SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: Bruno v. Keinick, 2012 NSSC 434

Date: 20121221
Docket: 1206-004799
Registry: Sydney

Between:

Maureen Adele Bruno

Applicant

v.

Paul Anthony Keinick

Respondent

Judge:	The Honourable Justice Theresa M. Forgeron
Heard:	July 12 and 13, 2012 and September 12, 2012, in Sydney, Nova Scotia
Written Submissions on Costs received:	October 5, and October 22, 2012
Written Decision:	December 21, 2012
Counsel:	Jennie Donnelly McDonald, for the applicant Paul Anthony Keinick, unrepresented

By the Court:

[1] **Introduction**

[2] A variation application on parenting and maintenance issues was heard on July 12 and 13, 2012. The oral decision was rendered on September 21, 2012; the written decision on October 10, 2012. The written decision is reported at 2012 NSSC 336. The parties were invited to make submissions on costs. These submissions were received on October 5 and October 22, 2012.

[3] **Issue**

[4] What is the appropriate cost award?

[5] **Analysis**

[6] *Position of Maureen Bruno*

[7] Ms. Bruno argues against an award of costs for a number of reasons, including the following:

- The issues were litigated because each party sincerely believed that each of their positions was in the best interests of Dakota.
- Ms. Bruno followed both the letter and spirit of the court order after being found in contempt. The contempt decisions are reported at 2012 NSSC 140 and 2012 NSSC 218.
- Ms. Bruno has shown a greater ability to be cooperative in resolving access issues following the contempt finding. In contrast, Mr. Keinick's actions were often not directed towards an amicable resolution.
- Success was mixed.
- Ms. Bruno was successful in her claim for retroactive child support.

- Although Ms. Bruno was not awarded section 7 expenses, her position was nonetheless reasonable. Ms. Bruno should not be penalized for litigating a child support issue.

- Ms. Bruno and Mr. Keinick resolved many of the access issues prior to the court hearing because of the report of Dr. Landry. Both parties were successful on the access issue.

- Ms. Bruno has limited income and is primarily responsible for Dakota's welfare. Ms. Bruno does not have an ability to respond to a cost award.

- Ms. Bruno did not believe that she would ever have to contribute to the cost of the parental capacity assessment. The parental capacity assessment was produced at a cost of $5,500.

- Mr. Keinick is in a stronger financial position than is Ms. Bruno. He is the party who should bear this expense.

- The parental capacity assessment provided a successful framework that improved the family dynamic.

- Ms. Bruno is not seeking costs because she is represented by Nova Scotia Legal Aid.

[8] *Position of Mr. Keinick*

[9] Mr. Keinick seeks costs in the amount of $13,402. His principle reasons in support of this request are outlined as follows:

- Mr. Keinick was substantially successful on the parenting issue.

- Mr. Keinick was completely successful on the section 7 activity claim. He had agreed to pay the orthodontic expense before the trial.

- Ms. Bruno was only partially successful on the issue of retroactive support. The court awarded 73% of the retroactive amount that Ms. Bruno claimed.

- Mr. Keinick acted reasonably and did not engage in inappropriate conduct.

- Disbursements included $5,500 for the parental capacity assessment. The parental capacity assessment largely supported Mr. Keinick's position.

- Other disbursements included $1,740 for travel and lost opportunity time for Mr. Keinick.

[10] **Law**

[11] Rule 77 provides the court with the authority to award costs. In **Harris v. Harris**, 2011 NSSC 418, MacDonald J. reviewed cost principles at para. 3, and states as follows:

> Several principles emerge from the Rules and the case law:
>
> 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, impecuniosity of the parties, 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 or reduce a cost award to an otherwise successful party.
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> 5. The amount of a party and party cost award should "represent a substantial contribution towards the reasonable expenses of presenting or defending the proceeding, but should not amount to a complete indemnity".
>
> 6. The tariff of costs and fees is the first guide used by the Court in determining the appropriate quantum of the cost award.

> 7. 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 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".
> 8. 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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> 9. If the award determined by the tariff does not represent a substantial contribution towards the 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.
>
> 10. 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] In addition to these principles, the issue of a successful or substantially successful self-represented litigant must be addressed because Mr. Keinick was not represented. In **Crewe v. Crewe**, 2008 NSCA 115, Roscoe, J.A. confirmed that costs are appropriately awarded to successful self-represented litigants. Although self-represented litigants are entitled to costs, such costs are not to be calculated on the same basis as costs for litigants who retain counsel.

