IN THE SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION

Citation: *Ward v. Murphy*, 2024 NSSC 117

Date: 2024-04-29
Docket: *SFSNMCA* No. 096620
Registry: Sydney

Between:

Paul Ward

Applicant

v.

Coralie Murphy

Respondent

Judge: The Honourable Justice Theresa M Forgeron

Costs Submissions: January 9 and 29, 2024 and February 20, 2024, in Sydney, Nova Scotia

Decision: April 29, 2024

Counsel: Paul Ward (Applicant), Self-Represented
Theresa O'Leary, counsel for the Respondent, Coralie Murphy

By the Court:

Introduction

[1] Paul Ward and Coralie Murphy each seek costs arising from two lengthy variation hearings. Mr. Ward states that he should be awarded costs of $32,938 plus $1,955 for his accountant's fees because he was the successful party. Ms. Murphy also seeks costs of $32,938 based on her success, her favourable settlement offer, and Mr. Ward's poor litigation conduct.

Issues

[2] What costs award will do justice as between the parties?

Background

[3] The parties have a nine-year-old son who has been the focus of litigation for about nine years. In 2016 and 2017, the parties participated in an 11-day hearing before Gregan J, which resulted in the decision, ***PW v CM***, 2017 NSSC 91. Following the release of this decision, Mr. Ward filed several applications on various issues which were likewise concluded by Gregan J.

[4] In September 2018, Mr. Ward filed the current variation application. A contested hearing was heard over six days in 2020 and 2021 before MacLeod-Archer J, who rendered her decision on the merits in ***PW v CM***, 2021 NSSC 127; and on costs in ***Ward v Murphy,*** 2021 NSSC 207.

[5] Mr. Ward appealed both the merits and costs decisions. On March 16, 2022, the Court of Appeal released its decision, ***Ward v Murphy***, 2022 NSCA 20, which directed a rehearing of the s. 18 analysis and costs issues.

[6] On June 12, 13, 14, and 15, 2023, I heard evidence and submissions, with post-trial submissions being received on June 29 and July 11, 2023. On November 24, 2023, I rendered my decision, ***Ward v Murphy***, 2023 NSSC 370, and invited costs submissions.

[7] On January 9, 2024, Ms. Murphy filed her written costs submissions. On January 29, 2024, Mr. Ward responded with his written submissions. Some of his submissions attempted to re-litigate previously decided substantive issues, and some

submissions focused on his theory that counsel, court staff, and the court conspired against him. On February 20, 2024, Ms. Murphy provided her reply submissions.

Analysis

What costs award will do justice as between the parties?

[8] Rule 77 provides me with the authority to issue a costs order that will do justice as between the parties. In ***Armoyan v Armoyan***, 2013 NSCA 136, Fichaud JA reviewed relevant costs principles:

- 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 amount, applying factors like those listed in Rule 77.07(2). These factors include unaccepted favourable written settlement offers, and the parties' conduct insofar as it affects the speed or expense of the proceeding: paras 12 and 13.

- Departure from the tariffs is permitted 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." A substantial contribution not amounting to a complete indemnity means 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": para 17. Some cases, however, "bear no resemblance to the tariffs' assumptions": para 18. 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"; "[t]he amount claimed may vary widely from the

amount awarded"; "[t]he 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"; and "[t]here may be rejected settlement offers, formal or informal, that would have saved everyone significant expense": para 18.

- When "subjectivity exceeds a critical level, the tariffs may be more distracting than useful": para 18. In such a situation, "it is more realistic to circumvent the tariffs, and channel that discretion directly to the principled 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.

[9] In ***Ward v Murphy***, *supra*, Beaton JA noted:

- That in family law litigation, it can be difficult to identify the "amount involved" where the issues "are not always easily expressed as or quantified by a dollar amount": para 98.

- That "…it would have been preferable for the judge's costs award, approached as a function of an amount involved, to have been expressed as a lump sum amount": para 100.

Successful Party

[10] Costs are ordinarily payable to the successful party. The parties disagree about who was successful. I therefore must resolve this dispute.

