SUPREME COURT OF NOVA SCOTIA
Citation: *Chipman v Chipman*, 2017 NSSC 293

Date: 2017-11-15
Docket: 1207-006357
Registry: Kentville

Between:

Doreen Lynn Chipman

Petitioner

v.

Frank Miles Chipman

Respondent

Judge:	The Honourable Justice Gregory M. Warner
Heard:	July 4 to 6, 2017, in Kentville, Nova Scotia
Final Written Submissions:	September 22, 2017
Counsel:	Marion Hill, counsel for the petitioner Maggie Shackleton, counsel for the respondent

By the Court:

[1] This is the costs decision arising out of the divorce trial heard July 4 to 6, 2017, with an oral decision on July 6, 2017.

Background

[2] The parties commenced cohabiting in 1977, married in 1979, and separated on November 1, 2015. They have two grown children, who are independent.

[3] Ms. Chipman commenced divorce proceedings early in 2016. On March 15, 2016, the court heard an application for interim relief and awarded Ms. Chipman interim spousal support of $500.00 per month and, by consent of the parties, divided a Scotiabank GIC valued at $103,494.77 equally between them.

[4] In the fall of 2016, Mr. Chipman lost his position as a municipal counsellor with the associated income and the parties agreed that no further spousal support would be paid or payable. As a result, the only issue for trial was the division of matrimonial assets.

[5] There were some agreements with regards to matrimonial assets.

[6] Mr. Chipman and his siblings had inherited substantial lands from their father in Annapolis County, of which about 26 remained in his name as of the date of separation. Ms. Chipman agreed that they were exempt, inherited assets of Mr. Chipman. Mr. Chipman had acquired a family farm from his uncle, which Ms. Chipman agreed was an exempt asset, either as a business asset (a farm) or inherited asset.

[7] The primary issues for trial included: whether any of Mr. Chipman's other assets were exempt from division as business assets or inherited assets; a determination of the valuation of some of those (and other) assets; and a determination of Mr. Chipman's claim for an unequal division of assets if his claim that any of the assets he claimed were business or inherited were found not to be exempt from division.

[8] The contest respecting exemption primarily involved three assets:

a) The homestead property of about 200 acres included woodland, farm land and the family residence. Mr. Chipman had inherited it and built the matrimonial home on it before he met Ms. Chipman. He claimed that only the house itself and about two acres were matrimonial property: the rest was exempt as inherited or business (farm) property.

b) Mr. Chipman claimed that in the 1980s he purchased the Mount Hanley property for development with proceeds from the sale of inherited lands; therefore, the property was exempt from division either as a business or inherited asset.

c) Mr. Chipman's share of proceeds from the sale of the lots inherited by him and his siblings from his father was kept separate from any other monies or accounts by him at the Bank of Nova Scotia. He claimed the proceeds (calculated as $272,243.37) were exempt from division as proceeds from inheritances kept in his name alone, and not used for the benefit of his spouse or children.

[9] At trial, the court determined that the homestead property consisting of all 200 acres, not just the house and surrounding two acres, was matrimonial property and not exempt from division. The court concluded that the land had not been used in an entrepreneurial or business manner for many years before the date of separation.

[10] The court concluded that Mr. Chipman failed to prove, on a balance of probability, that the Mount Hanley property was purchased or used for development purposes; it accepted the evidence that, while not extensively used, it was developed and used by the family for recreational purposes. It was not exempt from division.

[11] With respect to the proceeds from the sale of inherited lands maintained by Mr. Chipman at the Bank of Nova Scotia, the court concluded that those monies retained their status as an exempt inheritance not used for the benefit of his spouse or children.

[12] The parties disagreed as to the value of the matrimonial home. The court accepted Ms. Chipman's appraisal evidence that the matrimonial home was worth $300,000.00. With respect to the Mount Hanley property, each party produced appraisal evidence and the court split the difference between the two appraisals.

[13] With respect to the contents of the matrimonial home retained by Mr. Chipman, the parties' vehicles and some of the equipment associated with the property, the court found virtually all to be matrimonial property, subject to division, and assigned values to those assets.

