



**IN THE COURT OF APPEAL  
OF NEWFOUNDLAND AND LABRADOR**

**Citation:** *Stoodley v. Stoodley*, 2019 NLCA 10

**Date:** February 21, 2019

**Docket Number:** 201801H0091

**BETWEEN:**

ROBERT KEITH STOODLEY

APPELLANT

**AND:**

AMY DIANNE STOODLEY

RESPONDENT

**Coram:** Welsh, White and O'Brien JJ.A.

**Court Appealed From:** Supreme Court of Newfoundland and Labrador  
Family Division 201402F0784  
(2018 NLSC 204)

**Appeal Heard:** February 14, 2019

**Judgment Rendered:** February 21, 2019

**Reasons for Judgment by:** Welsh J.A.

**Concurred in by:** White and O'Brien JJ.A.

**Counsel for the Appellant:** Sandra M. Burke Q.C.

**Counsel for the Respondent:** Paul D. Dicks Q.C.

**Welsh J.A.:**

[1] At issue in this appeal is whether the applications judge erred in awarding a fixed sum of \$10,000 for costs on an interim application for variation of an interim spousal support order. The judge granted an increase of spousal support from \$9,000 per month to \$24,000 per month commencing on April 1, 2018. A trial date was set for March 2019.

The Fixed Sum Award of Costs by the Applications Judge

[2] I begin with the basic proposition that an award of costs is discretionary and will not be interfered with lightly on appeal. However, in exercising that discretion, the judge is required to comply with applicable rules of court and to act judicially on the facts of the case (*British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71, [2003] 3 S.C.R. 371, at paragraph 42).

[3] Proceedings relating to spousal support are governed by the rules contained in the *Rules of the Supreme Court, 1986*, Part IV, *Supreme Court Family Rules*. Rule F1.02 provides:

(1) This Part applies to proceedings in the Court, other than appeals, related to any of the following matters:

...

(c) ... spousal ... support;

(2) Where an issue respecting practice or procedure arises which is not covered by this Part or by an applicable statute, any of rules 1 to 4 or the rules in Part I may be applied as required, with any necessary modifications.

[4] Costs of proceedings are addressed in rule F33. The general principle is stated in rule F33.02(2):

There is a presumption that a successful party is entitled to the costs of a proceeding.

[5] An order for payment of a fixed sum in lieu of taxed costs in a family matter is governed by rule F33.05:

(1) A judge may make an order at any time during a proceeding that a party pay a fixed sum of money to another party instead of taxed costs.

(2) In determining whether to make an order pursuant to subrule (1) the judge must consider:

- (a) the importance, complexity, or difficulty of the issues;
- (b) the reasonableness or unreasonableness of each party's behaviour in the proceeding;
- (c) the lawyer's fees, if a party is represented by a lawyer;
- (d) the time properly spent on the proceeding, including
  - (i) discussions between the parties, their lawyers, and any witnesses,
  - (ii) drafting documents,
  - (iii) attempting to settle the matter and preparing for and attending any application or hearing, and
  - (iv) preparing any order;
- (e) expenses properly paid or payable; and
- (f) any other relevant matter.

[6] Because the rule specifies that the judge “must consider” certain factors before ordering a fixed sum in lieu of taxed costs, in order to permit review on appeal and to allow the parties to understand the rationale for the award, it is helpful to have those factors specifically addressed by the judge. In some cases, a review of the whole of the decision where fixed costs are ordered will be sufficient to indicate to the parties the basis for the order. While rule F33.05 requires the judge to turn his or her attention to the enumerated factors, every factor will not necessarily be relevant in a particular situation.

[7] An example is the decision in *Winsor v. Winsor*, 2017 NLCA 54. Hoegg J.A., for the majority, recognized that the trial judge did not address the factors enumerated in rule F33.05:

[51] The Judge did not advert to any of the factors that are normally considered when determining whether to order lump sum costs. Nevertheless, the lengthy proceedings (*Anstey*, at paragraph 58), the delay in getting the matter to trial (*Anstey*, at paragraph 59), and the fact that a lump sum award minimized further litigation by preventing a taxation hearing (*Anstey*, at paragraph 62) make a lump sum award appropriate. Minimizing litigation in the circumstances of the strained relationship between [the daughter] and her father would avoid additional conflict and expense, and could serve to afford some measure of closure for them.

[8] Hoegg J.A. rejected the view in the dissenting decision that counsel should be afforded an opportunity to make submissions on costs of this type:

[62] I add that I cannot agree with the suggestion of my colleague Welsh J.A., that if the Court proposes to depart from an order for taxed costs on column 3 of the scale of costs and to award costs on a different scale or by way of lump or fixed sum, the parties should be given notice and an opportunity to be heard. Such an approach unnecessarily formalizes a matter that is by its nature highly discretionary and generally regarded as incidental to a merits determination, and could lengthen proceedings or even require an additional hearing in some cases.

