

NOTICE TO THE PROFESSION

Amendments to Rule 56A: Changes to the Costs Rules in Family Proceedings

The Rules Committee of the Supreme Court of Newfoundland and Labrador, Trial Division, recently approved amendments to Rule 56A of the *Rules of the Supreme Court, 1986*. The regulation was published in the February 13, 2015 edition of the *Newfoundland and Labrador Gazette* (N.L. Reg. 18/15). It includes amendments to the rules relating to costs in family proceedings which will come into force on March 30, 2015.

Costs – General

Under the amended rule 56A.26, parties are encouraged to take a position towards the resolution of matters in a family law proceeding. While the discretion to award costs still remains with the judge hearing the matter (r. 56A.26(2)), there is now a presumption that a successful party is entitled to costs in a family law proceeding (r. 56A.26(3)). This presumption may be set aside, however, in custody and access matters where both parties maintained reasonable positions, held in good faith and in the best interests of the child (r. 56A.26(4)).

The amended rules 56A.26(5)-(7) reproduce, in large part, the current rules 56A.26(2)-(4). In determining whether a party has behaved unreasonably or in bad faith, the Court may now consider, in addition to the factors set out in the previous rule 56A.26(3), whether the party complied with or failed to comply with a Court order (r. 56A.26(6)(c)).

The amended rule 56A.26(8) allows the Court to apportion costs where the success in a proceeding has been divided.

The amended rules 56A.26(9) and (10) specify that the Court may make an award of costs for a fixed sum in lieu of taxed costs and set out factors the Court must consider in determining whether to make such an award.

Security for Costs

Under the amended rule 56A.26(11), a party may apply for an order for security for costs in relation to a family law proceeding, other than a proceeding for custody and access, and sets out the factors the Court may consider in determining whether such an order is appropriate. Rules 56A.26(12) – (16) set out additional procedures relating to orders for security for costs.

Costs – Where there is an Offer to Settle

The new rule 56A.26A provides for modified costs consequences in family law proceedings where one or both parties have delivered an offer to settle one or more issues to the other party.

This rule requires offers to settle to be made in Form 56A.26A(A) if a party wishes to avail of the costs consequences set out in the rules 56A.26A(12), (13) or (14).

The new rule 56A.26A sets out procedures for signing, delivering and withdrawing an offer to settle (r. 56A.26A(2) – (4)). An offer to settle may also be deemed rejected where it is not accepted within the time specified (r. 56A.26A(5)).

An offer to settle made under this rule is made without prejudice, unless the offer states otherwise (r. 56A.26A(6)). The fact that an offer to settle has been made must not be communicated to the Court until *after* the judge has dealt with all of the issues in dispute, except costs (r. 56A.26A(7)).

The new rule 56A.26A provides a form for accepting offers (Form 56A.26A(C)). Offers may be accepted in whole or in part, where the offering party indicates that the offer may be accepted in part. Once accepted, the offer to settle constitutes a binding agreement (r. 56A.26A(10)) and a party may apply to the Court for judgment in the terms set out in the offer (r. 56A.26A(11)).

The new rules 56A.26A(12) and (13) set out the modified costs consequences which apply in custody and access proceedings where both or just one party have made offers to settle, respectively. Where both parties have filed offers to settle in a custody and access proceeding that comply with the requirements set out in rule 56A.26A(12)(a) and (b), the presumption that the successful party is entitled to costs may be set aside and the Court may award costs to “all, either or none of the parties” after considering whether an offer to settle was as favourable or more favourable than the judicial outcome. Where one party has made an offer to settle in a custody and access proceeding that complies with the requirements set out in rule 56A.26A(13)(a), (b) and (c), the offering party is entitled to party and party costs on column 3 of the scale of costs up until the date the offer was delivered and party and party costs on column 5 of the scale of costs from the day after the offer to settle was delivered until the conclusion of the proceeding. Both rules 56A.26A(12) and (13) are subject to rule 56A.26(4), discussed above.

The new rule 56A.26A(14) sets out the modified costs consequences which apply in family law proceedings, other than custody and access matters, where one party has made offers to settle. Where one party has filed an offer to settle that complies with the requirements set out in rule 56A.26A(14)(a), (b) and (c), the offering party is entitled to party and party costs on column 3 of the scale of costs up until the date the offer was delivered and party and party costs on column 5 of the scale of costs from the day after the offer to settle was delivered until the conclusion of the proceeding.

The procedure for bringing an offer to settle to the attention of the Court and making an application for costs on the basis of rule 56A.26A is set out in the new rule 56A.26A(15). On the filing of such an application, which must be brought within 15 days following the filing of the relevant order, any prior order with respect to costs is suspended pending determination of the application by the Court. Rule 56A.26A(15)(c) states that the Court may, in its discretion, make an award for costs pursuant to rule 56A.26A or on some other basis, including costs on a higher column or solicitor and own client costs.

If you have any questions with respect to the above, please contact the Court's Legal Officer at 709-729-4743.

[Signed]

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