SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: Brandon v. Brandon, 2011 NSSC 128

Date: 20110401
Docket: 1201-061257
Registry: Halifax

Between:

Patricia Angela Brandon

Petitioner

v.

Gary Keith Brandon

Respondent

Judge:	The Honourable Justice Elizabeth Jollimore
Heard:	March 14, 2011
Counsel:	Deborah I. Conrad, on behalf of Patricia Brandon Angela A. Walker, on behalf of Gary Brandon

By the Court:

Introduction:

[1] The Brandons' divorce trial was heard on October 13, 2010. There were a number of matters in dispute between the parties. I rendered an oral decision later that month which is reported at *Brandon*, 2010 NSSC 394. Mr. Brandon and Ms. Brandon both seek costs.

The proceeding

[2] The couple appeared before Justice B. MacDonald in March 2007 for an interim hearing where Ms. Brandon sought interim exclusive possession of the matrimonial home, primary care and joint custody of their three dependent children, interim access between the children and their father, interim spousal and child support, and costs. Ultimately, the parties resolved the matters of exclusive possession, child support and access. Justice MacDonald dealt with the other matters and ordered that costs be in the cause. This application was scheduled for two hours.

[3] The matter was then dormant until Mr. Brandon filed a Request for a Trial Date in July 2009.

[4] At a pre-trial conference in January 2010, Justice Dellapinna directed that Mr. Brandon file his Statements of Property, Income and Expenses by February 5, 2010. His Lordship directed that Ms. Brandon provide full details of her 2009 income by February 5, 2010 and directed that if she had the matrimonial home appraised, she must file a copy of the appraisal with the court as soon as possible after receiving it from the appraiser. At the July 2010 conference, Justice Lynch directed Mr. Brandon to file his materials by July 16, 2010.

[5] At the July 2, 2010 conference each party indicated that she or he would be the only witness called. However, on August 13, 2010, Mr. Brandon filed an affidavit from his corporate counsel in Ontario, John Richard Ottewell. Ms. Brandon required the opportunity to cross-examine Mr. Ottewell and arrangements were made for him to testify by video conference from Ontario.

[6] At trial, the issues were:

(a) whether Mr. Brandon's common shares in an Ontario company were matrimonial assets;

(b) the value of the couple's household contents, a motor vehicle, a trailer;

(c) the amount of debts which the couple should share;

(d) whether child support should be retroactively varied;

(e) whether Mr. Brandon should pay prospective child support and, if so, based on what income level; and

(f) the quantum of prospective spousal support.

[7] The trial was scheduled to be heard on two days in September 2010. After Mr. Ottewell's affidavit was filed, the parties agreed the trial could be completed in one day and they agreed to adjourn it. The trial was heard one month later than originally scheduled. Each of the parties testified and Mr. Ottewell testified by video conference.

[8] Mr. Brandon was successful in proving his shares were not matrimonial assets. I ordered that the household contents be divided item-by-item. I accepted Mr. Brandon's value for the motor vehicle and the trailer. Mr. Brandon was unsuccessful in asking that I vary the amount of his child support payments retroactively, so no child support payments were returned to him.

[9] Ms. Brandon withdrew her claim for prospective child support at trial. I made a nominal award of spousal support to maintain her entitlement to support if Mr. Brandon's income increases. I rejected her position with regard to the value of debts to be shared between the spouses.

[10] Overall, Mr. Brandon was the successful party at the trial. As well, his claim regarding the business asset exclusion was the most significant issue.

Mr. Brandon's claim for costs

[11] Mr. Brandon's claim for costs seeks substantial compensation for his legal costs and for certain other expenses. His total legal expenses (inclusive of HST and disbursements) are $18,516.15. There are three other expenses Mr. Brandon claims.

[12] First, Mr. Brandon was required to travel from Ontario to Nova Scotia for the trial. While he initially sought a contribution to his $713.51 cost for airfare and car rental while in Nova Scotia, he conceded this claim in his submissions before me and I will not deal with it.

[13] Second, Mr. Brandon wants the costs award to recognize the expense of $497.05 for the video conference.

[14] Third, Mr. Brandon wants the costs award to recognize the expense for Mr. Ottewell's testimony. Mr. Ottewell sent an invoice for his testimony. His total invoice was approximately $2,100.00: fees of $1,700.00 for preparing himself to testify, travelling to the video conference facility and testifying, HST of $221.00 on the fees, disbursements of $151.10 and HST of $19.64 on the disbursements.