[14] There was no dispute that the pension entitlements of Mr. Chipman as a municipal counsellor and former MLA were matrimonial assets and subject to equal division.

[15] The court accepted Mr. Chipman's evidence that an I-trade account kept solely in his name was an inheritance from his mother, not used for the benefit of his spouse or children, and was therefore exempt from division. Similarly, Emera shares claimed by Ms. Chipman as an inheritance were found to be exempt from division.

[16] The court rejected Mr. Chipman's claim for unequal division of assets in his favor. The court divided the non-exempt matrimonial assets equally between the parties.

[17] The court attached to its oral decision a spreadsheet of the parties' assets. The divisible matrimonial assets were worth $656,215.52. Based on an equal division of the divisible assets, Mr. Chipman was ordered to make an equalization payment to Ms. Chipman of $251,296.98.

[18] The conduct of these divorce proceedings was hindered and became more expensive because of Mr. Chipman's failure to provide the disclosure that was in his possession or control, in some instances not at all and in other instances not in a timely manner. Ms. Chipman made two formal Demands for Production and disclosure - on April 13, 2016 and November 8, 2016. These were only partially answered, often with incomplete information, even as of the start of the trial.

[19] Ms. Chipman was forced to subpoena at trial witnesses from the three financial institutions with whom Mr. Chipman did business. From those witnesses, the court heard evidence and received records that Mr. Chipman should have provided. Mr. Chipman did not act in a responsible and diligent manner to facilitate the determination of the proceedings.

Settlement Offers

[20] Attached to Ms. Chipman's costs brief of July 18, 2017, is a copy of a formal offer to settle made by her pursuant to *CPR 10*, dated November 30, 2016 (before much of Mr. Chipman's financial information became available). It reads:

> Our offer to settle all issues between [these] parties stands at payout of $250,000.00, net of taxes from Mr. Chipman to Ms. Chipman, Mr. Chipman would retain ownership of cottage and Mat hom, as well as other assets without claim by Ms. Chipman. Otherwise status quo property division, no further claims to spousal support.

[21] Mr. Chipman did not respond to this offer to settle and on May 30, 2017, Ms. Chipman's counsel revoked the offer. In her brief, she stated the reason as "due to escalating legal costs, continuing lack of disclosure [or] response to our offer to settle, and the increasing costs of the pending five-day divorce scheduled for a start date of July 4, 2017".

[22] Ms. Chipman submits that Ms. Chipman's formal offer to settle was more favourable to Mr. Chipman than the court's decision.

[23] On July 3, 2017, the day before the divorce trial commenced, Mr. Chipman made a formal *CPR 10* Offer to Settle as follows:

> a) Spousal Support entitlement be fully satisfied as of today (no retroactive adjustments back to the date of material change in circumstance ie loss of job October 2016).
>
> b) Complete and final division of assets and all corollary relief claims arising from the breakdown of this marriage to be satisfied by a payment from Mr. Chipman to Ms. Chipman of $125,000 to be accomplished primarily by way of tax-free spousal roll-over of his pension and contributions. Ms. Chipman can "keep" the joint funds she removed from the bank accounts and the previously divided GIC, as well as the vehicle in her possession and the $5000.00 worth of spousal support paid since the date of job loss. (The value of this totals approximately $200,000.00).
>
> c) Ms. Chipman will quit claim any interest in lands to Mr. Chipman.
>
> d) Each party is responsible [for] their own costs.

[24] Mr. Chipman's offer to settle was significantly less than the court's award against him. For clarity, the court ordered an equalization payment of about $251,000.00 in addition to Ms. Chipman keeping her half of the already-divided GIC, keeping her vehicle, and keeping the interim spousal support to the date of

trial. Ms. Chipman notes that Mr. Chipman's offer would require Ms. Chipman to pay taxes on the roll-over of his pension benefits and reduce the proposed $125,000.00 equalization payment to an after-tax payment of $87,500.00.

