SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: Carlaw v. Carlaw, 2009 NSSC 297

Date: 20091013
Docket: 1201-60825
Registry: Halifax

Between:

Keith Martin Carlaw

Petitioner

v.

Colleen Elizabeth Carlaw

Respondent

Judge:	The Honourable Justice Elizabeth Jollimore
Heard:	September 14 - 16, 2009 in Halifax, Nova Scotia
Counsel:	Stephanie J. Atkinson for Keith Carlaw Deborah I. Conrad and Robert L. Miedema for Colleen Spencer

By the Court:

[1] Keith Carlaw and Colleen Spencer (formerly Carlaw) were divorced at a trial scheduled for September 14 - 16, 2009. In the months following their separation and with the assistance of their counsel, they negotiated a comprehensive separation agreement. The entirety of the trial focused on Ms. Spencer's retroactive claim for child support for the couple's two daughters and quantifying her claim for ongoing child support. Ms. Spencer's retroactive claim dated from when the separation agreement was executed. In both the retroactive and prospective claim, Ms. Spencer sought to impute income to Mr. Carlaw.

[2] At the conclusion of the trial, Ms. Spencer quantified the retroactive claim at approximately $575,000.00, considering her position on attributing income to Mr. Carlaw. Mr. Carlaw contended that a retroactive child support award was not appropriate. Mr. Carlaw proposed to pay ongoing child support of $2,400.00 per month, based on an annual income of $200,000.00.

[3] Mr. Carlaw was ordered to pay a retroactive award of child support of $116,883.56 and to pay prospective child support of $3,602.78 each month.

[4] Prior to the trial there were negotiations between the parties' counsel and the parties participated in a settlement conference. At the settlement conference in June, 2009, Ms. Spencer offered to settle the retroactive support claim for $73,271.00 and the prospective support claim for $3,593.00. Mr. Carlaw would have fared better by accepting Ms. Spencer's offer than by bringing the matter to trial.

[5] Bringing the matter to trial after the settlement conference was not straightforward. Mr. Carlaw is employed by a company in which he is a minority shareholder. Ms. Spencer sought disclosure of financial information from this company and others in which Mr. Carlaw has an interest. It was necessary for Ms. Spencer to obtain a court order compelling this disclosure. The order was granted on August 10, 2009.

[6] The trial was scheduled to begin on September 14, 2009. By the first day of trial, the ordered documents had not yet all been provided. The trial was adjourned to begin the next day, so Mr. Carlaw could provide the outstanding materials.

[7] Ms. Spencer has provided a copy of the invoice for professional fees incurred in preparation for the trial. The fees and taxes totalled $19,271.59. Additionally, I have been provided with a printout showing disbursements of $1,199.89 on Ms. Spencer's behalf. It does not appear that the disbursements are limited to those incurred following the settlement conference. With regard to the disbursements, I note that some of these (binding, CD data storage and computerized legal research) have been disallowed in cases where disbursements have been taxed: *Kimberly-Clark Inc. v. Julimar Lumber Co.*, 2004 NSSC 71 and *Jachimowicz*, 2009 NSSC 268. The total of these two amounts is $20,471.48.

[8] In their submissions, both parties direct me to consider Tariff A and the dollar amount awarded to Ms. Spencer.

[9] Mr. Carlaw argues that since Ms. Spencer was not successful in persuading me to impute income to him, I should treat this as a case of "mixed success". He says it is "of more significance" that I declined to impute income to him from retained corporate earnings than that I made a retroactive child support award. Because Ms. Spencer failed to have income imputed to him, Mr. Carlaw asserts that a costs award should be reduced.

[10] I reject this argument. While Ms. Spencer did not persuade me that income should be imputed for the purpose of the retroactive award, I did impute income to Mr. Carlaw for the purpose of the prospective child support award. Further, Mr. Carlaw's submissions entirely ignore the fact that Ms. Spencer was awarded retroactive support in an amount approximately $43,000.00 greater than the amount she had offered to accept in her settlement offer. Regardless of whether she achieved the success she hoped for at trial, she succeeded in obtaining an award which exceeded her settlement position.

[11] Applying the basic scale of Tariff A to the amount awarded generates a costs award of $12,250.00. Additionally, I am to consider the length of trial and to add $2,000.00 to the amount calculated under the Tariff for each day of trial. This matter was scheduled for a three day hearing. As noted, the trial was scheduled to begin September 14, 2009. By the first day of trial, the ordered documents had not yet all been provided. We convened for discussion and, by approximately 11 o'clock in the morning, the parties had agreed to adjourn the trial to begin the next day, to allow Mr. Carlaw a final opportunity provide the outstanding materials. The examination of the parties, who were the only witnesses, was concluded in one day and the final day was used for argument. Since neither the first nor final days of the trial were entirely utilized, I am satisfied that I should consider the trial to be a two day trial, rather than a three day trial. This adds a further $4,000.00 to the basic scale amount, bringing a total costs award to $16,250.00 - where the fees and disbursements incurred by Ms. Spencer were $20,471.48.

[12] Ms. Spencer argues that if the costs award determined by the Tariff does not represent a substantial contribution to her reasonable expenses I should award a lump sum. A costs award of $16,250.00 is a substantial contribution to Ms. Spencer's reasonable expenses. I consider the expenses she submits to be reasonable because she has not sought a contribution to any expenses incurred prior to September 4, 2009, though the parties participated in a settlement conference, two organizational pre-trial conferences and an interlocutory application prior to that date. Ms. Spencer did contend that I should treat the fees for Ms. Conrad's associate, Mr. Miedema, as a disbursement, similar to the cost of an accountant. I decline to do this. His fees are adequately considered under Rule 63.

[13] Ms. Spencer made an offer which should have been accepted. It was not. She is entitled to her costs. The application of the basic scale under Tariff A generates a substantial contribution to her reasonable costs. Mr. Carlaw shall pay costs of $16,250.00 to Ms. Spencer.

_____

J.S.C. (F.D.)

Halifax, Nova Scotia