

SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION

Citation: Scott v. Scott, 2013 NSSC 178

Date: 20130613

Docket: SFHD060913

1201-063013

Registry: Halifax

Between:

Dawn Scott

Petitioner

v.

Michael Scott

Respondent

Judge:

The Honourable Justice Moira C. Legere Sers

Heard:

February 28, 2013 in Halifax, Nova Scotia

**Final Written
Submissions:**

April 18, 2013 on Costs

Counsel:

Jessica Chapman for the petitioner Dawn Scott
The respondent, Michael Scott, Not Present

By the Court (Orally):

[1] I have before me the Divorce Petition of Dawn Marie Scott dated at Dartmouth, Nova Scotia October 1, 2008 and issued October 2, 2008.

[2] The respondent is Michael Allen Scott.

[3] The parties were married on May 30, 1992 at Halifax, Nova Scotia. They ceased cohabitation on July 1, 2008.

[4] The petitioner is currently 44 and the respondent 46 years old.

[5] There were two children born of this marriage: Chelsey Dawn Scott, born January 30, 1994 and Lindsay Marie Scott, born March 2, 1996.

[6] Chelsey is in her first year of university; she is 19 years old. Lindsay is in high school; she is 16 years old.

[7] Both children have remained in the primary care and custody of the petitioner. The respondent does exercise visiting privileges to the children at reasonable times on reasonable notice.

[8] The Petition was served personally on the respondent on October 15, 2008, and an Affidavit of Service reflects that on file.

[9] In January 2010 the parties entered into a Separation Agreement and Minutes of Settlement, settling all matters between them.

[10] The petitioner was represented by counsel.

[11] The respondent signed a Certificate dated January 29, 2010 indicating he was aware that the petitioner's counsel did not represent him, that he had been advised of his right to seek counsel, and had chosen not to retain or seek independent legal counsel.

[12] He signed the Agreement and Minutes of Settlement freely and voluntarily with a clear understanding as to the nature and effect of the Agreement.

[13] The petitioner seeks to incorporate the Agreement into the Corollary Relief Judgment.

[14] The petitioner is seeking prospective and retroactive child support and retroactive and prospective spousal support in accordance with the Agreement and Minutes of Settlement dated February 1, 2010 .

[15] At the hearing the petitioner waived her claim for the extraordinary expenses for orthodontic treatment, glasses, contact lenses and post secondary education, in large part due to the difficulties she encountered obtaining disclosure and the resulting difficulty she experienced getting an order from the court without this disclosure.

[16] She has been unsuccessful thus far because Mr. Scott has evaded disclosure, failed to follow the directions from the Conciliation Office and multiple Orders of the Court to file and disclose his financial information.

[17] On July 14, 2010, court administration staff forwarded a deficiency notice to the petitioner demanding she obtain the respondent's financial information. The notice required the petitioner to obtain the respondent's 2007, 2008 and 2009 income tax returns in order to properly determine child support.

[18] On February 22, 2011, the petitioner's counsel wrote to the court staff advising that they could not comply with the deficiency notice, asking that the matter be brought before a Justice for review.

[19] The running file indicated that the next action taken was the issuance of a Direction to Disclose March 31, 2011 served on the respondent on April 28, 2011.

[20] Failing response, an Order to Disclose was issued on September 8, 2011 and served on the respondent on September 19, 2011.

[21] The respondent did not appear or disclose and the matter did not proceed.

[22] There were subsequent attempts both by the petitioner and by the Court to engage the respondent in the process of disclosure either to achieve a consent variation order or to finalize these matters by way of court application.

[23] On October 23, 2012, there was a Direction to Disclose and a Notice to Appear on November 29, 2012.

[24] This is the date when this matter came before me.

[25] The respondent neither disclosed nor appeared.

[26] A Memorandum dated December 21, 2012 was issued by the Court. In that Memorandum, it was noted that I was satisfied that every attempt was made to encourage Mr. Scott to appear and disclose. He was served with notice of the appearance and had an opportunity to appear.

[27] Thus between 2010 and 2012, it is clear that the respondent has had full opportunity to be informed and advised and to disclose.

[28] The Memorandum of December 21, 2012 identifies the fact that a further Pre-trial Conference was set simply to give the respondent another opportunity to be present. A trial date was set.

