proceedings, except as provided in this Rule 92.
>
> (2) In this Rule, "family proceeding" means a proceeding started under Part 13 - Family Proceedings.
>
> 92.02 (1) Unless this Rule provides or a judge orders otherwise these Rules apply to all steps taken after the following dates in the following kinds of proceedings:
>
> (a) June 30, 2010 in a family proceeding started before that day;
>
> (b) January 1, 2009 in an action started before that day.
>
> (2) The *Nova Scotia Civil Procedure Rules* (1972) apply to all other proceedings started before January 1, 2009 unless a judge orders otherwise.

[7] Therefore, the “new” *Civil Procedure Rules* apply to all family proceedings commenced under Part 13 as well as all steps taken in a family proceeding that was commenced prior to June 30, 2010 unless Rule 92 provides or a judge orders otherwise.

[8] Rule 92.08 states:

> 92.08 (1) A judge who presides at a trial or hearing of a family proceeding started before June 30, 2010 may direct which of these Rules and which of the Rules in the *Nova Scotia Civil Procedure Rules* (1972) apply to the trial or hearing.
>
> (2) A judge who is satisfied that the application of this Rule 92 to a family proceeding started before June 30, 2010, or any other proceeding started before January 1, 2009, causes one party to gain

> an unfair advantage over another party may order either of the following:
>
> (a) these Rules apply to the proceeding, or a part of the proceeding, despite Rules 92.02(2), 92.04, and 92.05(1);
>
> (b) the *Nova Scotia Civil Procedure Rules* (1972) apply to the proceeding, or a part of the proceeding, despite Rule 92.02(1).

[9] I am satisfied that the determination of costs under the 2009 Rules would not cause one party to gain an unfair advantage over the other. Counsel agree. They also agree that the 2009 Rules have caused no major change to the law as it relates to the awarding of costs.

[10] Rule 77.02 provides that costs remain at the discretion of the presiding judge who may make any order about costs as the judge is satisfied "will do justice between the parties". Costs continue to follow the event unless a judge orders or a rule provides otherwise (Rule 77.03(3)).

[11] Rule 77.06 provides that party and party costs of a proceeding are, unless a judge orders otherwise, to be fixed by the judge in accordance with the tariffs of costs and fees determined under the *Costs and Fees Act.*

[12] Rule 77.07(1) provides that a judge who fixes costs may add an amount to, or subtract an amount from, tariff costs. Rule 77.07(2) provides examples of factors that may be relevant in determining whether the tariff cost amount should be increased or decreased. The factors listed in 77.07(2) are not intended to be exhaustive.

[13] In the case now before the Court, the Applicant was largely successful. Although he was not granted any child maintenance because of the low income of the Respondent, he did succeed on the issue that was most dear to both of the parties, i.e., custody of D.A.C. It is for that reason that he believes that he is entitled to the substantial costs that are being sought.

[14] The Respondent does not take issue with the degree of his success. On her behalf it is argued that she acted in what she considered to be in the best interest of the parties' daughter and that she presented genuine issues to be tried. I agree. Although I was not prepared to grant the Respondent custody or even joint custody, I

nevertheless concluded that she too was capable of meeting the needs of D.A.C.. A choice however had to be made and for the reasons stated in my earlier decision I favoured the plan put forward by the Applicant. It cannot be said that the Respondent's position was unreasonable and I am satisfied that her opposition to the Applicant's application was driven by her love for their daughter, her desire to have primary care of D.A.C. and her genuine belief that her plan was in D.A.C.'s best interest.

[15] The Respondent also argues that an award of costs, particularly one as high as that sought by the Applicant, would cause her financial hardship. At the time of the trial the Respondent supported herself with income from Social Assistance. While it is not in evidence, I have been told by her counsel that she is still not employed and is relying largely on the generosity of her mother for her financial support.

[16] The Respondent has two other children who rely, in part, upon her support.

[17] Costs are in the discretion of the judge and generally speaking costs are awarded to the successful party. There are however exceptions to the general rule. As stated by Hallett J. (as he then was) in *Bennett v. Bennett* (1981), 45 N.S.R. (2d) 683 (T.D.):

> Costs are a discretionary matter. It is normal practice that a successful party's entitled costs should not be deprived of the costs except for a very good reason.

[18] And as stated by MacDonald J. A. in *Kaye v. Campbell* (1985), 65 N.S.R. (2d) 173 (A.D.) "such reason must be based on principal".

[19] While I have concluded that it would be appropriate for costs to be awarded in favour of the Applicant, I am not prepared to order the full tariff amount for the reasons that follow:

1. The tariff costs sought by the Applicant ($22,250.00) would cause the Respondent considerable financial hardship. She is not employed and has no ability to pay such a sizable cost award. It would be years before she would have any reasonable hope of retiring that amount. Impecuniosity has long been a factor that has been considered in reducing or denying an award of costs. See for example *Kaye v.*

Campbell (*supra*) and *Paquet v. Clarke* 2005 NSSF 4. While impecuniosity is not a shield to a cost award it is a factor to be considered;

2. It would not be in the best interest of D.A.C or the Respondent's other children (from a previous relationship). Such an award would limit her ability to exercise access because of its probable impact on her ability to pay for access costs. Payments toward such a cost award would also limit her already modest ability to financially support her two older children;

3. The Respondent's position at trial was not frivolous. She had a genuine chance at success. As stated by Justice Jollimore of this Court in *Goodrick v. Goodrick*, 2009 NSSC 119 (CanLII), costs should not deter litigating a legitimate *bona fide* claim; and

4. To a lesser extent, the less than complete success of the Applicant.

[20] After considering all the circumstances I believe costs of $2,500.00 inclusive of disbursements would be appropriate and that amount is therefore ordered.

J.