[11] The variation application was determined over two separate and lengthy hearings. During the first variation hearing, the following issues were litigated:

- Imputation of personal income.

- Imputation of available corporate income for child support purposes.

- $300 holdback fee.

- Leave requirement.

[12] During the second variation hearing, the only issue in dispute was the imputation of available corporate income for child support purposes.

[13] Ms. Murphy was successful on the first issue. She successfully argued that an annual income of $60,000 should continue to be imputed to Mr. Ward. This finding was upheld on appeal. Mr. Ward was unsuccessful in arguing a reduction of this imputed amount.

[14] There was mixed success on the second issue. Although, Mr. Ward successfully argued that the amount of available pre-tax corporate income (PTCI) was less than $60,000, he was not successful in having the amount reduced to zero. To the contrary, I found that there were varying amounts of the PTCI available for child support purposes.

[15] Ms. Murphy was successful on the third issue involving the holdback fee, the resolution of which has little bearing on the costs issue.

[16] Ms. Murphy was successful on the fourth issue, the resolution of which has little bearing on the costs issue.

[17] In summary, I find that Ms. Murphy was the successful party. Costs will be payable to Ms. Murphy and not to Mr. Ward.

Amount Involved

[18] The tariffs are based on the quantification of "the amount involved", which is defined in part:

> (a) where the main issue is a monetary claim which is allowed in whole or in part, an amount determined having regard to
>
> (i) the amount allowed,
>
> (ii) the complexity of the proceeding, and
>
> (iii) the importance of the issues;

[19] In this case, the amount allowed involved a child support calculation based on an imputed income of $60,000 together with an imputed amount of available PTCI. Further, the proceeding was not complex, although the child support issue was important to the parties and to the child. Despite these findings, the "amount involved" is difficult to ascertain as child support is subject to variation should a material change in circumstances be proven.

[20] In this context, Ms. Murphy wants me to adopt the rule of thumb method when calculating the lump sum costs award. I cannot, however, use this approach for three reasons:

- Fichaud JA did not employ a rule of thumb when calculating costs in ***Armoyan v Armoyan,*** *supra.*

- The rule of thumb approach was specifically rejected in ***Veinot v Veinot Estate,*** 1998 NSCA 164, wherein Pugsley JA held that the rule of thumb was not "an appropriate yardstick." Rather, it was, in his view, "an arbitrary classification which in most cases, except by happenstance, would be of little relevance. ....": page 8.

- The rule of thumb is dated. The initial rule of thumb equated every day of trial to $15,000: ***Urquhart v Urquhart***, [1998] NSJ No 310 (SC). Nine years later, it was increased by Lynch J in ***Jachimowicz v Jachimowicz***, 2007 NSSC 303, to $20,000 per day. Seventeen years have since passed, which would likely require another update in the event the rule of thumb approach is deemed appropriate.

[21] When a court calculates a lump sum costs award, counsel ordinarily provides the party's legal accounts so that reasonable fees and disbursements can be assessed. Regrettably, Ms. Murphy did not provide evidence of her legal accounts. Thus, I will revert to the tariffs.

[22] In these circumstances, I find that the amount involved for the purposes of the tariffs is less than $25,000. I adopt scale 2, which would produce a costs award of $4,000, plus an increase of $2,000 for each day of trial. However, this amount must be reduced because Mr. Ward was partially successful on the issue of available PTCI – an issue which consumed more trial time than the other issues. I, therefore, provisionally set the costs amount, before adjustments, to $6,000.

Adjustments for Settlement Offer and Conduct

[23] Rule 77.07 (2) (b) and (e) provide the jurisdiction to adjust the tariff amount when there is an unaccepted favourable written settlement offer or when the party's conduct affects the speed or expense of the proceeding. Both of these factors are relevant to my costs decision.

