SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION
Citation: *Boylan v. MacLean*, 2018 NSSC 115

Date: 2018-05-16
Docket: SFHMCA-032826
Registry: Halifax

Between:

Michelle Boylan

Applicant

v.

Lauchlin MacLean

Respondent

LIBRARY HEADING (DECISION ON COSTS)

Judge: The Honourable Justice R. Lester Jesudason

Heard: April 25, 26 and July 18, 2017

Original Written Decision: March 5, 2018

Final Submission On Costs: April 27, 2018

Key words: Costs, Failure to Disclose, Blameworthy Conduct

Legislation: *Maintenance and Custody Act*, R.S.N.S. 1989, c. 160

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Counsel:	Julia E. Cornish, Q.C., and Gillian R. Lush, for Michelle Boylan Lauchlin MacLean, self-represented.

By the Court:

[1] This is a decision on costs following my written decision released on March 5, 2018: 2018 NSSC 15. The relevant background was summarized in my earlier decision so I won't repeat it again here.

Parties' Positions:

[2] The Father seeks an amount of $8000 for costs and disbursements. He asks that any amount of costs awarded to him be "set-off" against what I ordered he must pay to the mother for retroactive child support.

[3] The Mother requests that no costs be awarded.

Parties' Arguments:

[4] In support of his position, the Father makes a number of arguments. I summarize his primary ones as follows:

- He was largely or totally successful on the most contentious, complex and time-consuming issues;

- While I found his conduct blameworthy when assessing the Mother's claim for retroactive child support, he says he wasn't guilty of any blatant attempt to prefer his own interests over the parties' daughter's right to an appropriate amount of child support;

- He agrees that, in hindsight, he should have provided the financial disclosure required under the 2005 Consent Order. He emphasizes that he was always willing to do so if the Mother provided hers as he thought both parties were required to provide financial disclosure once a shared parenting arrangement was subsequently ordered;

- He says he has acted reasonably in terms of trying to resolve the numerous issues which were advanced by the parties since the Mother's variation application was filed on February 12, 2013. He suggests that the Mother maintained unreasonable positions on the issues which resulted in additional delays and costs

- He made offers to settle to the Mother in March and April 2017 which he says were considerably more favourable to the Mother than what I ordered;

- He spent many hours over the past five years representing himself in this proceeding with little legal assistance because he couldn't afford a lawyer. He incurred out of pocket expenses doing so and says he also gave up income he could have otherwise earned.

[5] In support of her position, the Mother makes a number of arguments. I summarize her primary ones as follows:

- Despite numerous requests from her to the Father to provide his financial disclosure as required under the 2005 Consent Order, he refused to provide it. This resulted in her having to file her variation application in 2013 seeking disclosure so that she could assess whether it was appropriate to seek to vary child support;

- Between 2013 and the date of the trial, the court issued two Directions to Disclose and two Orders to Disclose to the Father. The parties also appeared before Associate Chief Justice O'Neil on two occasions to deal with disclosure issues;

- Neither party was entirely successful on the contested issues at the hearing. She says she was successful on the issue of final decision-making for their daughter, the determination of the Father's income, Table Amount of child support from 2013 forward, and the sharing of medical plan costs. She says the Father was successful on the issue of Christmas Holiday parenting arrangements, pre-2013 child support as well as a number of other financial requests such as his ongoing obligation to contribute to the daughter's RESP.

- The Father's repeated failure to provide the financial disclosure required under the 2005 Consent Order shouldn't be sanctioned and constitutes blameworthy conduct. The Father's resistance to disclosing his financial information resulted in unnecessary legal costs to her. It also constituted a misuse of the court's time because the 2005 Consent Order required him to disclose this information annually to her.

- While the Father's request for $8000 in costs falls within Tariff A, it would be unjust to award the Father costs given his resistance to providing his financial disclosure. He's a self-represented litigant who incurred minimal legal fees compared to her. She relies on the Court of Appeal decision of *Crewe v. Crewe*, 2008 NSCA 115 which she says supports that the father, as a self-represented litigant, isn't entitled to costs on the same scale as parties who retain lawyers.

- The Father's offers to settle were only made shortly before the hearing. By that time, she had already incurred significant legal expenses and the bulk of the trial preparation was completed.

The Law:

[6] *Civil Procedure Rule* 77 deals with the awarding of costs. It gives the court a wide discretion to award costs to do "justice between the parties".

[7] In *Armoyan v. Armoyan*, 2013 NSCA 136, our Court of Appeal provided helpful guidance on the principles that should be considered when determining costs. Specifically, Justice Fichaud stated:

1. The court's overall mandate is to do "justice between the parties": para. 10;

2. Unless otherwise ordered, costs are quantified according to the tariffs; however, the court has discretion to raise or lower the tariff costs applying factors such as those listed in *Rule* 77.07(2). These factors include an unaccepted written settlement offer, whether the offer was made formally under Rule 10, and the parties' conduct that affected the speed or expense of the proceeding: paras. 12 and 13.

