SUPREME COURT OF NOVA SCOTIA
Citation: *Elliott v Pinch*, 2018 NSSC 45

Date: 2018-03-01
Docket: 1204-004585
Registry: Kentville

Between:

Michael Patrick Elliott

Applicant

v.

Lisa Christine Pinch

Respondent

Judge:	The Honourable Justice Gregory M. Warner
Heard:	January 19 and 22, 2018, in Kentville, Nova Scotia
Final Written Submissions:	February 11, 2018
Counsel:	Michael Elliott, self-represented applicant Sharon Cochrane, counsel for the respondent

By the Court:

[1] This costs decision is respecting an application for contempt and a cross-application to vary parenting.

Background

[2] The parties were divorced in 2007, after a short marriage that produced one child, born in May 2006.

[3] The Consent Corollary Relief Order provided for shared parenting of their son, no child or spousal support (both were teachers earning about the same income at that time) and a division of their assets and debts.

[4] In 2013, Dad applied to vary custody and access. Through judicial mediation, a consent order was issued. It added, to an already detailed co-parenting arrangement, even more detailed parenting provisions totalling 12 pages for their then seven-year-old child. The court observes with hindsight that the detail required in both the Consent Corollary Relief Order and Variation Order respecting parenting gives insight into how the present applications arose and were conducted.

[5] In mid-June 2017, the child stopped having any contact with Dad. At that time, as a self-represented party, Dad filed an application for contempt claiming alienation by Mom. Mom retained a lawyer and filed a cross-application for primary care, child support and for a Voice of the Child Report. Dad retained counsel. Both counsel consented to preparation of a Voice of the Child Report and adjourned the half-day set aside for the hearing, pending the report.

[6] The Voice of the Child Report, received in October 2017, confirmed that the parties' son was afraid of his father, wanted to remain in the primary care of his Mom and only wanted access to Dad in the presence of his parental grandparents, whom the son trusted. Dad discharged his counsel in early November and, on November 21st, hearing of this application was scheduled for one full day for January 19, 2018.

[7] Before January 19, 2018, Dad filed four affidavits of himself (some quite lengthy) and eight affidavits from others. Mom filed two affidavits of herself and three affidavits from others. Dad subpoenaed five of his affiants and nine other persons (counsellors, social workers, police, etc.) for the hearing. Mom subpoenaed

two other witnesses. Mom waived the requirement for four of Dad's affiants to attend for cross-examination.

[8] In his pre-hearing brief, Dad alleged parental alienation by Mom. He sought:

1. primary care for three months, with Mom having supervised access, followed by three months' primary care with Mom having access every second weekend, followed by a return to the shared parenting arrangement;

2. that Mom not have the ability to make unilateral decisions, as she did when she changed their son's school;

3. costs both for this application and the 2013 variation proceeding, which resulted in a mediated consent order.

[9] In her pre-trial brief, Mom sought:

1. primary care with liberal parenting time with Dad, as and when the son feels safe and secure;

2. their son to participate in counselling and, if the counsellor agrees, that dad participate; and,

3. child support.

[10] The hearing started on January 19th, with additional time being required on January 22nd. Effectively, it took the better part of two full days.

[11] The court's oral decision provided:

1. Mom was granted primary care, but the child was to remain in joint custody with Mom not having sole decision making authority;

2. Dad was granted fixed access every second weekend and some other times. Overnight access was delayed until March 2018;

3. Dad was ordered to continue his counselling and their son was to participate in his own counselling. Overnight access would be re-evaluated on the advice of the son's counsellor;

4. Dad was ordered to pay the table amount of child support.

Cost Submissions

[12] Mom seeks costs in the amount of $11,813.00, in accordance with Tariff A, Scale 3, applying the principles summarized in a decision of the Nova Scotia Supreme Court (Family Division) in *Arab v Izsak*, 2009 NSSC 275 ("*Arab*"), and, seeks to impute as the "amount involved" for the Tariff A analysis (when the issue is non-monetary), the sum of $20,000.00 per day. Counsel notes this court's cost decision in *Lake v Lake*, 2016 NSSC 255 ("*Lake*"), at paras 31 to 36.