[63] Parties know that costs are always an issue in litigation and that the Court can exercise its discretion to award them in differing ways. Parties always have the opportunity to make submissions on costs as part of their oral and written arguments and ought to assist the Court by doing so. If they do not do so, they effectively consign costs determinations to the Court's discretion.

[9] The majority in *Winsor* did not address the language in rule F33.05 specifying that the court “must consider” enumerated factors. Reference was made to the lengthy proceedings, the delay in going to trial, and the interest in minimizing further litigation associated with a taxation hearing, with the purpose of avoiding additional expense and conflict between the father and his daughter. The decision in *Anstey v. St. John's (City)*, 2014 NLCA 35, 356 Nfld. & P.E.I.R. 117, referred to in *Winsor*, provides a discussion of the purposes for awarding fixed costs. However, *Anstey* dealt with a commercial dispute which was governed by the general costs rule, which makes no reference to factors that “must” be considered as enumerated in rule F33.05(2).

[10] In this appeal, the applications judge did not review the enumerated factors to be considered under rule F33.05. However, he did reference three considerations on which he based his decision (2018 NLSC 204):

[22] [Mr. Stoodley's] financial dealings or affairs are complex and this matter is being determined after an interim hearing on affidavit evidence. Accordingly, my determination is without prejudice to a retroactive adjustment of the appropriate sharing of post-separation incomes and spousal support for the pre-trial period after a full hearing of the relevant evidence.

[23] Based on representations by the parties and based on [Ms. Stoodley's] success in this application and the complexity of the matter, I have ordered a lump sum cost payment of \$10,000 payable to [Ms. Stoodley].

[11] Mr. Stoodley appeals the order of \$10,000 for costs on the basis that it is plainly wrong, unfair and unreasonable, and rendered without proper

consideration of the factors set out in rule F33.05. In support, he submits: Ms. Stoodley had not made an offer to settle; the applications judge gave his oral decision immediately after the conclusion of the parties' submissions suggesting a failure to give the submissions due consideration; this was an interim application seeking variation of an interim spousal support order which was completed in less than one-half a day; the application proceeded on the basis of affidavits with no oral testimony; Mr. Stoodley was not given the benefit of time to review Ms. Stoodley's affidavit before the hearing; and Ms. Stoodley failed to provide evidence to support her request for a fixed sum costs award of \$20,000.

[12] Ms. Stoodley responds that this Court should not interfere with the judge's exercise of discretion because the assessment of Mr. Stoodley's income was complex, Ms. Stoodley was successful in obtaining a significant increase in spousal support, and the order was an "implicit recognition of the time spent on the proceeding and the cost of legal representation".

[13] The first factor referenced by the applications judge is the parties' representations. In this Court, counsel advised that, at the conclusion of the hearing, in response to the judge's indication that he was inclined to order a fixed sum in costs, Mr. Stoodley submitted that an appropriate order would be costs in the cause. Ms. Stoodley suggested a fixed sum of \$20,000 based on the difficulty in obtaining disclosure and an accurate picture of Mr. Stoodley's income for purposes of determining appropriate spousal support.

[14] Particularly where a substantial sum in costs is under consideration on an interim application, representations should include reference to and an explanation regarding the factors enumerated in rule F33.05(2). As indicated in the majority decision in *Winsor*, counsel is expected to come prepared to make submissions. That said, in this case, the question of a fixed sum in lieu of taxed costs or costs in the cause was raised by the judge, rather than by counsel. In that situation, where the judge ordered a large sum in costs, it was incumbent on him to provide an explanation based on the factors enumerated in rule F33.05(2). The reasons necessarily must go beyond mere reference to the factors. The applications judge did not satisfy this requirement.

[15] The second factor referenced by the applications judge is Ms. Stoodley's success on the application. While this is a relevant consideration in determining whether to award costs and to whom, it is a factor that applies generally to the award of costs and is of limited assistance in determining whether a fixed sum should be ordered in lieu of taxed costs. That said, factors such as minimizing further litigation or finalizing the dispute between the parties, as occurred in

*Winsor*, would be a relevant consideration in determining whether to award a fixed sum rather than taxed costs to the successful party.

[16] However, that is not the situation in this case. The parties have not yet had a trial and it is unlikely that the outcome of the interim application will finally determine the issues between the parties. Rather, as referenced by the applications judge, after a full hearing and evidence at trial, there may be “a retroactive adjustment of the appropriate sharing of post-separation incomes and spousal support for the pre-trial period” (decision of the applications judge, at paragraph 22).

[17] Further, Ms. Stoodley refers to her success in obtaining “a significant increase in spousal support”. While, under rule F33.02(2), there is a presumption that a successful party is entitled to costs of the proceeding, rule F33 does not reference “the amounts claimed and the amounts recovered” as a relevant consideration. This is in contrast to rule 55.04(4) which applies to costs ordered in civil matters falling outside the *Supreme Court Family Rules* in Part IV. Although the Family Rules do not preclude consideration of a factor such as obtaining “a significant increase in spousal support”, if the judge is relying on that factor in determining an award of costs, an explanation is necessary to indicate the underlying rationale and the effect that factor had on the decision.

