SUPREME COURT OF NOVA SCOTIA
Citation: ***Dawson v Dawson***, 2012 NSSC 36

Date: 20120123
Docket: 1204-005160
Registry: Kentville

Between:

Shelley Lee Dawson

Petitioner

v.

John Darren Dawson

Respondent

Judge:	The Honourable Justice Gregory M. Warner
Heard:	By written submissions dated January 10, 17 and 18, 2012
Written Decision:	January 23, 2012
Counsel:	**Deborah Bowes**, counsel for the petitioner
	Don Fraser, counsel for the respondent

By the Court:

[1] The Petitioner seeks costs arising from a divorce trial that lasted four days (October 3 to 6, 2011) and resulted in an oral decision on October 6, 2011. During the divorce trial, everything was in issue, beginning with the parenting of their three children; the Petitioner's claim for child support and spousal support, and the division of matrimonial property. The Petitioner was substantially successful.

[2] The Respondent argues that because the Petitioner caused the Court to issue a Divorce Order ("DO") and Corollary Relief Order ("CRO") on December 8, 2011, without having made a determination respecting costs, that the Court is *functus* and cannot now order costs.

[3] In fairness, counsel for the Respondent notes that this common law principle is subject to any *Civil Procedure Rule* and he notes that *CPR 78.08* enumerates four circumstances when a judge may act after a final order is issued. One of those circumstances reads: "[To] Amend an Order to provide for something that should have been, but was not, adjudicated on."

[4] Counsel for the Respondent acknowledges that the Petitioner requested in writing that the Court hear the parties on costs by a letter dated November 21, 2011, two weeks before December 8, 2011, when the DO and CRO were submitted to the Court by counsel for the Petitioner and issued by this Court. Counsel argue that the circumstances in this case are not those where the Court and/or the parties realized only after the final order was issued that no adjudication had been made on a relevant matter. The circumstances of this case, in which the Petitioner had asked the Court to hear the parties on costs before she submitted the final orders, mitigates against the Court acting pursuant to *CPR 78.08*.

[5] Counsel for the Petitioner replies that the reason she filed the DO and the CRO on December 8, 2011, and did not wait until her written request of November 21, 2011, asking the Court to hear the parties on the issue of costs and garnishment, was because, after the Court's oral decision of October 6, 2011, the Respondent ceased paying child and spousal support and immediately made an assignment into bankruptcy, thereby negating the Court's decision respecting the division of their property and debts. The Petitioner needed the support payments and an immediate order to enforce the Court's decision. Counsel submits that the Respondent is not prejudiced by the Court making an order for costs at this time because the request was made in writing before the CRO was issued.

[6] I find that *CPR 78.08(b)* does authorize this Court to amend the CRO, issued December 8, 2011, to include an order for costs, relief requested but not adjudicated on before the CRO was issued, and, for the reasons that follow, I make a costs order.

[7] Both parties sought costs in their pre-trial briefs. This Court made an oral decision at the end of a four-day hearing that dealt with the issues of parenting, child support, spousal support,

and property division. Neither the parties nor the Court addressed the issue of costs on October 6, 2011.

[8] The Petitioner asked the Court to hear the parties on costs before the DO and CRO were issued. Because the Respondent ceased paying child or spousal support and immediately made an assignment into bankruptcy (which had the effect of undoing the Court's decision respecting the division of the parties' property and debts), and she needed to enforce the decision, she did not wait for an adjudication of her claim for costs.

[9] The request for costs was not an after-the-fact request, nor a surprise to the Respondent. I fail to see any prejudice to the Respondent by reason of the fact that the adjudication of the Petitioner's request of November 21st, 2011did not occur before the CRO was issued.

[10] This matrix involves the court amending its order to adjudicate on an issue raised by both parties before the divorce trial and by the Petitioner before the issuance of the CRO, and which should have been adjudicated before issuance of the CRO, but for the Petitioner's need of an Order to enforce the payment of child and spousal support.

[11] The Petitioner submits that she was substantially successful at trial. I agree. The Petitioner sought a continuance of a joint parenting arrangement in which she was the primary care giver for their three children with the Respondent having generous access; the Respondent sought a change to a shared parenting arrangement. This was the major issue and, on this, he was not successful.

[12] The calculation of child support was affected by the parenting decision. The claim with respect to retroactive child support was contested and decided mostly in favor of the Petitioner. The claim for prospective and retroactive spousal support was contested and the Petitioner was partially successful.

[13] On the property issues, the Court ordered an unequal division in favour of the Petitioner. This was primarily to offset the Petitioner's obligation to pay the Respondent an equalization payment against her entitlement to retroactive child and spousal support.

[14] On the most substantive and time-consuming issues, the Petitioner was successful. Normally the loser pays. I see no reason, in the totality of the circumstances in this case, to deviate from the norm. I find the Petitioner is entitled to her costs. This Court has, and should exercise, the jurisdiction under *CPR 78.08(b)* to grant an order for costs.

[15] As to quantum, the Petitioner seeks costs in the amount of $6,000.

[16] The trial consumed four days. If this Court considers the factors in *CPR 77*, and applied Tariff A, the award of costs dealing solely with the money issues would exceed the Petitioner's

request. In addition, there was the substantial time taken up with the Respondent's request to change parenting from primary care by the Petitioner, to shared parenting.

[17] The Petitioner's claim for costs is reasonable in the circumstances when one considers the length of the hearing, the importance of the matters to the parties and the success of the Petitioner in almost all of her submissions.

[18] Therefore, costs are awarded in the amount of $6,000.

J.