[29] The respondent was advised, by way of this Memorandum, of the remedies and relief requested by the petitioner.

[30] He was directed to file in accordance with the Memorandum his Statement of Income with three recent pay stubs, full disclosure of year-to-date income for 2012 verified by source, full disclosure of year-to-date income for 2013 up to the Pre-trial Conference and a copy of his 2011 Income Tax Returns, complete with all attachments, whether filed or not.

[31] He was also directed to file Affidavits of himself or witnesses if he intended to proceed, and most notably at para. 5 of the Pre-trial Memorandum, it says:

5. In the event that the Respondent, Michael Allan Scott does not appear for the Pre-trial Conference scheduled for **February 11, 2013**, and the Court is satisfied that the Respondent received proper and adequate notice of the Pre-trial

Conference and hearing dates, **the matter may proceed and be determined in his absence at said Pre-trial Conference and the hearing date of March 18 shall be cancelled.**

[32] On January 14, 2013, the respondent was served with this Order and subpoena, as directed. I have an Affidavit of Service, indicating that he is aware of the relief sought. He has been served with the Affidavit, so he has the evidence before the Court and he has not appeared.

[33] On February 18, 2013, he was further served by bailiff with a letter from counsel for the petitioner dated February 11, 2013 and the Affidavit of the petitioner filed January 15, 2013.

[34] In the letter, counsel acknowledged the following:

Dear Mr. Scott:

... Following a teleconference with Scheduling at the Supreme Court (Family Division) to which you were in attendance by telephone, trial dates in this matter are now scheduled as follows:

- 1) February 28, 2013 at 9:30 a.m. to 10:00 a.m. for a pre-trial conference.
- 2) March 22, 2013 at 11:30 a.m. to 12:30 p.m. for trial [sic] . . .

The same issues, filing deadlines and terms and conditions of the Order issued December 21, 2012 (and attached hereto for ease of reference) shall apply for the newly scheduled trial dates.

[35] Despite the Subpoena and despite the notice and opportunity to consult with counsel and to be present at the pre-trial conference on February 28, 2013, Mr. Scott did not appear nor did counsel on his behalf.

[36] Further to para. 5 of the Order issued December 21, 2012 the matter proceeded.

[37] Before proceeding, the court clerk contacted the Devonshire Courthouse to see whether the respondent has gone there by mistake. We were advised that he did not appear there.

[38] On two occasions, once before the commencement of this hearing and during it, the Court Clerk contacted the reception desk to see whether the respondent registered and he had not.

[39] This delay has caused great prejudice to the petitioner. The respondent's failure to appear and the requirement that she produce his disclosure has created significant delay in the proceedings commenced in 2008. It has also caused the petitioner extreme difficulty in having the Agreement registered with the court.

[40] Thus, she has not had the assistance of Maintenance Enforcement to pursue Mr. Scott and to ensure that the appropriate garnishments are put in place, to begin to hold him accountable for the payment of child and spousal support in an appropriate and timely manner, in accordance with his income situation.

[41] I am therefore prepared to proceed.

[42] I am satisfied that the jurisdictional elements of the divorce have been proven including the parties have lived separate for at least one year prior to the determination of this divorce.

[43] I am prepared to grant the Divorce and I incorporate the Agreement, subject to the variations and reservations that I have indicated.

[44] I have reviewed the Minutes of Settlement.

[45] All matters have been resolved in accordance with those Minutes of Settlement. The parties agree to pg. 6 and I will incorporate that into this Corollary Relief Judgment subject to variations which I will set out below.

[46] The Separation Agreement appropriately deals with medical and dental coverage, mandatory exchange of information, and division of real and personal property.

[47] I do note that both parties have had to declare bankruptcy because of the financial difficulties in the household. The mother and children are living in the basement apartment of her family's household, while this matter has dragged on.

[48] The Agreement also includes many items including division of pensions, which has been acknowledged by Mr. Scott and the division of debts.

