

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN

BETHAN ROSE WILLIAMS

Petitioner

- and -

ALEXANDER CHRISTOPHER ROBERT STEINWAND

Respondent

MEMORANDUM OF JUDGMENT AS TO COSTS

A) INTRODUCTION AND BACKGROUND

[1] This application follows the decision issued by this Court on November 5, 2014. *Williams v. Steinwand*, 2014 NWTSC 74.cor.2. Ms. Williams seeks solicitor-client costs, or, in the alternative, an order for enhanced costs. She also asks the Court to make a lump sum order to avoid the need for taxation.

[2] The litigation between these parties was about child support. The Memorandum of Judgment filed on November 5, 2014 sets out the details of the various claims that Ms. Williams was making, the evidence adduced, and my findings. I will refer here only to what is relevant to the issue of costs.

[3] The first element of Ms. Williams' claim was ongoing child support. Mr. Steinwand claimed hardship, and argued that the amount of support should be much lower than the table amount payable, under the *Child Support Guidelines*, SOR/97-165, at his level of income.

[4] The second element of Ms. Williams' claim was an order requiring Mr. Steinwand to pay a proportionate share of various expenses, totalling approximately \$7,300. That claim was denied.

[5] The third element of Ms. Williams' claim was retroactive child support. She was asking that support be payable retroactive to June 2010, and be calculated based on the child support tables corresponding to Mr. Steinwand's income in each of the relevant years. Had her position prevailed completely, the total amount of retroactive support would have been approximately \$92,000. Mr. Steinwand argued that there should be no retroactive support at all.

[6] I decided that there should be some retroactive support, but that the retroactivity date should be January 1, 2012. I also decided that the amount should not be calculated strictly on the basis of the child support tables and on Mr. Steinwand's income in the relevant years. I concluded that the total amount of child support that should have been paid between June 2012 and April 2013 was \$35,000. Of this, I found that \$13,450 had been paid.

[7] To this, a further amount of \$8,208 was added to account for the difference between the ongoing support payable pursuant to my decision and what was ordered in a "without prejudice" Interim Order made after these proceedings were commenced. The total amount of child support Mr. Steinwand was found to owe Ms. Williams, as of the date of the Memorandum of Judgment, was \$29,758.

[8] Ms. Williams argues that she was the successful party in this case and as such is entitled to costs. She argues that solicitor-client costs are in order, based on Mr. Steinwand's blameworthy conduct before the proceedings were commenced, during the course of the proceedings, and, to a limited extent, after the completion of the hearing.

[9] Mr. Steinwand's position is that success was divided and the parties should each bear their own costs. He argues that if there is to be a costs order, it should be party-and-party costs only, with the amount set in accordance with the Tariff included in the *Rules of the Supreme Court of the Northwest Territories*, R-010-96 (the *Rules of Court*). He argues there is no basis here for solicitor-client costs or enhanced costs to be granted.

B) ANALYSIS

1. General Principles

[10] Costs are in the discretion of the Court, but that discretion cannot be exercised arbitrarily. Regard must be had for the general principles set out in the *Rules of Court* and in the caselaw.

[11] The general principles that apply to costs in this jurisdiction were recently summarized by this Court as follows:

Costs are always in the discretion of the court although it is generally acknowledged that costs are intended: to indemnify successful parties for the costs of the litigation; to encourage settlement; and to discourage or punish inappropriate behaviour by litigants: *Clark v. Taylor*, (2003) N.W.T.J. No 67 at Paragraph 5.

Rule 648(1) provides that costs are determined pursuant to Schedule A of the Rules [of Court], referred to as the Tariff, unless otherwise ordered by the Court.

Costs can also be awarded on a solicitor-client basis, which provides full indemnification for the costs incurred in a proceeding, or on an enhanced basis, which is generally somewhere between the Tariff amount and full indemnification.

With respect to solicitor-client costs, the approach that has generally been followed by this Court was stated in *Personal Insurance v. Richinger*, 2012 NWTSC 19, at p.12:

'In *Katlocheechee First Nation v. H.M.T.Q.*, 2004 NWTSC 12, Vertes J., citing *Young v. Young*, (1993) 4 S.C.R. 3, said that the jurisprudence is clear that solicitor-client costs should only be awarded in rare and exceptional circumstances, generally only where there has been reprehensible, scandalous or outrageous conduct on the part of one of the parties'

As mentioned, costs can also be awarded on an enhanced basis. There are a number of factors to consider in determining whether to grant enhanced costs: the reasonableness of the fees, the adequacy of the tariffs, the complexity of the matter, and whether the issues have important implications for the parties or broader implications for the community: *5142 NWT Ltd et al v. Town of Hay River et al*, 2008 NWTSC 31; *WCB v. Mercer*; *Mercer v. WCB*, 2012 NWTSC 78, at para.11; *Union of Northern Workers v. Kathryn Carriere* (No.2), 2013 NWTSC 27, at para.17.

