Clark v. Taylor, 2003 NWTSC 50

Date: 2003 08 27
Docket: S-0001-1-CV-2003000166

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

AIMEE CLARK

Applicant

- and -

PAUL TAYLOR

Respondent

MEMORANDUM OF JUDGMENT

[1] The parties are the parents of one child, now 2 ½ years old, who is in the care of his mother (the applicant herein). On September 28, 2001, an interim order was made whereby the respondent father is required to pay child support of $675.00 per month. Not all payments were made and arrears accumulated. By February of 2003 those arrears totalled $6,450.00. The applicant instructed the Sheriff to seize assets to satisfy the arrears. The Sheriff seized two vehicles. A Notice of Objection to Seizure was filed by the respondent. The applicant then launched these proceedings, by Originating Notice, for an order of removal and sale.

[2] The return date of the motion was May 23, 2003. On that date, the applicant (who represents herself) appeared in regular Chambers in Yellowknife. She travelled from her home in Fort Smith for the appearance. Counsel for the respondent appeared and asked for an adjournment. After some discussion, the matter was adjourned *sine die* but with directions (including a direction that the respondent pay $1,000.00 toward the arrears within 21 days, which he did).

[3] The motion was subsequently brought back by the applicant and a special Chambers hearing was held on July 23, 2003. The applicant participated by

teleconference while the respondent was represented by counsel who appeared in person. At that hearing, counsel informed me that the respondent had provided him with a cheque to cover the remaining balance of $5,450.00 on the arrears. I therefore ordered that the seizure be vacated upon payment to the applicant of that sum (plus payment of one of the monthly payments of $675.00 that had been returned to the respondent).

[4] I later directed that the parties file written submissions on the issue of costs (since the applicant sought recovery of her costs). I have now reviewed those submissions and this memorandum addresses that issue.

[5] Modern costs rules are designed with three objectives in mind: (a) to indemnify successful litigants for the cost of litigation; (b) to encourage settlements; and, (c) to discourage and sanction inappropriate behaviour by litigants. Of course, as a general rule, costs awards rarely provide full indemnification for the costs paid by the client to his or her lawyer. Similarly, costs awards usually do not account for the loss of income incurred by litigants who have to attend court. In the case of represented litigants, the *Rules of Court* provide a tariff of party-and-party costs. The situation is complicated, however, when a litigant chooses or, as often happens, has no choice but to represent himself or herself.

[6] There is now a significant body of authority recognizing that self-represented lay litigants are entitled to recover costs: *Fong* v. *Chan* (1999), 181 D.L.R. (4th) 614 (Ont.C.A.); *Skidmore* v. *Blackmore* (1995), 122 D.L.R. (4th) 330 (B.C.C.A.); *McBeth* v. *Dalhousie University* (1986), 10 C.P.C. (2d) 69 (N.S.C.A.). Indeed, respondent's counsel did not raise any question about this.

[7] The case law, however, holds that the self-represented litigant is not to be treated the same as a represented litigant. The calculation of costs is not necessarily done on a strict tariff basis. Costs should be awarded as a "moderate" or "reasonable" allowance for the loss of time, and actual expenses incurred, in preparing and presenting the case. This is how it was explained by Sharpe J.A. in *Fong* (*supra*) at para. 26:

> I would also add that self-represented litigants, be they legally trained or not , are not entitled to costs calculated on the same basis as those of the litigant who retains counsel. As the *Chorley* case, supra, recognized, all litigants suffer a loss of time through their involvement in the legal process. The self-represented litigant should not recover costs for the time and effort that any litigant would have to devote to the case. Costs should only be awarded to those lay litigants who can demonstrate that they devoted time and effort to do the work ordinarily done by a lawyer retained to conduct the litigation, and that as a result, they incurred an opportunity cost by foregoing remunerative activity. As the early Chancery rule recognized, a self-represented lay litigant should receive only a "moderate"

> or "reasonable" allowance for the loss of time devoted to preparing and presenting the case. This excludes routine awards on a per diem basis to litigants who would ordinarily be in attendance at court in any event. The trial judge is particularly well-placed to assess the appropriate allowance, if any, for a self-represented litigant, and accordingly, the trial judge should either fix the costs when making such an award or provide clear guidelines to the Assessment Officer as to the manner in which the costs are to be assessed.

[8] I note that the practice of the Registrar of the Supreme Court of Canada, when assessing costs for a self-represented litigant, is to do so on a "quantum meruit" basis, following the guidance of these comments: see, for example, *Metzner* v. *Metzner* (S.C.C. No. 28208; June 15, 2001).

[9] In this case, the applicant has presented a detailed breakdown of her expenses and the time she spent on research, preparation and court appearances. She is a self-employed businesswoman and she claims $6,685.00 as "lost contract hours" for all the time she spent on this case (which she says was in excess of 178 hours). She also claims $1,572.00 in other direct expenses.

[10] The respondent opposes the claim, saying the amounts are unreasonable and excessive. He also makes the argument that the applicant was unsuccessful (since the seizure was vacated), the legal issues were not complex, and the court appearances were relatively brief.

[11] It may be true that the legal issues were not complex (for someone who is legally trained). I certainly did not find the issues complex. To me they were quite straightforward: the respondent was required to pay child support; he did not pay all the child support he was required to pay; and, he did not pay it until the last minute when he was confronted with the likely removal and sale of his vehicles. There was an order in place that the respondent had to obey. No steps were taken to vary it or to cancel arrears. Thus there was no excuse. In my opinion, it was the fact that the respondent did not live up to his obligations that led to the necessity of these proceedings. For that I see no reason why the respondent should not be sanctioned by an award of costs against him.

[12] In considering what would be a "reasonable" allowance for the applicant's loss of time in preparing and presenting her case, I am not convinced that it is at all appropriate to simply apply what she herself would charge for her hourly fees to a client. The reality is that any litigation will eat up time and expenses whether one is represented or not. But some reasonable allowance must be allocated to the time expended by the applicant.

[13] While the cost assessment is not done on the tariff basis, the tariff can provide some useful benchmarks. The approximate party-and-party costs, under column 2 of the tariff of costs, for two appearances on a contested motion would be $1,000.00 plus disbursements. The applicant's claim here far exceeds that but that is due to the time she expended. While I recognize that a self-represented litigant must devote considerable hours to research and preparation (and in this case that was apparent), I do not think the total number of hours and rates as claimed are justified.

[14] Taking into account all of the circumstances, I fix the applicant's costs in the sum of $3,000.00. This includes all claims for time spent on research, preparation, court attendances, etc., as well as out-of-pocket expenses. The applicant will have judgment for this amount. I assume the applicant will be able to get at least some advice from a lawyer on how to register and enforce this judgment.

J.Z. Vertes
J.S.C.

Dated this 27th day of August, 2003.

The Applicant represented herself.

Counsel for the Respondent: Craig S. Haynes

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