[49] In reviewing the child support award, it was noted at the time at para. 4(k) on pg. 6, Parenting Plan No. 4 as follows:

Michael agrees to pay child support for the children to Dawn based on the Federal Child Support Guidelines. The base amount shall be set based on the Federal Child Support Guidelines and the Nova Scotia Tables. The current base, combined with and (the agreement actually says and) Section 7 amount of child support is \$2500.00 paid monthly and is payable continuing the 1st of February, 2010 and every month thereafter until further agreement or court order. Michael agrees to pay the child support by direct or automatic deposit from his account to Dawn's account. The child support shall continue to be paid commencing the 1st day of each month until further agreement of the parties.

[50] The parties considered at the time that the respondent's income was \$200,000.00; the petitioner's annual income for the 2010 year was \$5,833.44. On reflection that appears to be an overstatement as her 2010 Income Tax Return reflects income of \$3,824.00.

[51] The affidavit evidence before me discloses that there was random and intermittent payments made.

[52] According to the best information I have on file from Ms. Scott, the respondent paid approximately \$200.00 from February to May for a credit of \$800.00.

[53] From May to August, when the petitioner moved in with her parents the respondent paid nothing and from September to December he paid \$500.00, approximately a four-month period, which would give him a credit of \$2,800.00.

[54] The combination of child support and section 7 expenses for 11 months in 2010 amounts to \$27,500.00 for the 2010 year. With credit for that which the respondent paid (\$2,800.00), the balance outstanding is **\$24,700.00**. He is to be given credit for any cash payments, including the \$2,800.00.

[55] The respondent will have two weeks from the date of this decision to provide further evidence to Maintenance Enforcement and to the Court concerning any other payments other than \$2,800.00 for the 2010 year. After that two weeks is up, the total amount will be due and owing.

[56] The respondent's 2011 post bankruptcy return was provided to Ms. Scott through the Trustee. This shows his 2011 post bankruptcy income of \$88,780.00. This is the most accurate information that I have.

[57] The table amount on this income is \$1,212.00.

[58] The petitioner advises that the respondent paid \$5,695.00 for the 2011 year. He shall be given credit for that, resulting in an amount owing of **\$8,849.00**.

[59] Because Mr. Scott has not provided any information, the calculations for 2012 must be based on the salary for 2011.

[60] The table amount of \$1,212.00 x 12 months, for a total of \$14,544.00 less his payments of \$3,000.00 show a balance of **\$11,544.00**.

[61] I reserve the right to Ms. Scott, if she is ever able to obtain the respondent's proper disclosure as required by the incorporated Agreement and court order, to review 2012 and 2013 child support.

[62] In the interim, the only reliable evidence I have for 2013 on a go forward basis is the respondent's 2011 post bankruptcy income for a child support payment of \$1,212.00 per month. For the 2013 year to and including June 2013 the respondent owes \$7,272.00 less any as yet uncredited payments.

[63] Given her frustration and the delay, she has asked that we proceed without considering the extraordinary expenses of orthodontics, medical and college.

[64] I am going to reserve her right, once the disclosure becomes evident, to look at retroactive analysis of what his contribution should have been to the post secondary education expenses, as well as to the section 7 extraordinary expenses outlined in her application. This would include orthodontic treatment, glasses, contact lenses, etc.

[65] I will also deal with costs when you submit your final affidavit, but I want you to make sure that your request for costs is also served on the respondent, to give him an opportunity to submit an affidavit or information in reply to the subsequent affidavit you will file, as well as your request for costs.

[66] I need further information to make a more realistic and credible decision on the issue of retroactive spousal support and prospective spousal support.

[67] I direct you submit that affidavit within two weeks of today's date and have him served.

[68] I will give him two weeks from today's date, the 15th of March noon, and I presume it would take you a bit of time to serve him. It is interesting that it does not seem to be difficult to serve him.

[69] I will give him until April 3rd to respond to your affidavit with any information relating to his financial circumstances. I will give him until April 3rd to respond to your request for costs.

Conclusion on Spousal Support

(After Adjournment and Further Evidence and Submissions)

[70] The respondent was required to pay \$1,000.00 per month for spousal support, subject to any further reviews or applications to vary. There have been none other than this proceeding.

[71] On the last day the Court granted the divorce on one year's separation, having been satisfied that all jurisdictional elements had been proven.

[72] The parties had entered into a Separation Agreement and Minutes of Settlement on January 29, 2010.

[73] The petitioner was represented by counsel; the respondent chose not to be represented by counsel. He signed a Certificate of Unrepresented Party dated January 29, 2010.

