

SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION

Citation: Jessome v. Desmarias, 2014 NSSC 373

Date: 2014-10-16

Docket: 90501

Registry: Sydney

Between:

Rhonna Jessome

Applicant

and

Anne Marie Jessome

Applicant

v.

Michael Desmarias

Respondent

DECISION ON COSTS

Judge: The Honourable Justice Lee Anne MacLeod-Archer

Heard: September 22 and 23, 2014, in Sydney, Nova Scotia

Written Release: October 16, 2014

Counsel: Damien Barry for the Applicant
Lisa Fraser-Hill for the Applicant

By the Court:

[1] This is a decision on costs arising from an earlier decision on competing custody claims between Anne Marie Jessome and Rhonna Jessome. This court delivered an oral decision on September 26, 2014, granting custody of the child, Faaron Jessome, (DOB July 13, 2002) to Anne Marie Jessome.

[2] Counsel were directed to file written submissions if costs are being claimed. Both counsel have now done so.

[3] By way of background, both applicants filed applications for standing and custody of Faaron Jessome. Anne Marie Jessome is the child's grandmother, while Rhonna Jessome is the child's maternal aunt. Both parties consented to the standing of the other to apply for custody. The child's father did not participate in the proceedings, though he was notified. The child's mother is deceased.

[4] Two pretrial hearings were held prior to the custody hearing, during which time the leave applications were addressed. No hearing was required on the leave issue. The custody hearing was held over 1.5 days. The oral decision required another brief court appearance. There was also a motion by correspondence

dealing with the admissibility of an expert's report. That motion did not require a separate appearance but did involve submissions by counsel.

[5] Anne Marie Jessome seeks costs of the custody hearing. She requests a lump sum of \$5,000, stating that she was 100% successful at trial. In support of that argument, she sets out seven factors:

- she was wholly successful at trial.
- she has a limited income in the approximate amount of \$24,000 annually. She recently began receiving the Child Tax Benefit for her grandson, Faaron, which supplements her income. The cost of the trial created a financial hardship for Ms. Jessome. Rhonna Jessome is single and has an annual income in excess of \$100,000 Canadian.
- her position from the outset regarding custody of her grandson was reasonable, as she had raised him since birth.
- A Child's Wish Assessment was completed by Dr. Julie MacDonald confirming that the child's wish was to remain residing in his grandmother's care in Florence. The Wish Assessment also confirmed that the child was not influenced in his decision by either party.

- she continued to allow Rhonna Jessome liberal and extended access with her grandson following his mother's death in July, 2013.
- Rhonna Jessome refused to communicate her plans for access with the child to Anne Marie Jessome, placing the child in the middle.
- Rhonna Jessome testified that she was aware the child did not want to go to Germany prior to the Child's Wish Assessment, but continued to seek custody against his wishes.

[6] Rhonna Jessome rejects the claim for costs by Anne Marie Jessome. She makes the following points:

- the decision of the court included direction that certain services for Faaron be sought or followed up;
- Anne Marie Jessome was directed to attend grief counseling, as well as counselling to assist her in dealing with a pre-teen child, particularly in relation to discipline and appropriate limits;
- she consented to, and paid for, the Children's Wish Assessment;

- she endured the expense of bringing a motion by correspondence to have a physician's report excluded from evidence, based on non-compliance with Civil Procedure Rule 55.

[7] Justice Legere-Sers recently dealt with costs in the case of *MacLeod v MacLeod* 2014 NSSC 339. That case involved a mobility hearing and a Divorce trial with associated claims for division of assets and debts, as well as spousal support. The Petitioner was successful on the mobility issue, while the Respondent was wholly successful in the Divorce and matrimonial property trial. Settlement offers had been exchanged which were more generous than the result at trial. The decision on mobility did not reflect any adverse findings against the father (Respondent) but the court found that on the other issues the Petitioner's demands were unreasonable. In the end, Justice Legere-Sers awarded \$5,000.00 in costs payable to the Respondent. That case illustrates the circumstances in which such an amount is appropriate.

[8] Counsel for Anne Marie Jessome relies on Civil Procedure Rule 77 and the recent decision of Justice Forgeron in **Cameron v. Cameron**, 2014 NSSC 325, in which Justice Forgeron outlined the principles to be applied when determining costs.

[9] Counsel for Rhonna Jessome distinguishes that case, noting that in **Cameron** (*supra*) there was a significant failure to disclose necessary information, which impeded settlement and prolonged the proceeding. Rhonna Jessome states that she created no delays or additional costs in the proceeding.

[10] Conversely, Rhonna Jessome says that Anne Marie Jessome failed to produce information from her physician in a reasonable time, or in the correct report format required under Rule 55. This is a reference to the motion filed by Ms. Jessome to exclude a report by Mrs. Jessome's physician.

[11] It is important to note that Mrs. Jessome did not request that a physician's report be entered into evidence. The report which was the subject of the motion was actually the physician's response to questions posed by Rhonna Jessome's counsel (which I will call the "addendum" for purposes of this decision) in an effort to clarify the main report. The main report appears to have been generated in response to allegations about Mrs. Jessome's poor health raised by Rhonna Jessome in her custody application. The main report was disclosed to Ms. Jessome but not filed with the court. At the first pretrial conference, there was some suggestion that Anne Marie Jessome would rely on a physician's report for purposes of the hearing, however, no physician's report was ever filed with the court.