[15] Excluding the cost of his own travel, Mr. Brandon's expenses were $21,104.94.

Ms. Brandon's response

[16] Ms. Brandon offers a number of reasons to dismiss Mr. Brandon's claim for costs. She says, in fact, that she is entitled to costs. Her reasons can be grouped into different areas and I'll deal with each in turn.

[17] First, she says the claim should be denied for reasons relating to how the proceeding unfolded. She says that the proceedings were "elongated" because Mr. Brandon filed conflicting Statements of Property and he did not give notice that he would be calling a witness until approximately two months before the trial, while she withdrew her claim for child support.

[18] Mr. Brandon filed his first Statement of Property on February 22, 2007. He swore this before his counsel in Nova Scotia. In it, he noted ownership of a business interest in Rainbow Valley Campground. As its name suggests, this was a business which owned land and rented lots to campers. He did not provide an estimate of its value. On March 16, 2010, he swore a Statement of Property in which he made no mention of the land or business in Ontario. On July 16, 2010, Mr. Brandon provided a Statement of Property which disclosed, as a business interest, his ownership of 500 common shares in 1641959 Ontario Limited, having an estimated value of $5.00.

[19] Section 4(1)(e) of the *Matrimonial Property Act*, R.S.N.S. 1989, c. 275 provides that business assets are excluded from the definition of matrimonial assets. So, Ms. Brandon's earliest information about the campground from Mr. Brandon was his assertion that it was an excluded asset. His only apparent deviation from this position is suggested by the March 2010 Statement of Property in which he made no reference to this asset at all.

[20] The property in Ontario was not unknown to Ms. Brandon: she claimed the property was a gift from Mr. Brandon’s parents to them when they married. She listed the house and five acres of land in Bluewater, Ontario as "Real Estate" on her very first Statement of Property which she filed on December 1, 2006. She did not identify how title was held. On the same Statement, she listed the Rainbow Valley Campground in the "Business Interests" category. Ms. Brandon’s May 18, 2010 Statement of Property repeated the listing of the real estate, now showing it as owned by Mr. Brandon or an Ontario numbered company. She also repeated her listing of the campground as a business interest. At no point did Ms. Brandon indicate a value for these assets. She provided as exhibits to her costs submission, copies of property tax invoices for the Ontario property dating from September 2006 which were addressed to the numbered company. It appears these may have come into her possession, based on the fax transmittal line, as long as three months before the trial.

[21] Ms. Brandon was aware of the Ontario property and Mr. Brandon made known his position that the asset fell into a category of property to be excluded from division under the *Matrimonial Property Act* from the outset.

[22] With regard to the evidence of Mr. Ottewell, I note that the filing of his affidavit was coincident with a one month adjournment of the trial. It was also coincident with the trial being reduced from two days to one day. Calling Mr. Ottewell as a witness was a neutral event: while it seems to have caused some delay, it also reduced the amount of time needed for the trial.

[23] I give no credit to Ms. Brandon for withdrawing her claim for prospective child support. Mr. Brandon addressed the claim for child support in his affidavit and his pre-trial submissions. Ms. Brandon withdrew her claim during her cross-examination when Mr. Brandon had devoted almost as much effort to addressing the issue as was possible.

[24] Ms. Brandon filed a forty-four paragraph reply affidavit from which seventeen paragraphs were struck as not being properly in reply. While dealt with expeditiously at the trial, the improper filing did require time to address.

[25] Second, Ms. Brandon says that Mr. Brandon did not comply with the court's disclosure notices or orders until he was admonished by Justice Lynch, while she complied with any and all requests and directions from the court.

[26] Justice Dellapinna directed that Mr. Brandon file his Statements of Property, Income and Expenses by February 5, 2010. At the same time, he directed that Ms. Brandon provide full details of her 2009 income by February 5, 2010 and directed that if she had the matrimonial home appraised, she must file a copy of the appraisal with the court as soon as possible after receiving it from the appraiser. Ms. Brandon filed her 2009 income information on April 9, 2010. The appraisal was dated February 10, 2010 and was filed at the court on April 9, 2010. Mr. Brandon did not meet his deadline, either: he provided corporate materials to his counsel on June 22, 2010 and they were then relayed to Ms. Brandon's counsel. At the July 2, 2010 conference, Justice Lynch directed Mr. Brandon to file his materials by July 16, 2010. Mr. Brandon met this deadline.