[74] All matters between the parties were resolved including spousal support at para. 7, pg. 10. In this Agreement the following was agreed upon:

Michael agrees to pay to Dawn for spousal support the sum of \$1,000.00 per month continuing February 1, 2010 and continuing on the 1st day of the month thereafter until further Agreement or Court Order. Michael agrees to pay the spousal support by direct automatic deposit from his account to Dawn's account. The spousal support shall be review able upon a material change in circumstances.

[75] In the relevant history clauses at pg. 2 of the Agreement, the incomes of both parties are listed in 1(d) and (e):

- (d) Dawn is currently employed as Library Clerk at HRM - Halifax Public Libraries and earns a gross annual income of \$5,833.44.
- (e) Michael is currently a self-employed Electrician and earns a gross annual income of approximately \$200,000.00.

[76] In the oral decision rendered on February 28, 2013, the Court accepted a figure of \$2,500.00 per month for 2010 child support based on Mr. Scott's income of approximately \$200,000.00.

[77] Mr. Scott was to be given credit for any random or intermittent payments of \$2,800.00 in 2010 as a contribution to child support and section 7 expenses.

[78] I granted him two weeks to provide further information on any other payments for the 2010 year. Failing receipt of any information **the total amount for the 2010 year (based on 11 months) would become due and owing.**

[79] The 2011 post bankruptcy information shows Mr. Scott's income of \$88,780.00. This is the most reliable information available producing a table amount of \$1,212.00 for 12 months . This results in \$14,544.00 less a credit of \$5,695.00 for a balance owing of **\$8,849.00.**

[80] The Court relied on the 2011 income to determine the 2012 child support for a table amount of \$1,212.00 for 12 months, resulting in a total annual payment of \$14,544.00 less payments of \$3,000.00 for a total outstanding of **\$11,544.00.**

[81] The Court confirmed spousal support of \$1,000.00 per month for 2010.

[82] I deferred on retroactive spousal support for 2011 and 2012 seeking information about the principals outlined in the *Divorce Act* and evidence on Ms. Scott's salary for 2008, 2009, 2010, 2011, her current income today without RRSP and information on the effect of the marriage breakdown and other factors which she must address, including her efforts at self-sufficiency.

[83] I also reserved the right for Ms. Scott to look at spousal support for 2012 and 2013 and child support if, in future, she was able to obtain Mr. Scott's proper disclosure, recognizing that the only reliable evidence I have for 2013 is the 2011 post bankruptcy return.

[84] The Court also reserved the right for Ms. Scott upon adequate disclosure to look at a retroactive analysis of what Mr. Scott's contribution should have been to post secondary and section 7 expenses including orthodontic, glasses, etc.

[85] I sought submissions from counsel and Mr. Scott on costs.

Historical facts

[86] The petitioner's supplementary affidavit indicates that the petitioner graduated from high school in June of 1986; the respondent in 1987.

[87] The petitioner attended Hansen College for a French Immersion course during the summer of 1987. In the fall of 1987 she trained to become a flight attendant for Air Canada and unfortunately had to resign in the winter of 1987 for medical reasons.

[88] In September of 1988 she attended the Nova Scotia Community College for a Secretary Diploma and worked evenings and part time to assist her. In June of 1989 she graduated with her Secretarial Diploma and obtained full time work at a data entry clerk earning \$12,000.00.

[89] She became engaged to Mr. Scott in 1990 and married on May 30, 1992. Her employment ended at or around that time.

[90] In the spring of 1993 she became pregnant and had her first child in January of 1994.

[91] Her evidence indicates that both parties agreed that she would be a stay-at-home mother.

[92] She became pregnant with her second child in the summer of 1995. This child was born March 2, 1996.

[93] Between 1994 and 2004 the petitioner was a stay-at-home mom with the consent of the respondent. She was a volunteer at the elementary school and in her church.

[94] She advises that the respondent spent many hours at work and away from the home.

[95] In the fall of 1997 she began to work part time in her home and in 1998 she took a night course for accounting.

[96] In 2002 she stopped to spend more time at home with the children and in 2004 she became employed part time at a public library.