[12] Rhonna Jessome requested in her motion that the addendum be excluded from the evidence because it did not comply with the Civil Procedure Rules. That was a moot point, as it was an addendum to a report which was never filed with the court.

[13] In her response to the request for costs, Ms. Jessome relies on the decision of **S.N. v. I.F.**, 2009 NSSC 23, in which Justice Gass addressed costs arising from a custody, access and mobility hearing. The court's discussion of costs in the context of mobility issues is relevant to this case, because Ms. Jessome resides in Germany. Had her application for custody been granted, it would have involved relocating the child to live with her in Germany.

[14] In **S.N. (supra)** Justice Gass declined to award costs, noting that there was a genuine issue to be tried, both parents had a reasonable position, and the motivation behind both applications was the best interests of the child.

[15] Ms. Jessome argues that in this case, there was a genuine issue to be tried, and that her reasons for applying for custody and her conduct were reasonable. She takes the position that both parties should bear their own costs.

[16] As noted by Justice Forgeron in **Cameron (supra)**:

- the court's overall mandate in awarding costs is to "do justice between the parties";
- party and party costs are the norm and are to be quantified according to the Tariffs found in the Civil Procedure Rules;
- costs are in the discretion of the court;
- the amount set out in those Tariffs may be adjusted in accordance with certain factors, including written settlement offers which were not accepted, the conduct of the parties insofar as it affects the speed or expense of the proceeding, and the positions taken by the parties;
- Civil Procedure Rule 77 permits the court to award lump sum costs apart from Tariff costs in certain circumstances, with the basic principle being that cost awards reflect a substantial contribution to the parties' reasonable fees and expenses.

[17] In this case, I have considered the following factors in determining costs:

- neither counsel has presented a bill for services rendered in relation to the hearing, but counsel for Mrs. Jessome points out that the proceeding involved a number of shorter appearances, as well as 1.5 days of hearing time;

- there is no amount involved for purposes of determining costs; the issue was custody of the child, with the ancillary issue of whether he should be permitted to relocate to Germany with Ms. Jessome;
- a Child's Wishes assessment was conducted and Ms. Jessome paid for that report;
- counsel have not brought any written settlement offers to the attention of the court;
- neither party unreasonably delayed the hearing and there were no disclosure issues which impacted the hearing.

[18] Several other factors are relevant to my decision on costs. The Child's Wishes assessment was completed well in advance of the hearing. This factor is important vis-a-vis the position taken by both parties. Mrs. Jessome indicated that she was prepared to abide by Faaron's wishes. If he had indicated it was his desire to move to Germany with his aunt Rhonna Jessome, she would not have opposed it. Ms. Jessome acknowledged in her evidence that she was aware of the report and its recommendations, but wished to have the court adjudicate the matter anyway. She took the position that the child had been influenced and had not made a fully informed decision. Her position that the child had been influenced

was not supported by the evidence, and was contrary to the conclusion of the assessor.

[19] Ms. Jessome's position was not without its merits, but certain aspects of her position remain troubling. She refused to have communication with her mother on the issue of Faaron's future. She arranged access with Faaron directly with him, rather than through Mrs. Jessome. She knew the child's wishes, but continued to seek custody despite the clear evidence that Faaron wished to remain with his grandmother in the only home he'd ever known. Had there been a basic level of communication, the issue of Faaron's future might have been decided between the parties differently, and without the need for court intervention.

[20] In my oral decision, I directed that certain services for Faaron and Mrs. Jessome be undertaken. The court recognized the concerns presented by Rhonna Jessome at the hearing. However, that does not detract from the fact that Anne Marie Jessome was successful in the custody application. Again, had Ms. Jessome communicated with her mother, her concerns with respect to Faaron's care might have been addressed sooner. Mrs. Jessome struck me as eminently reasonable in her approach to Faaron's care. She allowed access with Ms. Jessome and Faaron on a number of occasions, including access outside of the local area, knowing that

Ms. Jessome was seeking custody. She would not have ignored Rhonna Jessome's concerns.

[21] I do not doubt that the motivation of both parties was the best interests of Faaron, from their own perspective. However, Ms. Jessome's judgment was clouded by the conflict with her mother. Anne Marie Jessome made overtures to Ms. Jessome after Faaron's mother died, but Ms. Jessome refused them. Their lack of communication made a custody hearing necessary.

[22] Finally, I am cognizant of the costs incurred by Ms. Jessome in pursuing the application for custody. She resides in Germany and incurred her own travel and legal costs. However, she is in a far better financial position to absorb those costs than Mrs. Jessome.

DECISION

[23] I award costs of \$3,000.00 to Anne Marie Jessome in the circumstances of this case. She was successful at trial. The position she took with respect to Faaron's custody was reasonable. She did not delay the hearing or fail to make disclosure. She cooperated with the Child's Wishes assessment requested by Ms.

Jessome, as well as the requests for information about her own health. The costs are payable within 30 days. Counsel for Mrs. Jessome will prepare the order

MacLeod-Archer, J.