Submission on Costs

[25] Ms. Chipman's submissions on costs is dated July 18, 2017. She notes that her November 30, 2016 offer to settle was the equivalent, if not better than, the overall result that she obtained at trial and was significantly better than Mr. Chipman's last offer to settle of effectively $87,500.00. Ms. Chipman states that the respondent's conduct of the proceedings was unreasonable, with important non-disclosure up to the date of the trial that necessitated issuance of three subpoenas for witnesses to attend the trial with Mr. Chipman's financial records, two Demands for Production, and an interim application for spousal support.

[26] Ms. Chipman asked the court to award her costs by applying Tariff A as follows:

a) Total matrimonial assets divided as a result of the divorce proceedings were $656,215.52.

b) Applying Tariff A, Scale 1 for the range $500,000.00 to $750,000.00 results in a Tariff A award of $37,313.00.

c) Add $6,000.00, for three days of trial.

d) Add $1,000.00, for the successful 2016 interim motion for spousal support.

e) Total costs claimed: $44,313.00.

[27] Mr. Chipman's costs submission was dated September 20, 2017. He acknowledged that the court had a broad discretion respecting a costs award pursuant to *CPR 77*, and that CPR 77 applied to family proceedings, as reflected in this court's decision in *Lake v Lake*, 2016 NSSC 255. He submits that he used his best efforts to respond to Ms. Chipman's pretrial disclosure requests.

[28] Mr. Chipman submits there was mixed success both at the interim spousal support hearing on March 15, 2016, and the trial held over three days starting on

July 4, 2017. He states that, based on the financial information as to the extent and values of his assets at the time of Ms. Chipman's offer to settle - very substantially less than those determined at the time of the divorce trial, it was reasonable to reject her offer.

[29] He submits that each of the parties should be responsible for their own costs.

Analysis

The Law

[30] *Civil Procedure Rule 77* (and where offers to settle are advanced, *Civil Procedure Rule 10*) apply.

[31] The following provisions are particularly relevant:

> **General discretion (party and party costs)**
>
> 77.02 (1) A presiding judge may, at any time, make any order about costs as the judge is satisfied will do justice between the parties.
>
> (2) Nothing in these Rules limits the general discretion of a judge to make any order about costs, except costs that are awarded after acceptance of a formal offer to settle under Rule 10.05, of Rule 10 - Settlement.
>
> **Liability for costs**
>
> 77.03 (1) A judge may order that parties bear their own costs, one party pay costs to another, two or more parties jointly pay costs, a party pay costs out of a fund or an estate, or that liability for party and party costs is fixed in any other way.
>
> …
>
> (3) Costs of a proceeding follow the result, unless a judge orders or a Rule provides otherwise.
>
> …
>
> **Increasing or decreasing tariff amount**
>
> 77.07 (1) A judge who fixes costs may add an amount to, or subtract an amount from, tariff costs.

> (2) The following are examples of factors that may be relevant on a request that tariff costs be increased or decreased after the trial of an action, or hearing of an application:
>
> (a) the amount claimed in relation to the amount recovered;
>
> (b) a written offer of settlement, whether made formally under Rule 10 - Settlement or otherwise, that is not accepted;
>
> …
>
> (e) conduct of a party affecting the speed or expense of the proceeding;

[32] The starting point for assessment of the quantum of party-and-party costs is Tariff A. Tariff A mandates three determinations: first, the "amount involved"; second, the appropriate scale, starting with Scale 2 (basic) reduced by 25% for Scale 1 or increased by 25% for Scale 3; and finally, the "length of trial".

[33] *Tariffs*, appended to *CPR 77*, states:

> **Rule 77 - Costs**
>
> **TARIFFS OF COSTS AND FEES DETERMINED BY THE COSTS AND FEES COMMITTEE TO BE USED IN DETERMINING PARTY AND PARTY COSTS**
>
> In these Tariffs unless otherwise prescribed, the "amount involved" shall be
>
> (a) where the main issue is a monetary claim which is allowed in whole or in part, an amount determined having regard to
>
> (i) the amount allowed,
>
> (ii) the complexity of the proceeding, and
>
> (iii) the importance of the issues;

[34] *Civil Procedure Rule 10.03* reads:

Settlement offers and costs

10.03 A judge who determines costs may take into consideration a written offer of settlement made formally under this Rule or otherwise, unless the offer was made at a settlement conference or under an agreement that the offer would not be admissible in relation to costs.