[97] In June of 2008 the parties separated. In 2008, she received salary of \$420.59 plus income from Mr. Scott's family trust which totalled \$2,664.03 per month, for an annual income total of around \$31,972.00.

[98] In September of 2009 she attended Nova Scotia Community College full time in a Library and Information Technology field. In 2009, her income was \$22,217.00.

[99] In 2010, the petitioner's income was \$3,824.00. That would be reflective of the end of her payments from the trust.

[100] In November of 2010 she obtained full time work at the library as a library assistant for \$29,000.00 and she graduated in 2012 with her Diploma.

[101] In 2011 her employment income rose to \$29,119.00. I presume, given her financial circumstances, she cashed in an RRSP. She earned income from \$500.00 from some other source, for a total of **\$33,836.00**.

[102] Her 2012 T4 income was \$31,629.00 (she has union dues of \$427.64) and in 2013 her projected 2013 income is **\$31,820.00**.

[103] For a period of the marriage and subsequently, the responsibilities for child care, maintaining the home and assisting her husband in later years with the accounting in his work disadvantaged her economically and financially after the separation.

[104] She was the primary parent, indeed at times the sole parent. She invested a great deal of her efforts raising their children and maintaining the household to allow the respondent to work full time and many extra hours.

[105] There is no question that the evidence supports her entitlement to spousal support.

[106] There is also evidence of her sincere efforts to obtain employment.

[107] They began to live together in the fall of 1990 and married in May of 1992. The marriage lasted 16 years; the union 18 years.

[108] For the majority of the time the petitioner was in the home as the primary parent and caretaker, maintaining the home for her children and her husband.

[109] Since the separation in July 2008 the mother has undergone significant financial crises.

[110] The petitioner has not had the assistance or the reliable and constant contribution from the respondent. This has impaired her ability to financially recover from the separation and divorce as well as her ability to focus on obtaining employment to sustain herself and the children.

[111] I conclude her entitlement is established.

[112] Placing a termination date on spousal support would be a matter to be determined at a future hearing on application of the parties.

[113] In the Separation Agreement as of 2010 the respondent's income is shown to be \$200,000.00. They agreed to ongoing spousal support of \$1,000.00 per month.

[114] The respondent has failed to provide the Court with information as to his current circumstances.

[115] Spousal support is due and payable as per the agreement for the 2010 year for 11 months.

[116] The petitioner started full time work in November of 2010 for \$29,000.00 annually.

[117] The only reliable information I have as to the income of the respondent for 2011 is the post bankruptcy return showing \$88,780.00, resulting in a child support payment of \$1,212.00 per month for two children.

[118] The petitioner has managed to achieve some sort of self-sufficiency, although her recovery has been hampered by the lack of cooperation and consistent support by the respondent.

[119] I have reviewed her income statement, the history of this relationship pre and post separation, the general circumstances of the parties, the law relating to spousal support and the Spousal Support Guidelines. I assess the petitioner's entitlement to spousal support for the 2011 year at \$788.00 (as requested by the petitioner) from January 1, 2011 to December 2011 for a total of \$9,456.00.

[120] I continue her entitlement at \$800.00 per month continuing each month until altered by further agreement of the parties and incorporated into a court order.

[121] This results in a payment of \$11,000.00 for 2010; \$9,456.00 for 2011; \$9,600.00 for the 2012 year and \$4,800.00 for the 2013 year to and including June 2013.

[122] The respondent shall continue to pay \$800.00 per month pending further order of the court.

[123] Either party has the right to apply to have a review of his obligation as it relates to entitlement duration and amount in the future.

[124] I have chosen to continue the spousal support award at the medium range despite the fact that the petitioner has achieved some degree of success in raising her earning capacity due in part to the financial hardship caused to her in establishing some financial stability for the children and herself.

[125] The cause of this difficulty rests in large part on the respondent's failure to pay and his failure to address the issues of support in a timely fashion. He has impaired the family's recovery and impaired the petitioner's ability to enforce the agreed upon child and spousal support awards.

[126] Once timely payment is established such that the petitioner's household is in a better position to establish some financial recovery, she should anticipate a reduction in spousal support.

COSTS

[127] Set out above in the course of both parts of this decision is the series of appearances and extraordinary documentation and notices required by the rules and the Court to attempt to obtain some reliable disclosure from the respondent.

