

SUPREME COURT OF NOVA SCOTIA
Citation: Bezanson v. Troop, 2017 NSSC 285

Date: 20170628
Docket: Ken No. 1204-005197
Registry: Kentville

Between:

Kimberley Anne Bezanson

Applicant

v.

Todd Stephen Troop

Respondent

LIBRARY HEADING

Judge: The Honourable Justice Mona Lynch

Heard: April 12, 2017, in Kentville, Nova Scotia and June 28, 2017, in Bridgewater, Nova Scotia;

Written Decision: November 6, 2017

Subject: Costs; Application to Vary Child Support

Summary: The parenting arrangement changed from shared parenting to the Mother having primary care. The Mother applied to vary the parenting order and to vary table and s. 7 child support, both ongoing and retroactively. The hearing took almost two full days in court. Parenting was varied by consent. The Mother was successful in relation to the table amount of child support and some s. 7 expenses. The Father was successful in not having income imputed and in relation to some s. 7

expenses.

Issues: What is the appropriate award of costs?

Result: Tariff A is more appropriate in the circumstances. Mother clearly the more successful. Both parties prolonged the matter. Costs of \$7,000.00 inclusive of disbursements.

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Oral Decision: June 28, 2017

Written Decision: November 6, 2017

Counsel: Darlene Lamey, for the Applicant
Heidi Foshay Kimball, Q.C., for the Respondent

By the Court:**Background:**

[1] The Mother, Kimberley Anne Bezanson, filed an Application in Chambers on April 19, 2016, to vary child support, and to seek changes in the parenting of the two children of the marriage. She sought a variation in the table amount of child support as well as a variation in the s.7 expenses both prospectively and retroactively. The Father, Todd Stephen Troop, filed a Notice of Contest seeking a finding that he had overpaid child support for a two-year period; credit for payments made; that only health related s.7 expenses be ordered; and forgiveness of all s. 7 claims made by the Mother. The matter was adjourned a few times at the request of counsel for the parties. An interim order regarding child support was made in November of 2016.

[2] The parties reached an agreement regarding parenting, passport applications, health forms, ongoing child support and reimbursement for health care costs for the children. The matters in relation to retroactive child support, s. 7 expenses and determination of the Father's income were heard on April 12, 2017, and June 28, 2017. The oral decision of June 28, 2017, found that the shared parenting ended in May 2015, when one of the children went to live primarily with the Mother and the second child began to live primarily with the Mother in September of 2015. The Father was found to have engaged in blameworthy conduct and he was ordered to pay retroactive child support and s.7 expenses in the amount of \$6,710.00 within 90 days of June 28, 2017. Because of incomplete financial disclosure by the Father, his income was found to continue to be the line 150 amount from his 2015 income tax return. Retroactive variation in favour of the Father was not awarded due to the Father's failure to disclose his income as required.

[3] The Mother sought costs and the Mother filed the written submissions on July 7, 2017, with submissions from the Father filed on July 17, 2017. Clarification of the accounts submitted by the Mother was sought and received.

Issue:

[4] What is the appropriate award of costs?

Position of the Parties:

[5] The Mother's submissions are not entirely clear, but the Mother appears to be seeking solicitor and client costs or an elevated costs order under Tariff A. The Father seeks that each party bear their own costs or an award not exceeding \$3,000.00 under Tariff C.

Analysis:

[6] *Civil Procedure Rule 77.02* provides the overall principle in relation to an order for costs is to "do justice between the parties". General principles include that costs are in the discretion of the court, a successful party is entitled to a cost award and the costs award should represent a substantial contribution to the party's legal costs in relation to the proceeding.

[7] *Civil Procedure Rule 77.07(2)* lists some factors that can be taken into consideration in an award of costs to add or subtract from the Tariff costs. In relation to offers to settle, the Mother's offer was much more reasonable than the Father's offer to settle. The Mother was successful in obtaining retroactive table child support and some s. 7 expenses. The Father was not successful in his claim for retroactive credit for the set off amount of child support under the prior shared parenting arrangement.

[8] Both parties complain that the other prolonged the proceeding. The Mother complains that the Father failed to provide financial disclosure required by the Corollary Relief Order that necessitated the commencement of the proceeding and that he failed to agree to matters that he should have agreed to.

[9] The Father's complaints include that the Mother:

- (a) Did not file a properly sworn affidavit until a few weeks prior to the hearing which contained significant irrelevant evidence regarding parenting even though parenting had been settled for months before the affidavit was filed;
- (b) Prolonged the hearing by her manner of testifying;

- (c) Provided confusing and incomplete information in relation to s. 7 expenses; and
- (d) Failed to provide evidence of the antique business for which she sought to have income imputed to the Father.