[35] In *Lake v Lake*, 2016 NSSC 255, this court wrote:

> [31] In recent years, substantial costs awards have been issued in family proceedings to reflect what Justice Jollimore described in *Poirier v Poirier*, 2013 NSSC 366, ("*Poirier"*) at para 45 as a recognition of Recommendation 26 in the Access to Justice Report: "judges should use costs awards more freely and more assertively to contain process and encourage reasonable behaviour".
>
> [32] *Armoyan v Armoyan*, 2013 NSCA 136, ("*Armoyan"*) sets out the principle that costs awards in family litigation should represent a substantial contribution to the successful parties' reasonable expenses.
>
> [33] In the Family Division, the practice is to apply Tariff A to the hearing of family applications and to apply a rule of thumb of $20,000 for each day where the issues are not primarily monetary but involve parenting. In the Districts, where divorce petitions proceed as actions (*CPR 4* and *66.22*) and involve trials without affidavits, and interim motions and variation applications proceed by way of affidavit evidence and cross-examination, the practice is to apply Tariff C to chambers applications and Tariff A to trials and court applications. (See *Harris v. Durling and Weir*, 2016 NSSC 19)
>
> [34] The end goal of costs awards is to do justice between the parties. The quantum of costs awards should not depend on whether Tariff A or Tariff C is applied, in circumstances where the issues, time and effort involved, are similar.
>
> [35] Costs awards in family matters should reflect the same factors as costs awards in civil litigation generally. Traditionally cost awards in family matters were low because of the court's concern about the adverse impact upon the resources available to support children. That concern has diminished in circumstances where the emotions and ill-will of parents causes them to lose objectivity and sight of the impact of litigation on the best interests of their children, and act unreasonably.
>
> [36] The following family costs decisions are examples of the new approach. They apply the general principle that costs awards on a solicitor-client basis should be reserved for rare and exceptional occasions, but that costs awards in family litigation should follow the general principle that, subject to the factors identified in the decisions, the loser should pay the winner a substantial contribution of their reasonable legal expenses.

Relevant Considerations

[36] The petitioner is entitled to her costs. Three important circumstances in this proceeding govern the quantum of those costs.

[37] First, this proceeding was entirely about the division of assets after 38 years of cohabitation. Ms. Chipman was almost entirely successful. Before trial, Ms. Chipman conceded that the interim spousal support order should be terminated because Mr. Chipman lost his employment after the date of the interim order. She conceded that the Chipman Family Farm, held in the name of Mr. Chipman only, and the 26 properties that remained from the lands inherited by Mr. Chipman and his siblings from their father many years before were exempt from division.

[38] Ms. Chipman was successful and Mr. Chipman was unsuccessful in these substantial issues:

a) Whether the homestead property consisted of the entire 200-acre property, valued at about $300,000.00 or, as Mr. Chipman claimed, only two acres and the house, the rest being exempt from division as business or inherited property;

b) Whether the Mount Hanley property was exempt from division as a business development asset or property purchased with money derived from the sale of lots he inherited from his father; and

c) Whether Mr. Chipman was entitled to an unequal division in his favor if any of these assets were found to be divisible.

[39] The only significant issue in which Mr. Chipman was successful was whether Mr. Chipman's Scotiabank accounts were matrimonial property. These funds totaled about $272,000.00.

[40] The only reason that Ms. Chipman was unsuccessful in this issue was because Mr. Chipman failed to produce the complete records before trial. It was the records subpoenaed by Ms. Chipman at trial that led this court to conclude that the source of the Scotiabank accounts was proceeds from inherited assets.

[41] The court determined that the divisible matrimonial assets total about $656,000.00. The Scotiabank accounts totaled $272,000.00, and no value was determined for the 'Chipman family farm' or the other 26 properties, all of which remained undivided assets of Mr. Chipman.

