SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION
Citation: *Illingworth v. Illingworth*, 2020 NSSC 371

Date: 2020-12-17
Docket: 1201-71561
Registry: Halifax

Between:

Patricia Blaire Illingworth

Petitioner

v.

Douglas James Illingworth

Respondent

Decision

Judge:	The Honourable Justice Theresa Forgeron
Costs Submissions:	October 29 and December 15, 2020
Decision:	December 17, 2020
Counsel:	Jane Lenehan for the Petitioner, Patricia Blaire Illingworth Douglas James Illingworth, Self-Represented

By the Court:

Introduction

[1] This decision will decide the costs award between Mr. and Ms. Illingworth following a contested divorce hearing and decision reported as ***Illingworth v Illingworth***, 2020 NSSC 285.

[2] Ms. Illingworth seeks costs. She states that she was the successful party. Further, she notes that her settlement offer was more advantageous to Mr. Illingworth than the trial decision.

[3] In contrast, Mr. Illingworth wants each party to bear their own costs. He states that he should not be penalized for seeking to have his son live in HRM, especially given the conduct of Ms. Illingworth during the first month of their separation. In addition, he states that he cannot afford a costs award.

Issue

[4] Should costs be payable to Ms. Illingworth?

Analysis

Position of Ms. Illingworth

[5] Ms. Illingworth seeks costs of $15,063.00 for the following reasons:

- She was the successful party. The court granted the relief she sought on the disputed parenting and property issues. She was also successful on the child support issues, except that the amount of retroactive child support ordered was less than the amount she requested during the hearing.
- Mr. Illingworth did not succeed on any of the contested trial issues.
- There is no principled reason why Ms. Illingworth should be deprived of costs.
- The court should resort to the $20,000 per day rule of thumb when assessing "the amount involved" because the most significant issue centered on parenting. The trial was not focused on monetary issues. Therefore, the amount involved should be set at $60,000.

- Scale 3 of tariff 1 should be used given that Ms. Illingworth's legal fees and disbursements total $54,657.29. A substantial contribution would not result from the application of scale 2.
- Costs should be increased because of Ms. Illingworth's formal settlement offer dated July 15, 2020. This offer presented Mr. Illingworth with a more favourable outcome than the one he ultimately received in the court's decision. The offer proposed joint custody with no final decision-maker; no obligation to pay retroactive child support; and a child support payment of only $200 per month. In contrast, the decision granted Ms. Illingworth final decision-making authority on educational and health issues, and awarded both retroactive and the table amount of child support.
- Costs should reflect Mr. Illingworth's poor litigation conduct as confirmed by the following three examples. First, Mr. Illingworth filed affidavits 12 days late which then necessitated a motion appearance to determine admissibility and further filing deadlines. Costs of $250 were ordered and subsequently paid by Mr. Illingworth. Second, Mr. Illingworth's application to have his sister testify by phone was denied, although a video option, with commissioner, was permitted in its stead. Mr. Illingworth decided not to utilize this option. Third, Mr. Illingworth was disorganized and prepared exhibits which were not identical. As a result, about an hour of valuable court time was used to ensure that all copies of Mr. Illingworth's exhibits were identical.

Position of Mr. Illingworth

[6] Mr. Illingworth objects to paying costs. He rests his objection on the following points:

- Ms. Illingworth denied him access for over a month after the parties separated. He was therefore forced to apply to have Hunter returned to HRM.
- Ms. Illingworth refused to communicate with him and instead was content in letting the courts decide the issue. In contrast, he was always cooperative.
- He did not intentionally cause delay. He didn't understand legal and procedural requirements. He didn't mean to cause confusion with the exhibit book.
- He wasn't able to arrange a video conference through the Moncton courts because of Covid.

- He is unemployed. He relies on EI to pay rent, car payments, bills, and child support. As demonstrated in his revised budget, he has no ability to pay. He cannot afford any additional strain on his finances.