[10] The leading case on costs awards in family cases is **Armoyan v. Armoyan**, 2013 NSCA 136. The court notes that solicitor and client costs are engaged in rare and exceptional circumstances, such as when misconduct has occurred in the conduct of, or related to, the litigation (para. 11 quoting **Williamson v. Williams**, 1998 NSCA 195). There are no rare and exceptional circumstances in this case and solicitor and client costs are not warranted.

[11] The Father's position that each party should bear their own costs is also rejected. The Father was successful in not having income imputed to him and the Mother was not successful in her claim for extracurricular expenses. However, the Mother was clearly the more successful party.

[12] In the **Armoyan** decision, the Court of Appeal emphasizes that the tariffs are the norm and there must be a reason to consider a lump sum. Also, that costs awarded should afford substantial contribution to the party's reasonable fees and expenses (paras. 15 and 16). The Court of Appeal agrees with the principle that a substantial contribution should exceed fifty percent of the reasonable lawyer's bill, but should be less than one hundred percent of that reasonable bill (para. 37).

[13] There is a discussion of the use of the tariffs versus a lump sum award in the **Armoyan** decision starting at para. 17 and the principles to be extracted include:

- (a) The tariffs deliver the benefit of predictability by limiting the use of subjective discretion (para. 17);
- (b) Some cases bear no resemblance to the tariffs' assumptions (para. 18);
- (c) A proceeding begun as a chambers motion signalling Tariff C may assume trial functions as contemplated by Tariff A (para. 18);
- (d) A Tariff A case may have no amount involved but have other important issues (para. 18);

- (e) Cases can assume a complexity that is far disproportionate to court time and a substantial sum may turn on a concisely presented issue. (para. 18);
- (f) Some cases may combine several factors which would result in a heavy dose of subjectivity which the tariffs aim to avoid by defining an artificial amount involved (para. 18); and
- (g) Where subjectivity exceeds a critical level, it is more realistic to circumvent the tariffs and use discretion for a principled calculation of a lump sum based on the objective criteria accepted by the *Rules* or the case law (para. 18);

[14] The court noted that Justices of the Family Division of the Supreme Court of Nova Scotia have found that trial-like hearings are more appropriate for Tariff A than Tariff C (para. 20). The **Armoian** case considered by the Court of Appeal started as a motion which would engage Tariff C but became more complex which would engage Tariff A (para. 21). The Court of Appeal also noted that there was no amount involved in the proceeding and agreed with the **Williamson** decision that a notional amount involved supported the use of a lump sum award (para. 22).

[15] The Mother asks that the amount involved be set at the notional amount involved of \$20,000.00 per day of hearing or \$40,000.00 and that Tariff A be used to arrive at a costs award of between \$8,600.00 and \$11,800.00. There are problems with this submission. First, it asks that the court apply the notional amount involved that was frowned on by the Court of Appeal in the **Armoian** decision at paras. 18 and 22. Also, in the present case there was an amount involved. The Mother sought an amount of \$11,000.00 and the court awarded \$6,710.00.

[16] While the matter took the better part of two days to complete, it should not have. I agree with the Father that the Mother's affidavit prolonged the matter by referring to parenting issues that had been settled. The Mother's confusing evidence regarding s.7 expenses prolonged the matter. The Mother's effort to impute income to the Father prolonged the matter.

[17] However, the Father bears most of the blame for the matter having to proceed to hearing. He failed to disclose financial information, even at the

hearing of the matter. He failed to agree to matters which were clear, such as the date that shared parenting had stopped. These failures by the Father both necessitated a hearing and prolonged that hearing.

[18] The Mother has provided a legal bill of \$30,561.00 for this matter and a substantial contribution would be more than \$15,280.00. Tariff A, with an amount involved less than \$25,000.00, would result in a costs award somewhere between \$7,000.00 and \$9,000.00 for a two day matter. Tariff C would result in an award of approximately \$4,000.00.

[19] This matter should not have taken the court time that it did. The issues were not complex. The actions of both parties prolonged the matter, however the Father's failure to provide disclosure and failure to agree to matters were the primary reasons that the matter had to proceed to a hearing.

[20] The matter resembled a trial more than it did a chambers motion and costs in keeping with Tariff A are more appropriate. The low end of the scale is appropriate because of the actions of the Mother.

[21] Most disbursements were for photocopying and fax charges, but the cost per page was not disclosed for me to determine reasonableness.

Conclusion:

[22] The Father shall pay costs to the Mother in the amount of \$7,000.00 inclusive of disbursements.

Justice Mona M. Lynch