3. The *Rule* permits the court to award lump sum costs and depart from tariff costs in specified circumstances. Tariffs are the norm and there must be a reason to consider a lump sum: paras. 14-15

4. The basic principle is that a costs award should afford a substantial contribution to, but not amount to a complete indemnity to the party's reasonable fees and expenses: para. 16

5. The tariffs deliver the benefit of predictability by limiting the use of subjective discretion: para. 17

6. Some cases bear no resemblance to the tariffs' assumptions. For example, a proceeding begun nominally as a chambers motion, signaling Tariff C, may assume trial functions; a case may have "no amount involved" with other important issues at stake, the 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, etc.: paras. 17 and 18; and

7. When the subjectivity of applying the tariffs exceeds a critical level, the tariffs may be more distracting than useful. In such cases, it is more realistic to circumvent the tariffs, and channel that discretion directly to the principled calculation of a lump sum which should turn on the objective criteria that are accepted by the *Rules* or case law: para. 18.

Analysis:

[8] The hearing was conducted on April 25, 26 and July 18, 2017. Both parties filed extensive pre- and post-hearing written submissions. The parties had many other court appearances since the Mother's variation application was filed in 2013 including four judicial settlement conferences.

[9] The most contentious, complex and time-consuming issue was the Mother's claim for retroactive support going back to September 1, 2006. I agree with the Father that he was largely successful on that issue. The Mother doesn't contest that the Father made offers to settle which were more favorable on that issue than what I awarded to her.

[10] On the other hand, I agree with the Mother that the Father's failure to provide the financial disclosure required under the 2005 Consent Order shouldn't be condoned. Indeed, as I stated in paragraph 179 of my decision, while the Father was largely successful in resisting the Mother's retroactive claim, I am troubled by the fact that he simply did not annually provide the Mother with his financial disclosure as required under the 2005 Consent Order. Furthermore, as stated in paragraph 145 of my decision, parties are expected to follow court orders and cannot unilaterally decide to disregard or not comply with them.

[11] Proper disclosure in family law litigation is crucial. It assists with timely progress of litigation and helps promote equitable settlements of litigants' affairs. A number of cases emphasize this:

i) *Leskun v. Leskun*, [2006] 1 S.C.R. 920 – In delivering the unanimous decision of the Supreme Court of Canada, Justice Binnie stressed the importance of disclosure albeit in the context of spousal support, and quoted favourably from paragraph 9 of *Cunha v. Cunha* (1994), 99 B.C.L.R. (2d) 93 (S.C.), where Justice Fraser stated:

> Non-disclosure of assets is the cancer of matrimonial property litigation. It discourages settlement or promotes settlements which are inadequate. It increases the time and expense of litigation.

ii) *MacLean v. MacLean*, 2002 NSSC 5 - Justice Goodfellow stated:

> **19** Full disclosure in family matters is a given. Failure of a party to do so will, in most circumstances, result in adverse consequences. Such could include, a deeming of income, deeming of value, possibly contempt, if the failure persists, if an Applicant, possibly dismissal, stay, adjournment/postponement of relief sought, denial of costs, etc.
>
> **20** Failure to comply with this basic prerequisite, full financial disclosure almost automatically will have cost consequences because compliance of such a fundamental requirement should rarely require the Court's intervention - usually, only if there are major practical/time/confidential issues that need to be addressed.
>
> **21** The Court has developed a zero tolerance policy where full financial disclosure could reasonably have been complied with without Court intervention

iii) *Fielding v. Fielding*, 2015 ONCA 901 – In delivering the unanimous decision of the Ontario Court of Appeal, Justice Benotto stated:

> [64] The most basic obligation in family law is the duty to disclose financial information. This requirement should be automatic. It is immediate and ongoing. Failure to abide by this fundamental principle impedes the progress of the action, causes delay and generally acts to the

> disadvantage of the opposite party. It also impacts the administration of justice. Unnecessary judicial time is spent and the final adjudication is stalled.

iv) *Gouthro v. Gouthro*, 2018 NSSC 21 – Justice Forgeron stated:

> Costs consequences arise because incomplete disclosure unreasonably lengthens litigation and negatively impacts on the integrity of the litigation process, which is particularly repugnant in the family law setting (para. 11).

[12] In the present case, I find that the Father's failure to abide by his disclosure obligations under the 2005 Order warrants reducing the amount of costs I would otherwise award to him. Thus, when I consider the provisions of Civil Procedure 77, the Tariffs, the principles with respect to the awarding of costs from the case law, and the unique circumstances of this case, I exercise my discretion to award the Father costs and disbursements in the total amount of $2500.

[13] I decline the Father's request that the costs awarded be "set-off" against the amount I ordered he pay to the Mother for retroactive child support. The amount I ordered for child support is designed to address the daughter's right to an appropriate amount of child support. My costs award, on the other hand, is meant to do justice between her parents resulting from their litigation.

[14] The costs award must be paid by the Mother within 60 days.

[15] I direct that counsel for the Mother prepare the appropriate form of Costs Order reflecting my decision which should be consented to as to form only by both parties and sent to me within two weeks.

Jesudason, J.