[27] It is wrong for Ms. Brandon to say that she "complied with any and all requests and directions of the Court". She did not respect the deadlines imposed on her. Neither party fully complied with the court's direction. I am unwilling to penalize Mr. Brandon for a shortcoming common to both parties.

[28] Third, Ms. Brandon says that an award of costs will cause "significant hardship" and her legal expenses exceed her annual income.

[29] Ms. Brandon's claim of significant hardship is not supported by evidence. I have not been provided with information that shows the funds she will receive from the sale of the home. She has received a vehicle, one half of an RRSP and one-half of her former husband's employment pension. These resources are all part of her ability to afford her legal expenses.

[30] I am aware of the magnitude of her total legal expenses. However, Ms. Brandon has not provided any indication of her actual legal costs, recognizing that she is able to deduct that

portion of her expenses which relates to her claims for support. I've addressed this point in a number of other decisions (*D.L.P. v. S.J.*, 2010 NSSC 107, at paragraph 75; *Hamilton*, 2010 NSSC 381, at paragraph 15; *Peraud*, 2011 NSSC 80 at paragraphs 19 - 21; and *Lockerby*, 2011 NSSC 103), noting the deductibility of legal expenses incurred to pursue a claim for support and the need to have this information to determine a party's actual legal costs.

[31] Fourth, Ms. Brandon says her claims weren't frivolous or without merit.

[32] I agree that Ms. Brandon's claims weren't frivolous or without merit: they were unsuccessful. An award of costs is to compensate the successful party.

[33] Fifth, Ms. Brandon says she "made an offer to settle which excluded the Ontario Land and Company [the common shares in the Ontario company] even before receiving Mr. Brandon's complete financial disclosure". Ms. Brandon did not disclose the terms of her offer. In his submissions, Mr. Brandon took exception to this reference to the settlement offer, suggesting that the offer was not better than the result he achieved at trial. I advised that I understood Ms. Brandon's statement to mean only what it said and no more: Ms. Brandon said she made an offer which excluded the land in Ontario and the company, she did not say that she had made an offer which would have left Mr. Brandon better situated than going to trial. I did not interpret Ms. Brandon's statement as meaning she had made an offer that was better than the result Mr. Brandon achieved by going to trial. Ms. Brandon didn't correct me on my comments. Since her offer was not superior to the result Mr. Brandon achieved at trial, it doesn't weigh into my consideration of the entitlement to costs.

[34] Sixth, Ms. Brandon argues that the claim for costs should be dismissed because she was the primary care-giver for the couple's five children while Mr. Brandon was away from home for extended periods working at the Ontario campground or for the Department of National Defence and because Mr. Brandon has the potential to generate income from the Ontario campground while she does not. These claims have little relevance to an award of costs. Ms. Brandon's role as care-giver for the family's children and Mr. Brandon's future income-earning have been recognized in my order preserving her entitlement to spousal support.

[35] Seventh, Ms. Brandon says that she incurred the costs of drafting the Divorce Order and the Corollary Relief Order and the amendments to them. In her submissions on costs, Ms. Brandon says that "overall she has been successful." In drafting the orders, *Civil Procedure Rule* 78.04(3)(a) applies in the absence of specific direction about preparation of the Orders. If Ms. Brandon saw herself as the successful party, she bore the obligation to prepare these orders. The Corollary Relief Order is peculiar to the circumstances of this case, but the Divorce Order is a standard form of order, Form FDO 2. The Divorce Order's only unique content is names, dates and locations: there were no applications for early effect to be given to the date of divorce or a change of name.

[36] In conclusion, Ms. Brandon's arguments do not persuade me that she is entitled to an award of costs or that Mr. Brandon is not entitled to such an award.

Mr. Brandon's costs

[37] A claim for costs is governed by *Civil Procedure Rule* 77. Costs are to be fixed in accord with the tariffs of costs and fees determined under the *Costs and Fees Act*, R.S.N.S. 1989, c. 104. Costs generally follow the event, according to *Rule* 77.03(3).

