Court of Appeal for Saskatchewan
Docket: CACV3525 **Date: 2021-07-28**

Jeffrey Batan Eugenio	Appellant (Respondent)
and	
Thea Myra Ferrer Eugenio	Respondent (Petitioner)

Before: Amy Groothuis, Registrar (on June 22, 2021)

Fiat

[1] On November 25, 2019, Jeffrey Eugenio [appellant] filed a notice of appeal against an interim order made by a Court of Queen's Bench judge in Chambers dated October 19, 2019, which addressed his application for joint custody, shared parenting and the determination of child support, among other requests for interim relief.

[2] The appeal was heard and dismissed on March 9, 2021, with Caldwell J.A. providing oral reasons dismissing the appeal with costs to the respondent "in the usual way". An affidavit of service sworn on May 4, 2021 confirms that a draft judgment was provided to counsel for the appellant on April 16, 2021, and the formal judgment was subsequently issued on May 14, 2021.

[3] On behalf of Thea Eugenio [respondent], counsel then took out an appointment for taxation of costs returnable before me on June 22, 2021, supported by a draft bill of costs (totalling $4,325.00 in fees) and an affidavit of disbursements (totalling $214.20). With appropriate taxes, the total amount claimed for fees, disbursements, and taxes was $5,014.95. During the hearing, counsel for the respondent additionally requested reimbursement for costs incurred in filing documents at the Court of Appeal, and for the time spent on the taxation hearing. This fiat is my decision on the taxation of costs.

[4] At the outset of the taxation hearing, counsel for the appellant confirmed that he took no issue with the proposed bill of costs as drafted. More particularly, counsel agreed that Column II of the Court of Appeal Tariff of Costs [Tariff] was the appropriate column, that the fees were all appropriately claimed, and that he took no issue with the amount or type of disbursements included. However, counsel for the appellant requested that payment of the taxed costs be deferred, so that a set-off could occur following an impending equalization of assets payment from the respondent to the appellant, which was expected to occur following a pre-trial conference or, failing that, a trial. This particular request – to defer costs otherwise payable – was not made in the appellant's factum, was not requested orally at the appeal hearing, and was not made to counsel for the respondent following the appeal hearing but before the taxation of costs hearing. The appellant's request to defer or set-off the payment of the agreed-upon amount of taxed costs

became the primary focus of submissions during the taxation hearing, given that there was no dispute that the amount of costs claimed by the respondent were owed by the appellant.

[5] For the appellant, counsel pointed me to *The Court of Appeal Rules* [*Rules*], and in particular, to the following:

> 54(7) On a taxation, the registrar may do any of the following:
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> (a) take evidence by affidavit, administer oaths or affirmations and examine witnesses, as the registrar considers appropriate;
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> (b) require production of records;
>
> (c) require notice of the taxation to be given to all persons who may be interested in the taxation or in the fund or estate out of which costs are payable;
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> (d) give any directions and perform any duties that the registrar considers are necessary for the conduct of the taxation;
>
> (e) refer a matter requiring direction to the court or a judge.
>
> (emphasis added)
>
> 56 The court may order a set-off of costs or of judgments, whether obtained in the court or in the court appealed from.

[6] Counsel for the appellant argued that it was within my discretion to refer to the court or a judge the matter of deferring payment of the taxed costs owing to the respondent until the amount of the equalization payment that is expected to be owed by the respondent to the appellant is determined. In response, counsel for the respondent pointed me to *MIF AG Services Ltd. v Sotkowy*, 2014 SKCA 69, which stands for the proposition that when a matter is dismissed with "costs in the usual way", such costs are taxable and payable forthwith.

[7] As Registrar, the scope of my authority is limited to that which is permitted by the *Rules*. The *Rules* do not grant the registrar the authority to delay the payment of taxed costs until a future debt owed by one party to the other crystalizes, which would lead to a prospective set-off payment as between the parties; to his credit, counsel for the appellant agreed with that particular point. Rather, Rule 54(8) provides:

> 54(8) After a taxation, the registrar may do any of the following:
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> (a) if parties are liable to pay costs to each other:
>
> (i) adjust the costs by way of set-off; or
>
> (ii) delay the allowance of costs a party is entitled to receive until that party has paid or tendered costs that the party is liable to pay;
>
> (b) award the costs of a taxation to any party and fix those costs.

[8] Yet Rule 54(8)(a) is not here engaged, because the respondent is not liable to pay costs to the appellant. As such, I easily conclude that the *Rules* do not grant me the authority to order a deferral or set-off of costs as against the prospective equalization payment.

[9] Ultimately, I see the issue as being whether I am authorized to refer the question of deferring the payment of taxed costs to the Court, and if indeed I have that authority, whether I should in the within instance exercise that discretion. I will consider both issues in turn.

[10] As a preliminary point, I note that counsel for the appellant did not file any materials or point me to any legislation or case law in support of his request that would help guide my thinking. He relied only on Rule 54(7)(e), and also pointed to Rule 56 in support of his position. While counsel for the appellant requests that I refer this matter to the panel that heard and disposed of the appeal, my own review and consideration of the applicable principles does not support his read of the scope of Rule 54(7)(e) in the within circumstance.

[11] While Rule 54(7)(e) permits the registrar to seek the Court's 'direction', that term is generally used in the *Rules* to indicate situations when the registrar receives guidance on a subject but still completes the action or procedural step. For example:

- Rule 39(3): Subject to direction by the Chief Justice, the registrar shall fix the time and place for the hearing of an appeal, and shall notify the parties.