Nielsen v. Nielsen, 2013 NWTSC 82, Paragraphs 26 to 30.

2. Whether Ms. Williams is entitled to costs

[12] The general rule is that the successful party in litigation can expect to benefit from a costs order. Here, Mr. Steinwand argues this general rule does not apply because success was divided.

[13] It is true that Ms. Williams was not successful in every single aspect of her claim. With respect to special or extraordinary expenses, her claim was dismissed. With respect to retroactive support, her positions on the date of retroactivity, and on how the amount should be calculated, did not prevail.

[14] On the other hand, she was successful on her claim for ongoing child support, which, financially, represented a much more significant aspect of her claim than the claim related to special and extraordinary expenses. As for retroactive support, while the amount awarded was less than what she was claiming, it was nonetheless a substantial amount. And it is worth noting that an important consideration in setting that amount was the potential hardship to Mr. Steinwand's other children. *Williams v. Steinwand, supra*, Paragraphs 127-128 and 134-136.

[15] Under the circumstances, I do not think this case should be characterized as one where success was divided. Ms. Williams was substantially successful on her claim. In my view, she is entitled to an order for costs. The more difficult question is deciding what level of compensation she should benefit from.

3. Solicitor-client costs

[16] Ms. Williams' claim for solicitor-client costs is based on Mr. Steinwand's conduct both before the proceedings were commenced and while they were ongoing.

[17] As far as conduct that occurred before the proceedings were commenced, she points to Mr. Steinwand's persistent failure to fully disclose his income and his hostile attitude on some occasions when she asked him to increase the amount of support he was providing her. She argues that Mr. Steinwand's conduct made litigation inevitable.

[18] I agree that some aspects of Mr. Steinwand's conduct before the proceedings were commenced were blameworthy. That was one of the reasons retroactive support was ordered. But given the many other areas where there were factual disputes and differences of opinion between these parties about what was fair, I am

not persuaded that litigation could have been avoided, even if Mr. Steinwand's conduct had been different.

[19] Ms. Williams also relies on Mr. Steinwand's conduct after the proceedings were commenced. She notes that he continued to resist providing full financial disclosure. He failed to file a Property Statement as required, which led her to file an application to compel him to do so. This led to the issuance of a Consent Order which set a filing deadline. Mr. Steinwand did not comply with that deadline. It was only after Ms. Williams took the further step of filing an application seeking to have him found in contempt of the Consent Order that he did file his Property Statement.

[20] Ms. Williams notes that the same pattern of non-disclosure continued during the hearing itself, and resulted in the proceedings taking longer than they might otherwise have.

[21] The amount of child support that Mr. Steinwand had paid to Ms. Williams between June 2010 and 2013 was one of the contentious issues between these parties. On March 4, 2014, the first day of the hearing, Ms. Williams testified and filed as an exhibit a chart detailing the amounts she believed she had received each month during the relevant time frame. She was cross-examined about the accuracy of those numbers.

[22] The continuation of the hearing had to be adjourned due to lack of time. Mr. Steinwand testified when the hearing resumed on May 21, 2014. During his evidence he said that he had bank records reflecting interac transfers from his account to Ms. Williams' account, and that those records showed that her numbers were inaccurate. It was not until his Re-Examination that he actually sought to produce those documents. It is clear from the record that until then, the documents had not been shown to Ms. Williams' counsel.

[23] The earlier disclosure of these documents could have streamlined this aspect of the case considerably. It could have saved time, and reduced the costs for all involved.

[24] Finally, Ms. Williams notes that Mr. Steinwand continued to be unresponsive after the hearing was completed and the Memorandum of Judgment was filed. Her counsel attempted to engage his counsel in an exchange on the issue of costs, but received no response. Similarly, she did not get a response when she sought counsel's approval of the draft Order reflecting the terms of the

Memorandum of Judgment. No explanation was provided for the lack of response to these inquiries.