Law

[7] Rule 77 governs awards of costs in matters before the Supreme Court of Nova Scotia. In ***Armoyan v. Armoyan***, 2013 NSCA 136, Fichaud, J.A., reviewed relevant principles, as follows:

- The court's overall mandate is to "do justice between the parties": para. 10.
- Unless otherwise ordered, party and party costs are quantified according to the tariffs. The court has discretion to raise or lower the tariffs applying listed factors, which include unaccepted written settlement offers and the conduct of the parties insofar as it affects the speed or expense of the proceeding: paras. 12 and 13.
- The Rule permits the court to award lump sum costs and depart from the tariffs in specified circumstances. Tariffs are the norm and there must be a reason to consider a lump sum: paras. 14 and 15.
- The basic principle is that costs should afford a substantial contribution to the party's reasonable fees and expenses which means not a complete indemnity, but rather more than 50 and less than 100% of a lawyer's reasonable bill for services: para. 16.
- The tariffs deliver the benefit of predictability by limiting the use of subjective discretion. This works well in a conventional case whose circumstances conform generally to the parameters assumed by the tariffs. Some cases, however, bear no resemblance to the tariffs' assumptions. For example, a proceeding begun nominally as a chambers motion may assume trial functions; a case may have no "amount involved"; efforts may be substantially lessened by the efficiencies of capable counsel, or handicapped by obstructionism; the amount claimed may vary widely from the amount awarded; the case may assume a complexity with a corresponding work load that is far disproportionate to the court time by which costs are assessed under the tariffs; there may be rejected settlement offers, formal or informal, that would have saved everyone significant expense: paras. 17 and 18.
- When subjectivity exceeds a critical level, the tariffs may be more distracting than useful. In such a situation, it is more realistic to circumvent the tariffs and channel that discretion directly to the calculation of a lump

sum. A principled calculation should turn on the objective criteria that are accepted by the *Rules* or case law: para. 18.

[8] Another legal principle relevant to my decision concerns Mr. Illingworth's claim of impecuniosity. If a party wants insulation from costs, they must successfully apply to do so pursuant to Rule 77.04. Such motion must be made as "soon as possible" after the application/response is contested: ***Canadian Residential Inspection Services Ltd. v. Swan***, 2013 NSSC 226, and ***Hatfield v. Intact Insurance Co***., 2014 NSSC 288. Otherwise, difficult financial circumstances do not preclude an award of costs. For example, unsuccessful litigants who were represented by legal aid can be ordered to pay costs*:* ***S. v. M.*** (1996), 157 N.S.R. (2d) 156 (C.A.), and ***Leigh v. Milne***, 2010 NSCA 36, wherein Mr. Milne was stated to have free legal representation at para 54. Further, the one sentence comment of Bateman, JA in ***Cameron v. Cameron***, 2006 NSCA 76, does not detract from this principle. I note that although Bateman, JA referred to the mother's limited financial circumstances, she nonetheless ordered costs. Costs on appeal are ordinarily less than costs awarded at the trial level.

[9] I have also considered the additional cases submitted by Ms. Illingworth, which were ***Gomez v Ahrens***, 2015 NSSC 3 and ***Nurse v Holden,*** 2020 NSSC 110.

Decision on Costs

[10] I award costs of $15,063, inclusive of disbursements, to Ms. Illingworth. In so doing, I find that Ms. Illingworth was the successful party and that there is no principled reason why she should be deprived of costs. I will now explain my reasons.

Amount Involved

[11] Tariff A requires the court to determine the amount involved. In this case, the amount involved cannot be ascertained from a principled lens. The most significant litigated issue concerned the child's primary caregiver and primary residence. Neither of these designations involved monetary issues. In addition, the prospective child support award is difficult to quantify for costs purposes. Further, I do not accept that the rule of thumb is an appropriate consideration given the comments of Fichaud JA in ***Armoyan v Armoyan***, *supra*.

[12] I find that a lump sum award is the most appropriate award in the circumstances of this case.

Settlement Offer

[13] Settlement offers play a significant role when calculating costs. For example, in ***Armoyan v Armoyan***, supra, Fichaud JA increased the costs award from 66% to 80% of the wife's reasonable legal fees after the wife filed her settlement offer. Fichaud, JA explained his reasoning at para 37 which provides as follows:

> [37] As noted in *Williamson*, with which I agree, generally speaking the "substantial contribution" should exceed fifty percent of the appropriate base sum, but should not approach the full indemnity of a solicitor and client award. The percentage should vary, in a principled manner, according to the circumstances of the case. Considering Mr. Armoyan's conduct, as discussed, and the rejected settlement offer of October 2011, a substantial contribution here should represent: (a) 66% of the $100,000 base sum before the settlement offer of October 2011 for the *forum conveniens* proceeding in the Family Division (*i.e.* $66,000); plus (b) 80% of the $200,000 base sum after that settlement offer for the *forum conveniens* proceeding in the Family Division (*i.e.* $160,000); plus (c) 80% of the $100,000 base sum in the Court of Appeal for both appeals (*i.e.* $80,000). This totals $306,000, including disbursements.

