

SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: Hatheway v. Duval, 2012 NSSC 442

Date: 20121219

Docket: SFHMCA-052074

Registry: Halifax

Between:

Keitha Michelle Hatheway

Applicant

v.

Edward John Duval

Respondent

Judge:

The Honourable Justice Beryl MacDonald

Heard:

November 26, 2012, in Halifax, Nova Scotia

Counsel:

Keitha Michelle Hatheway, self-represented;
Edward John Duval, self-represented

By the Court:

[1] On November 26, 2012 I provided an oral decision in this matter requiring Edward Duval to pay table guideline child support retroactively and ongoing commencing January 1, 2011 based upon a total annual income of \$22,600.00. Keitha Hatheway has requested a cost award. She was self represented in this proceeding that started when she filed her Variation Application on November 15, 2011. One of the reasons this matter has taken a year to resolve is Edward Duval's failure to file financial information and affidavit evidence that may have supported his allegation of undue hardship, and assisted in the appropriate calculation of his yearly income. He was given several opportunities to do so and he only marginally complied with the instructions given to him.

[2] Ms. Hatheway requested as "costs" reimbursement of expenditures she has made on behalf of the child. These cannot be reimbursed as part of a costs award. Mr. Duval's contribution to clothing, and school supplies is considered satisfied by payment of his table guideline amount of child support. If additional contribution toward child care is requested, a request for contribution must be made as a "Special and Extraordinary Expense" under the child support guidelines. Moneys paid by Ms. Hatheway to third parties or directly to Mr. Duval for which she seeks reimbursement must be collected through an action commenced in the Small Claims Court for amounts under \$25,000.00.

[3] Ms. Hatheway is requesting reimbursement for lost wages and vacation time.

[4] At one time it was understood that a person who was self represented was not entitled to an award of costs, other than for approved disbursements. This is no longer the case in Nova Scotia. In *McBeth v. Dalhousie College and University* (1986), 26 D.L.R. (4th) 321 Justice Morrison said:

34 I conclude that the practice should be discontinued and that the successful unrepresented litigant should be awarded his or her costs the same as a litigant who is represented by counsel. The appeal, therefore, on the third ground is allowed and I direct that the appellant shall have her costs in this Court and in the Court below to be taxed on a party and party basis in accordance with the tariff as to costs and fees. It may well be that the taxing master will have difficulty in allowing certain costs that would be peculiar to legal counsel. That, however, is a matter that will be determined by the taxing master and perhaps subsequently by the Courts.

[5] The annotation to this decision discusses some of the challenges presented by this decision. I also note that a represented party does not have his or her costs of pursuing the litigation, such as missed time from work, reimbursed.

[6] Whether costs should be granted to a successful party is in the discretion of the trial judge. When exercising his or her discretion the trial judge must consider the provisions of the *Civil Procedure Rules* and principles that have been developed by the court over time to guide the exercise of that discretion. The *Civil Procedure Rules* and the principles developed to guide the exercise of discretion have all considered party and party costs from the viewpoint of the represented litigant. The costs and fees tariff and many of the developed principles do not appear appropriate to an assessment of costs when faced with a self represented litigant. Courts can award costs based upon the trial judges view of what appears fair and appropriate without reference to the tariff.

[7] Costs are awarded to successful party for number of reasons amongst which are:

- to deter frivolous actions and defenses
- to discourage improper and unnecessary steps in the litigation thus encouraging parties to comply with the courts rules and procedures
- to encourage reasonable settlements

[8] However, these goals must be balanced with other goals of the justice system one of which is providing unimpeded access to the courts to those of limited financial means. Costs awards can impede that access.

[9] The factors favoring a cost award in this case relate to the frequent appearances required by Ms. Hathaway caused solely by Mr. Duval's failure to file the documents requested. At the beginning of this matter Mr. Duval suggested he had a case to put before the court that would result in an order for child support in an amount considerably below the amount he would be required to pay under the table child support guideline. He in fact put no case forward because he did not compile the necessary documents to do so. This was entirely within his control. Ms. Hathaway as a result was required to leave her workplace more frequently than should have been necessary if Mr. Duval had been prepared to recognize much earlier that he was required to change the amount of child support based upon the income he earned.

[10] Ms. Hathaway has provided information from her employer about time lost and her rate of pay. Taking this into consideration with the other factors I have discussed I award costs in the amount of \$500.00 which, because they were incurred in order to collect child maintenance, will be collected by the Maintenance Enforcement Program.

Beryl MacDonald, J.S.C.