[18] The third factor referenced by the applications judge is the complexity of the matter, which is an item included in rule F33.05(2)(a). The judge referred to Mr. Stoodley’s financial dealings or affairs as complex. Nonetheless, for purposes of the interim application, the judge was satisfied that he had sufficient information to warrant ordering a substantial increase in spousal support. He made reference to a computer-based software formula that helps to simplify the process and assists the judge in determining an appropriate order for spousal support.

[19] Further, the interim application, for which limited court time was available, was heard on affidavit evidence which was not tested by cross-examination. While determination of which of Mr. Stoodley’s income was taxable, and which was not, was an issue, this was an interim application, heard in less than half a day, with a date set for the trial within a reasonable time. The trial will provide an opportunity for the full presentation and assessment of the evidence, including a determination of which of Mr. Stoodley’s income is taxable and which is not.

[20] Further, the trial would provide an appropriate venue for Ms. Stoodley's submissions as to difficulties she experienced in obtaining disclosure. A party's unreasonable behaviour, if established, is a consideration in ordering a fixed sum for costs (rule F33.05(2)(b)). In this case, although Ms. Stoodley submits that Mr. Stoodley's behaviour was unreasonable because he did not provide proper and timely financial disclosure, the judge did not mention Mr. Stoodley's conduct as being a relevant factor in ordering the fixed sum of \$10,000 for costs of the interim application.

[21] I would contrast this with a previous order in the same proceeding, dated January 9, 2018. In that interim application a different judge awarded costs under column 3 of the scale of costs:

10. [Ms. Stoodley] shall have the costs of this Application in any event of the cause since, but for the recalcitrance of [Mr. Stoodley] and his demonstrated, ongoing intention to prevent [Ms. Stoodley] from knowing his full financial position, this application would have been unnecessary. Costs to be taxed on Column III.

[22] Finally, while Ms. Stoodley requested \$20,000 in costs for the interim application, counsel did not provide support for that submission by reference to the costs associated with that particular application, including the factors enumerated in rule F33.05(2)(c), (d), and (e). This is a relevant consideration particularly in situations where it is necessary or appropriate to distinguish costs associated with an interim application from those that may be awarded upon the completion of the proceedings as a whole.

[23] In summary, I am satisfied that the applications judge erred by failing to apply rule F33.05 and to provide sufficient reasons to support his award of a fixed sum of \$10,000 in costs for the interim application. Consistent with the decision in *Winsor*, flexibility in applying the rule may be appropriate. However, in this case, reading the decision as a whole does not provide a basis for concluding that the applications judge turned his mind to relevant considerations or adequately explained his decision for awarding the fixed sum amount.

[24] Accordingly, I would set aside the award of costs ordered by the applications judge.

### Remedy

[25] In the Court appealed from, Mr. Stoodley requested an order for costs in the cause. While he maintains that position in this Court, in the alternative, he

submits that, if this Court determines that costs should be awarded for the interim application, then costs under column 3 of the scale of costs would be appropriate. Ms. Stoodley takes the position that, if Mr. Stoodley's appeal is successful, she is nonetheless entitled, at a minimum to costs of the application under column 3 of the scale of costs because she was successful in obtaining an increase in spousal support.

[26] I am satisfied from reading the applications judge's decision as a whole that he intended to make an order for costs of the interim application, rather than an order for costs in the cause. That option had been requested by Mr. Stoodley and rejected. There is no basis on which to conclude that the judge erred in the exercise of his discretion on this point. Rather, the error occurred in his analysis of the form and amount of a costs order.

[27] Applying rule F33.05, this Court does not have the information necessary to determine that a fixed sum in lieu of taxed costs would be appropriate, or the quantum. However, given the alternative positions of the parties, an order awarding costs of the interim application to Ms. Stoodley under column 3 of the scale of costs would provide an appropriate remedy. That order is consistent with the general principle of awarding costs to the successful party.

#### Summary and Disposition

[28] The applications judge erred in awarding Ms. Stoodley a fixed sum of \$10,000 in costs for the interim application. By way of an appropriate remedy, I would set aside the applications judge's costs order and replace it with an order for costs under column 3 of the scale of costs under the *Rules of the Supreme Court, 1986*.

[29] Accordingly, I would allow the appeal and replace the applications judge's award of a fixed sum for costs of the interim application with an order for costs of that application under column 3 of the scale of costs under the *Rules of the Supreme Court, 1986*. Having been successful in having the costs awarded in the Court appealed from set aside, I would award Mr. Stoodley his costs of this appeal under column 3 of the scale of costs under the *Court of Appeal Rules*.

I Concur: \_\_\_\_\_

C. W. White J.A.

I Concur: \_\_\_\_\_

F. P. O'Brien J.A.