[25] On the whole, the record shows that Mr. Steinwand adopted a rather cavalier attitude about these proceedings. He was not diligent in providing timely and accurate information about his financial situation or in complying with Court Orders. It also appears he was not careful about providing accurate information. Mr. Steinwand acknowledged during the hearing that the Property Statement that he filed was inaccurate, in that it included reference to debts that, at the time the document was sworn, had already been paid off. He was unable to provide an explanation for this.

[26] Mr. Steinwand's counsel noted in her submissions at the costs hearing that she and Mr. Steinwand live in different provinces, that this caused delays in the transmission of certain documents, and that this could account for some of the inaccuracies noted in the materials.

[27] This is not a satisfactory explanation. Delays in the exchange of documents may explain why some of the information in the documents prepared by counsel was no longer current by the time those documents reached Mr. Steinwand. But even if that is the case, the fact remains that he swore a document that contained major inaccuracies. It shows, at the very least, carelessness and disregard for the significance of swearing an oath as to the accuracy of the document.

[28] The lack of timeliness in the disclosure of Mr. Steinwand's records of bank transactions shows a similar careless attitude about the proceedings. These records were readily accessible to him all along. All he had to do was print them. Mr. Steinwand did not have an explanation for not having done so much sooner.

[29] Mr. Steinwand's conduct during these proceedings, and his attitude towards Court Orders and disclosure requirements, are of concern. It is not an attitude that this Court should be seen to condone.

[30] Still, the threshold for awarding solicitor-client costs is a high one. A solicitor-client costs order should only be made in "rare and exceptional instances to mark the court's disapproval of the conduct of a party in litigation". *Woodley v. Yellowknife Education District No.1*, 2000 NWTSC 7, Paragraph 6. Unexplained delays in complying with disclosure requirements and Court orders, while reprehensible, do not necessarily entitle the other party to solicitor-client costs. *MacKenzie-Luxon v. MacKenzie-Luxon*, 2014 NWTSC 65, Paragraph 11.

[31] Despite the concerns noted above about aspects of Mr. Steinwand's conduct during the course of this litigation, I am not persuaded that this is one of those rare and exceptional circumstances where an order for solicitor-client costs is justified.

4. Enhanced costs

[32] As noted by this Court in *Nielsen v Nielsen*, quoted above at Paragraph 11, a variety of factors may be taken into account in determining whether costs should be granted on an enhanced basis.

[33] This was not a particularly complex case, but it was made more complicated, and more costly for Ms. Williams, by some of Mr. Steinwand's actions. A number of the applications that were made would have been unnecessary had he complied with his disclosure obligations. The evidence could have been more streamlined, and the hearing shortened, had he disclosed the records of the interac transactions at an earlier date.

[34] The actual costs to Ms. Williams in this case were in excess of \$20,000. There is nothing to suggest that any of the steps taken by her counsel in this litigation were unnecessary or frivolous. There is also no suggestion that the fees charged were unreasonable.

[35] The amount that Ms. Williams would be entitled to recover under the Tariff is \$5,800. The gap between this amount and the amount of her actual costs is significant. That is not determinative in and of itself, but the amount that full indemnity would represent can be relevant in setting the amount of costs, as noted recently by our Court of Appeal. *Bell Mobility Inc v. Anderson*, 2015 NWTCA 3, Paragraphs 100-102.

[36] The more protracted proceedings are, the greater the gap between the Tariff amounts and a litigant's actual legal costs is likely to be. This is because the amounts in the Tariff are lower than the actual legal fees charged by counsel, especially experienced counsel. As a result, the more steps have to be taken by counsel to advance a case, the more the gap between the amounts recoverable under the Tariff and the actual costs grows.

[37] Here, although I have concluded that Mr. Steinwand's conduct does not meet the very high threshold that would justify a solicitor-client costs award, I do find that it contributed to increasing Ms. Williams' costs. This, in my view, justifies an enhanced costs award.

[38] I conclude that Ms. Williams should be awarded costs on an enhanced basis, at double the amount that would be applicable under the Tariff. In arriving at this ratio, in addition to the other factors I have already referred to, I have taken into account that the draft bill of costs submitted by Ms. Williams' counsel did not include the fees associated with the costs hearing, and with obtaining the issuance of the Order arising from the decision filed on November 5th.

[39] For those reasons, I grant Ms. Williams' application for costs, and set the amount of those costs at \$11,600.

L.A. Charbonneau
J.S.C.

Dated at Yellowknife, NT, this
14th day of January 2015

Counsel for the Petitioner: Margo Nightingale
Counsel for the Respondent: Jane Olson

S-1-DV-6101-103531

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