[14] On July 15, 2020, about three months before the divorce hearing, Ms. Illingworth provided a written settlement offer to Mr. Illingworth. The settlement proposal offered to resolve contested claims in a manner that was similar to many of my rulings, and on occasion, the settlement proposal provided a more advantageous outcome than what Mr. Illingworth achieved at trial. This finding is confirmed by the following examples:

- The most contentious and time-consuming issue concerned the child's primary residence. Ms. Illingworth's settlement offer was based on Ms. Illingworth having primary care in Englishtown. Mr. Illingworth did not agree with Ms. Illingworth's settlement position. In my decision, I agreed with Ms. Illingworth. I found that it was in the child's best interests to be in the primary care of Ms. Illingworth in Englishtown.
- Ms. Illingworth's settlement offer proposed a joint custody order in keeping with the August 2019 interim consent order. Mr. Illingworth did not agree. Mr. Illingworth wanted to decide the child's educational and health issues. In my decision, although I ordered joint custody, I assigned final decision-making authority to Ms. Illingworth on matters related to the child's health and education. Ms. Illingworth's settlement offer was therefore more advantageous to Mr. Illingworth.

- Ms. Illingworth's settlement offer proposed a liberal parenting schedule which was similar to what I eventually ordered, although Mr. Illingworth was ultimately granted more time during March break and some holiday weekends than what Ms. Illingworth proposed. The parenting schedule occupied little litigation energy or time.
- Ms. Illingworth's settlement offer was based on the parties sharing costs and responsibilities for the parenting exchanges. I ordered the parties to continue to meet in New Glasgow for the parenting exchanges, thus ensuring a sharing of costs and responsibilities. This issue was not contested and occupied little litigation energy or time.
- Ms. Illingworth offered to forgive the retroactive child support claim if her settlement offer was accepted. I ordered retroactive child support of $1,956.
- Ms. Illingworth offered to accept $200 per month in child support if her settlement offer was accepted. I ordered the table amount of child support in the monthly amount of $552.
- Ms. Illingworth offered to equally divide the $10,000 held in trust. I ordered an equal division, subject to Mr. Illingworth first using his share to pay the retroactive child support award and any costs award that may follow.
- Ms. Illingworth offered to forgo costs if the offer were accepted before September 1, 2020, otherwise she would proceed to have the court determine costs. I awarded costs to Ms. Illingworth.

[15] In summary, Ms. Illingworth is entitled to a higher costs award because her settlement offer was, for the most part, similar to my decision, or more advantageous to Mr. Illingworth than my decision. I further note that Ms. Illingworth incurred about $28,000 in legal fees and disbursements after the offer to settle was made.

Litigation Conduct

[16] On a few occasions, Mr. Illingworth's conduct resulted in unnecessary expense. For example, he did not file documents when scheduled and provided exhibits that were not properly copied. Further, he did not advise that he quit his job until he was cross examined. These findings, however, are tempered because Mr. Illingworth neither intentionally thwarted filing deadlines nor intentionally filed an improper exhibit book.

Financial Difficulties

[17] Mr. Illingworth did not obtain an order under Rule 77.04. He is not immune to a costs order. Further, Mr. Illingworth is unemployed because he quit his job. He is largely responsible for his own financial position.

Other Factors

[18] The following additional factors are relevant to my decision:

- The most contested issue involved the primary residence of the parties' five-year-old son. The outcome was important to each of the parties and to the child. Although Ms. Illingworth was the successful party, I recognize that both parties advocated their position out of love for their child. There was no improper motive.
- The parties resolved most of their outstanding financial issues, other than responsibility for the line of credit debt and child support issues.
- The matter was not overly complex.
- The divorce hearing was held over three days. In addition, there were prehearing conferences and post-hearing submissions.
- Costs were already awarded for late filing and cannot be reassessed by a further award of costs.

Conclusion

[19] In the circumstances, a lump sum of $15,063 is ordered to do justice between the parties. Ms. Illingworth incurred about $54,657 in legal fees. She claims less than 28% in costs despite her settlement proposal. Ms. Illingworth's claim is more than reasonable. $15,063, inclusive of disbursements, is ordered payable by Mr. Illingworth to Ms. Illingworth.

[20] Ms. Lenehan is to draft the order.

Forgeron, J.