[42] As a result, this court concludes that "the amount involved" for the purposes of *CPR 77, Tariff A*, the first step in the Tariff A determination, should be based upon those assets which were in dispute. While an argument could be made that they exceeded $750,000.00, I accept Ms. Chipman's estimate that the 'amount involved' was between $500,000.00 and $750,000.00 for the purposes of Tariff A.

[43] Second, Mr. Chipman failed to make full disclosure of his financial situation, even up to the time of trial. He failed to properly respond to two Demands for Production.

[44] Much of the financial disclosure relied upon at trial came from the three witnesses subpoenaed by Ms. Chipman to produce Mr. Chipman's bank and financial information. This included the Scotiabank records upon which the court based its decision that those accounts were exempt from division.

[45] Mr. Chipman's pretrial conduct added to the expense of the proceedings, delay in the setting down of the trial, and the length of the trial itself.

[46] Third, despite not having Mr. Chipman's full disclosure and records until substantially afterwards, Ms. Chipman made an offer to settle on November 30, 2016, for an equalization payment of $250,000.00, and termination of interim spousal support, with Mr. Chipman to retain the "cottage" [Mount Hanley property], the "Mat home" [matrimonial home], "as well as other assets without claim by Ms. Chipman. Otherwise status quo property division".

[47] It is not clear to the court that this formal offer to settle, which was withdrawn close to the trial date because of the increased legal costs, was compliant with *CPR 10* or that she received a 'favourable judgment' per *CPR 10.09*, but it is an offer to settle that was very close to the equalization payment of $251,296.88 that the court awarded to Ms. Chipman (in addition to what had already been divided and was in her possession).

[48] In contrast, Mr. Chipman made an offer the day before the trial commenced to settle by the payment of $125,000.00 "to be accomplished primarily by way of tax-free spousal rollover of his pension and contributions" - effectively about $87,500.00 in after-tax dollars. The offer was far less than the court's eventual award, even though Mr. Chipman was in the best position to know of the actual financial circumstances of the parties before the production of the subpoenaed records from the three witnesses subpoenaed at trial.

[49] In summary, the court's decision was very close to Ms. Chipman's November offer and very far from Mr. Chipman's July 3rd offer.

Conclusion

[50] With respect to the amount involved, I accept Ms. Chipman's submission that it was between $500,000.00 and $750,000.00.

[51] The basic scale of Tariff A is Scale 2. That is the scale to be applied where the action proceeds in the normal manner. Scale 1 is usually reserved to simple actions with few pre-trial proceedings and few real issues of law or fact.

[52] I do not understand why Ms. Chipman seeks costs based on Scale 1. This proceeding was made more expensive and delayed by reason of: Mr. Chipman's failure to make complete, proper and timely disclosure; the interim spousal support motion; and the necessity for Ms. Chipman to subpoena three witnesses for records at trial that disclosed Mr. Chipman's finances.

[53] The court notes that if Ms. Chipman had claimed the Basic Scale; that is, Tariff A, Scale 2, for the "amount involved", the award would have been $49,750.00.

[54] Instead, Ms. Chipman seeks Tariff A, Scale 1, at $37,313.00 plus $6,000.00 for the "three-days length of trial", plus $1,000.00 for the successful interim spousal support motion, for a total of $44,313.00.

[55] I agree that Ms. Chipman is entitled to $6,000.00 for three days of trial. This trial was scheduled for five days, but completed in three.

[56] Ms. Chipman was successful in obtaining interim spousal support in a contested motion on March 15, 2016. I agree that Ms. Chipman is entitled to costs of the interim spousal support motion.

[57] No evidence was presented as to Ms. Chipman's actual legal costs. As a result, there is no basis upon which to assess whether an award, pursuant to Tariff A, constitutes a "substantial contribution" to Ms. Chipman's actual but reasonable legal costs. Said differently, there is no basis for awarding a lump sum that differs from the tariff, which is the starting point for the assessment of party-and-party costs.

[58] Ms. Chipman claims less than the Tariff A, Scale 2 basic scale. She is entitled to and therefore awarded costs, as claimed, in the amount of $44,313.00.

Warner, J.