[13] Mom's counsel submits that most of the hearing time was taken up with Dad's evidence, much of which pre-dated the 2013 mediated consent order, and that much of Dad's evidence was not relevant or admissible.

[14] Dad submits that the length and number of affidavits filed on his behalf, as well as the witnesses subpoenaed, were not excessive. He states that the court denied Mom sole custody.

[15] He submits there was no "definitive" successful party and that he did not attempt to inflate the costs of the hearing. He repeats evidence he gave during the hearing that he is currently bankrupt and has no savings or available financial resources to pay costs. He pays child support to an older son, and he has been on medical leave from work since November 2017.

Costs Analysis

[16] Dad's allegation of alienation by Mom was not substantiated and his proposed parent plan to remedy her alleged alienation was not objectively reasonable. While I have no doubt that Dad loves their son, all his extensive evidence sought to point the finger at Mom as the sole cause of his recent estrangement from his son. Dad appeared to be largely at fault for his son's withdrawal from access.

[17] While Mom was not given sole decision making authority over their son, and the court set out a path for Dad to try to repair his relationship with their son – not for his benefit, but for the benefit of their son, who benefits from a close relationship with both parents, Mom was substantially successful.

[18] Mom should have costs of this application, as she was the successful party.

[19] As this court noted previously in *Lake*, costs are in the discretion of the court and ultimately intended to do justice between the parties. It is not just the losing applicant who will suffer financially because of these court proceedings. The money

both parents spend on these proceedings is money not available to provide for their son.

[20] The starting point for a cost decision in *CPR 77*. In *Lake*, I wrote that whether Tariff A or Tariff C applies should not affect the end result. With respect to Tariff A, I have difficulty with the artificiality of imputing $20,000.00 for each day of hearing as the "amount involved" where the proceedings involve non-monetary issues.

[21] *Civil Procedure Rule 77.07* authorizes the court to add or subtract from tariff costs for a number of factors, including the conduct of a party affecting the speed and expense of a proceeding, or the taking of improper or unnecessary steps. *Civil Procedure Rule 77.08* authorizes lump sum costs instead of tariff costs.

[22] In my view, the starting point is Tariff C where the application is primarily affidavit evidence subject to cross-examination.

[23] This application was heard over most of two days. It was not made complex by the subject matter, but rather than by the overwhelming amount of evidence, often marginally relevant or duplicitous, that was advanced by Dad.

[24] Tariff C starts with a range of costs of $2,000.00 per full day ($1,000.00 to $2,000.00 for more than a half day and less than a full day). For this matter, which consumed most of two days, Tariff C would suggest costs of $4,000.00.

[25] However, this proceeding was made complex because of lengthy and numerous affidavits and the substantial pre-hearing submissions by both sides about the admissibility of much of the lengthy affidavit evidence of each other. Tariff C expressly provides that the court may take into consideration the complexity of the matter, the amount of time needed to prepare and conduct of the hearing, as well as the importance of the matter to the parties, in determining whether or not to multiply the "range of costs" by any factor up to four times.

[26] One of Dad's submissions is that he does not have the ability to pay costs. He is bankrupt, impecunious and has been off work. *Civil Procedure Rule 77.04* provides a procedure for seeking relief from liability for costs because of poverty. The procedure is not complicated, and it exists to create fairness between the parties. Dad has not followed that procedure. I have therefore not considered Dad's financial circumstances, not just because he failed to follow the procedure in *CPR 77.04*, but

also because their son suffers a financial loss because both parents have been required to incur legal expenses as a result of *his* contempt application.

[27] In all the circumstances, Mom should have costs greater than the basic Tariff C amount for two days.

[28] Often this court applies the principle of a substantial contribution to reasonable solicitor / client cost as a measure for awarding costs. There is no information respecting Mom's reasonable actual solicitor / client costs in this case.

[29] In all the circumstances, Mom is awarded costs in the amount of $6,000.00 plus disbursements as claimed in the amount of $190.00.

Warner, J.