[128] The respondent's failure to properly and adequately disclose all that is normally required both by the rules and the Court to assess child and spousal support necessitated a considerable expenditure of costs and fees.

[129] In the end, to facilitate the petitioner's obtaining a court order which she could then enforce, she gave up on her children's entitlement to section 7 expenses.

[130] The arrears in child support to any including June 2013 are \$52,365.00 and for spousal support for the same period are \$34,856.00 less any payments not yet credited to his account.

[131] The total arrears to and including June 2013 therefore are \$87,221.00 subject to credit for payments made and not already credited.

[132] The petitioner's legal fees exceed \$15,000.00.

[133] The petitioner is seeking a substantial contribution towards her costs in the amount of \$12,188.00 plus disbursements for a total of \$15,000.00.

[134] This case required attendance at court for a short pretrial conference and an hour before the court for the hearing.

[135] The bulk of the costs are associated with the efforts to obtain disclosure in accordance with the directions of court administration, the filing of affidavits, and service of documents to ensure the respondent had notice. In addition the court administration required updated documentation as a result of the lengthy delays.

[136] The respondent's income at separation was \$200,000.00. This did not result in timely or consistent payment.

[137] Through the Trustee in Bankruptcy, the petitioner learns that the respondent's 2011 income is significantly reduced without any explanation.

[138] Disclosure became important to justify the reduction and to make accurate and fair income determinations for the calculation of child and spousal support.

[139] The delay and non compliance with the court requirements were matters outside the control of the petitioner and well within the control of the respondent.

[140] The conduct and lack of compliance with court directives and failure to appear is blameworthy conduct on the part of the respondent that has not been explained.

[141] This conduct places the petitioner in a more fragile financial position.

[142] The petitioner is successful in that her position was the only position put before the court.

[143] The spousal support award was adjusted downward and she waived her entitlement to seek section 7 costs to bring the matter to a conclusion if only to give herself an order that could be enforced.

[144] The divorce could have been processed with minimal costs if the respondent had complied with the deficiency notice to support his income tax information.

[145] However, in reading the running file and the evidence presented it became clear as early as February 22, 2011 by representation of the petitioner's lawyer to the court administration that the petitioner could not force the respondent to disclose despite her best efforts.

[146] This burden on the petitioner to pursue the respondent placed an unfair onus on her to comply with the rules of disclosure, further delaying her ability to obtain an order to enforce her child support.

[147] I have reviewed the rules and relevant case law including the factors set out in **Kozma v. Kozma 2013 N.S.S.C. 20** where in MacDonald J. reviewed the general principles associated with costs in matrimonial matters.

[148] This case is similar to **Ghosn v. Ghosn, [2006] N.S.J. No 272** in that actual court time was minimal, perhaps no more than two hours.

[149] The bulk of the costs was associated with the preparation of the divorce documents, the many discussions that occurred between the court office and counsel to accommodate for the respondent's lack of disclosure, bailiff costs incurred to ensure the respondent was notified of each step and extended ample opportunities to disclose, appear and speak to his obligations.

[150] Not only did the respondent's failure to disclose cause the petitioner to incur significant legal costs, the office of Maintenance Enforcement would not register the Agreement until it became incorporated into a court order, all of which was aggravated by the respondent's lack of disclosure.

[151] I adopt wholeheartedly the comments of Dellapinna J. in "Costs in Family Matters" (May 2006) wherein he refers to and adopts the comments of Williams, J. in **Grant v. Grant (2002), 200 N.S.R. (2d) 173 (T.D.)** that an "amount involved" analysis has limited utility in complex, multi-issue matrimonial proceedings.

[152] I am also reluctant to equate each day of trial to an amount of \$15,000.00 particularly where the court time did not exceed two hours.

[153] I am however very much aware of the sizeable legal fees paid by the petitioner, most of which were unnecessary.

[154] I have reviewed the fees and note there are some disbursements I am not inclined to allow such as file management and copying (where no amount is discernable).

[155] I therefore allow the petitioner's costs of \$8,000.00 plus disbursements related to couriers, law stamp, postal charges and bailiff charges in the total amount of \$884.00 (rounded) plus HST of \$115.00 (rounded) for a total disbursement claim of \$999.00.

Legere Sers, J.