- Rule 44(1): In every stated case where the applicable statute provides a time limit within which the court must rule on the case, the registrar shall, subject to direction by the Chief Justice, enter the case for hearing by the court on receipt of the case. The applicant may apply to a judge for directions as to the filing of or dispensing with a case book and factum.

[12] In both Rules 39(3) and 44(1), the registrar has specific, delegated authority, but the exercise of that authority may be subject to direction received by the Chief Justice.

[13] When Rule 54(7) is read in the context of the entirety of the *Rules* and in its grammatical and ordinary sense, it is clear that the authority to refer a matter requiring direction to the Court or a judge must involve the determination of a procedural or administrative matter related to the taxation hearing, where the registrar requires direction prior to making a decision or taking a procedural step, and does not involve the merits of the appeal before the Court. Rule 54(7) relates to the process of conducting a taxation hearing, including the taking of evidence, the production of records, and providing appropriate notice of the hearing. The authority outlined in Rule 54(7) is separate and distinct from the registrar's authority on deciding the outcome of a taxation hearing – that authority is contained in Rule 54(8), which is reproduced above. Because I do not have the authority to order a delayed payment of the taxed costs, I conclude that I cannot therefore seek the Court's direction on that question, nor can I transfer this taxation of costs hearing to the Court for ultimate determination. The proposed bill of costs is properly before me as Registrar, and, as such, I must decide the taxation, noting that a party retains the right to seek a review of a taxation of costs by applying to a judge pursuant to rule 54.1.

[14] Further, I consider it important to note that in the within appeal the respondent has already prepared and served the judgment on counsel for the appellant; the draft judgment was then

formally issued by the Court on May 14. The formal judgment includes the following language and resulting orders:

> **THIS COURT HEREBY ORDERS:**
>
> 1. That the Appellant's appeal be dismissed.
>
> 2. The Respondent is entitled to costs in the usual way.

[15] The Court has made its order, and it is one by which I am bound. At its core, what the appellant is really seeking is a rehearing of a substantive issue – that of tying the payment of costs to the outcome of a property equalization following a pre-trial or trial. The Court made an order on costs and the appellant now wishes to change that order. While Rule 47 allows a party to an appeal to apply for a re-hearing, with such an application being by notice of motion before the panel constituted on the hearing and determination of the appeal, that application must be filed *before the formal judgment is issued.* As noted above, the formal judgment was issued on May 14, 2021.

[16] Respectfully, I consider that the only option that was open to the appellant following the dismissal of his appeal by the Court was to apply for a rehearing pursuant to Rule 47, seeking a change to the costs order that would have deferred the payment until such time as equalization of family assets occurs. No such application was made. As a result, I am bound by the Court's judgment that the costs be paid in the usual way, that is, forthwith.

[17] In the event that I have too narrowly interpreted my authority, recognizing that I did not have the benefit of fully formed submissions from counsel, and the *Rules* do authorize me to refer this question to the Court for direction, I decline to do so, for two reasons.

[18] First, in his oral reasons for dismissing the appeal, Caldwell J.A. made the following comment:

> …this is an interim order and it is 17 months old. As counsel recognized, we are generally reluctant to interfere with interim orders of the sort made in this case because appeals against interim orders come with delay and additional cost, when the best interests of the children are usually best served by proceeding quickly to a pre-trial settlement conference or a trial.

[19] The principle of finality in litigation is important and referring this issue back to the Court would only result in further delay and potentially increased cost. I rely on Justice Caldwell's statement that the children's best interests are likely best served by proceeding to a pre-trial settlement conference, rather than spending further time and resources at the Court of Appeal.

[20] Second, I am not aware of any evidence before the Court, nor was any evidence filed with me, that leads to the conclusion that the respondent will owe the appellant an equalization payment, or the amount of any such payment. It may very well be the case that the respondent will owe an amount to the appellant, but I cannot make that determination in a vacuum, even if the scope of my authority permitted such a decision to be made.

[21] The fees are therefore taxed and allowed under Column II of the Tariff, as follows:

3.	Fee to Respondent on receipt of notice of appeal	$125.00
7.	Preparation of Appeal Book	$500.00
8.	Preparation of Factum	$2,000.00
9.	All Other Preparation for Hearing	$750.00
10.	Appearance to present Argument	$400.00
11.	Preparing Formal Judgment	$200.00
12.	Correspondence	$200.00
13.	Preparation of Bill of Costs	$150.00
14.	Taxation of Bill of Costs	$ 75.00
	Total Fees:	**$4,400.00**

[22] The disbursements are taxed and allowed in the amount of $274.20, comprising the $214.20 claimed in the affidavit of disbursements filed by the respondent, plus the $60.00 in fees associated with filing documents with the Court of Appeal, namely, the Formal Judgment, the Appointment for Taxation, and the Certificate of Taxation. Finally, I tax on the appropriate amount for taxes, being $484.00 for GST & PST on fees and $10.20 for taxable disbursements.

[23] The proposed bill of costs is therefore taxed and allowed at $5,158.20. For enforcement purposes, the respondent may prepare and file a certificate of taxation of costs in Form 11d in this amount for issuance.

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Counsel: M. Danish Shah for Jeffrey Batan Eugenio
Mary Lou Senko for Thea Myra Ferrer Eugenio