[13] I have also considered the instructive and detailed analysis of Price, J. in **Jahn-Cartwright v. Cartwright**, 2010 ONSC 2263 on the issue of costs where the successful party was self-represented.

[14] Further, unsuccessful litigants who are represented by legal aid are not immune to a cost award: **S. v. M.** (1996) 157 N.S.R. (2d) 156 (C.A.); and **Leigh v. Milne**, 2010 NSCA 36.

[15] **Decision**

[16] I have determined that Ms. Bruno must pay Mr. Keinick costs in the amount of $6,000 for the application to vary. The following discussion outlines my reasons for this cost award.

[17] The variation application involved three discrete issues - parenting, retroactive child support, and section 7 activity expenses. Each of these issues were important to Dakota's welfare.

[18] The monetary issues were neither complex, nor difficult. Ms. Bruno was substantially successful on the retroactive child support issue, while Mr. Keinick was wholly successful on the section 7 activity expenses. Little court time was utilized in the determination of the monetary issues.

[19] The parenting issues, in comparison, were complex and difficult. Litigation was necessary to secure the best interests of Dakota. The litigation involved more than a simple alteration of the access regime. This case involved a high conflict dynamic. The court found that Ms. Bruno was largely responsible for the parental acrimony, and that Mr. Keinick and his wife played only a minor role by occasionally engaging in inappropriate reactive responses.

[20] The court found that Dakota adopted harmful coping strategies, including reconstructing her memories because of the loyalty conflict that she was experiencing. In addition, the court found that Ms. Bruno engaged in both direct and indirect methods of manipulation. Further, the court found that Ms. Bruno lacked the requisite insight to fully appreciate the problems that the dysfunctional mother/daughter enmeshment was having on Dakota.

[21] In contrast, the court found that Mr. and Mrs. Keinick were appropriate and excellent parents. Their home was welcoming, nurturing, and child focussed. There were no health or safety issues. Mr. Keinick was found to have significant insight into the problems, and was measured in his responses on most occasions.

[22] Mr. Keinick was largely successful in respect of the parenting issue. The monetary issues dwarfed in comparison to the importance, complexity, and difficulty of the parenting issue.

[23] The trial took two full days in July and 1.5 hours for the oral decision on September 21. I have referenced party and party costs based on Scale 2, which must be discounted because Mr. Keinick was self-represented. The amount involved is $40,000 based on the rule of thumb.

[24] Mr. Keinick was not obstructive, vexatious, or oppressive. He did not engage in misconduct.

[25] Mr. Keinick was generally well-prepared and concise. His documents were generally appropriate and timely. Ms. Bruno's counsel was likewise well-prepared and concise. Her documents were generally appropriate and timely.

[26] The parental capacity assessment was necessary to the court's determination. The parental capacity assessment was discussed and ordered, by consent, during the pretrial conference held on November 17, 2011. The court broached the issue with the parties because Ms. Bruno wanted to introduce hearsay comments from Dakota as proof of the statements made. According to Ms. Bruno, these statements were made to her and a doctor. Given this context, the court asked the parties if they would be interested in having a parental capacity assessment completed by a child psychologist. Both parties agreed.

[27] Ms. Bruno's understanding of the cost implications of a Supreme Court hearing was inaccurate. Ms. Bruno understood that she was immune from a cost award as it related to the parental capacity assessment. It is unfortunate that she harboured such an erroneous view. Ms. Bruno's misunderstanding does not impact upon the court's authority to award costs, including a partial indemnification towards the costs of the parental capacity assessment.

[28] Costs should be awarded to Mr. Keinick in these circumstances. The cost award has been discounted for three reasons. First, Mr. Keinick was not successful on the retroactive child support issue, and not wholly successful on the parenting issue. Second, Ms. Bruno's financial circumstances are difficult. Third, Mr. Keinick did not retain a lawyer.

[29] **Conclusion**

[30] Costs in the amount of $6,000 are payable by Ms. Bruno to Mr. Keinick taking into account the factors addressed in this decision, including the principle of partial indemnity, the success of the parties, the nature of the litigated issues, the financial circumstances of the parties, and the fact that Mr. Keinick was unrepresented.

[31] Counsel for Ms. Bruno will draft the necessary order.

Forgeron, J.