[24] First, Ms. Murphy's settlement offer was more favourable to Mr. Ward than was my decision. On January 4, 2023, Ms. Murphy made the following written settlement offer to Mr. Ward[i]:

- A payment of monthly child support for 2018, 2019, and 2020 of $750 per month.
- For 2021 and ongoing, the monthly table amount based on Mr. Ward's reported line 150 ITR amounts[ii], plus $250 per month from the business income.
- $10,344 in costs, representing half of the original costs award granted by MacLeod-Archer J. Costs would be payable at a rate of $500 per month and collected through MEP.

[25] Although there were two years, 2020 and 2022, when my decision produced a lower annual support payment, these years were offset by the other years when my order produced a child support payment that was greater than that proposed in the settlement offer.

[26] Mr. Ward refused this offer. Instead, he countered with a letter dated January 11, 2023, in which he confirmed his offer of shared parenting with an annual $5,000 payment to an RESP. He also indicated that Ms. Murphy could "keep the baby bonus." It should be noted that the parenting issue was not before court. As a result, Mr. Ward held no realistic expectation that the parenting arrangement would be varied. Further, neither the court nor the parties have the jurisdiction to direct the federal government to pay the Canada Child Benefit to only one parent in a shared parenting arrangement.

[27] In the circumstances, I award an additional $2,000 in costs because of Ms. Murphy's unaccepted, favourable settlement offer. The $2,000 adjustment is granted in recognition of the two years in which the offer produced a child support amount that was more than what I ordered, and because the offer was only made after the conclusion of the first hearing.

[28] I will now address Mr. Ward's litigation conduct. Mr. Ward's conduct unduly and inappropriately increased the time it took to complete the hearing. His conduct cannot be attributed to his lack of legal representation. In family law, many litigants are self-represented, but ordinarily self-represented litigants conduct themselves in an appropriate fashion.

[29] In contrast, this variation hearing was held over six days before MacLeod-Archer J and four days before me. The litigation assumed a life of its own because of Mr. Ward's conduct. He was disorganized and often unfocused. Examples which support my conclusion include:

- Even though the second hearing was focused solely on the s. 18 analysis, he attempted to provide evidence and submissions about other issues, including the inappropriateness of imputing $60,000 personal income to him; the $6,000 he paid for the parental capacity assessment; his right to shared parenting; the illegality of the $300 holdback; and the bias of the judicial system.

- He treated counsel with significant disrespect. He lashed out at counsel and made inappropriate comments, inuendo, and allegations about her character - all such allegations being unsubstantiated.

- He blamed court staff and a judge for what he perceived as bias and unfair treatment of him[iii].

- He failed to accept evidentiary rulings and argued with MacLeod-Archer J in the face of her rulings.

- He failed to provide timely, organized disclosure.

- He failed to provide organized exhibits and blamed others when he did not have sufficient copies of his exhibits. Ordinarily exhibits are quickly marked before hearings begin. In the second hearing before me, the process of marking exhibits was inordinately lengthened because of Mr. Ward's conduct.

[30] Given these circumstances, I will increase the costs award by $8,000 because of Mr. Ward's litigation conduct.

Accountant's Fees

[31] For the reasons stated at para 23 of MacLeod-Archer J's costs decision, I will reduce the costs award by $750 for the accountant's discovery expense.

Conclusion

[32] Mr. Ward must pay costs of $16,000 to Ms. Murphy, less $750 for the costs of the discovery, for a total costs award of $15,250 payable in installments of $500 per month and through MEP, as costs were incurred solely in respect of the child support issues.

[33] Counsel for Ms. Murphy is to draft and circulate the costs order.

Forgeron, J

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[i] Ms. Murphy had not received Mr. Ward's income information for 2021 and 2022 at the time the offer was made.

[ii] Despite the Court of Appeal ruling, Ms. Murphy was willing to accept a table amount based on less than the imputed amount of $60,000 for personal earned income.

[iii] For example, in his costs submissions, Mr. Ward stated that a judicial assistant "was repeatedly called out on subrosa with Theresa O'Leary to her supervisor….." and that the judicial assistant "was not in the court room the last day of the first hearing although * [the judicial assistant's first name] was witnessed by the applicant at the courthouse on this day."