[38] The most significant claim at the trial related to the Ontario business. While the business has yet to generate any income which could sustain the payment of spousal support, the real estate owned by the company was assessed in 2010 for $362,250.00. A real estate agent provided a "letter of opinion" to Mr. Brandon saying the fair market value of the property was in the range of $190,000.00 - $210,000.00. It wasn't necessary to determine the property's value at trial. I prefer to rely on the realtor's estimate of the property's value rather than the property tax assessment. The realtor's estimate was prepared for the purposes of valuing the specific property, while the tax assessment is a generalized valuation prepared as the basis of municipal taxation. Based on the opinion of the real estate agent, which was not challenged by Ms. Brandon, Mr. Brandon's greatest exposure on the Ontario land was $105,000.00.

[39] The debt issues that Ms. Brandon pursued unsuccessfully had a value of $11,372.09. If she had been successful in this claim, she would have saved approximately $5,685.00 in the property division.

[40] Overall, the amount in issue was $110,685.00. On Scale 2 of Tariff A, this entitles Mr. Brandon to costs of $12,250.00. An additional $2,000.00 is allowed to reflect the length of the trial.

[41] Mr. Brandon has made additional requests for recognition of his expense for Mr. Ottewell's testimony and the video conference in the costs award. I do order that Ms. Brandon pay the $497.05 cost of the video conference. She required Mr. Ottewell to testify. This expense for his testimony is less than the cost of his travel to Halifax to offer his evidence.

[42] There remains the issue of Mr. Ottewell's invoice. In *Jachimowicz*, 2009 NSSC 268, Justice Legere-Sers said, at paragraph 20, that in assessing whether the witness fee is a legitimate disbursement, one must determine whether the witness was a fact witness or an expert witness. There, the witness had rendered an account for almost $16,000.00. Like me, Justice Legere-Sers was not provided with an hourly rate for the witness nor with a breakdown of his time spent in preparation. Her Ladyship allowed $3,000.00 in total. Her decision reviewed the law relating to claims like this, referring to the Court of Appeal's decision in *D.W. Matheson & Sons Contracting Ltd. v. Canada (Attorney General)*, 2000 NSCA 44 where Justice Cromwell wrote, at paragraph 80, that "the specification in the Tariff relates only to attendance money for the purposes of testifying; it does not address specifically the question of allowance for necessary preparation time." He concluded that this, coupled with the broad discretion under s. 2(13) of Tariff D and Rules 63.10A and 63.36, made it clear there was a discretion to permit an allowance for needed preparation time.

[43] Like Justice Legere-Sers in *Jachimowicz*, 2009 NSSC 268, I consider this to be a case where the issue and the evidence offered by Mr. Ottewell meant it was appropriate for him to prepare himself to testify. The parties' Statements of Property make clear that the parties did not understand the exact ownership of the Ontario land and business and Mr. Ottewell was best positioned to offer evidence about this.

[44] I have considered the matters outlined by Justice Cromwell in paragraph 90 of *D.W. Matheson & Sons Contracting Ltd. v. Canada (Attorney General)*, 2000 NSCA 44. In this case, the evidence from Mr. Ottewell was available from no other individual. The expense has actually been incurred. In the absence of a detailed invoice from him, I have had to use my own best estimate of the preparation that was reasonable and, in some part, I have relied on the detailed invoices from Ms. Walker to make this estimate. Ms. Walker's invoices record the time she spent working with Mr. Ottewell. His invoice is not itemized. Lastly, Mr. Ottewell's typical retainer by Mr. Brandon or the Ontario company would not have implicitly included an allowance for testifying. I award $1,000.00 toward the cost of Mr. Ottewell's invoice.

[45] It was necessary for Ms. Brandon to make her interim application. Tariff C provides that a successful party in an application of less than one-half day would be awarded costs in the range of $750.00 to $1,000.00. Ms. Brandon's application was resolved, in part, by agreement. I reduce the award of costs in favour of Mr. Brandon by $500.00 to recognize Ms. Brandon's success in that application.

A general comment on disbursements

[46] With regard to the disbursements, some of these (binding, file maintenance fees or 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.

Conclusion

[47] I award Mr. Brandon costs of $15,247.05. If the matrimonial home has not yet been sold, this amount shall be paid from Ms. Brandon's share of the sale proceeds. If the home has been sold and its proceeds divided, this award shall be paid forthwith.

_____

Elizabeth Jollimore, J.S.C.(F.D.)

Halifax, Nova Scotia