

SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: *Risk v. Risk*, 2014 NSSC 248

Date: 20140422

Docket: No. 1201-065234

Registry: Halifax

Between:

Michael Jacob Risk

Petitioner

v.

Lissa Colleen Risk

Respondent

Judge:

The Honourable Justice Deborah Gass

**Written Costs
Submissions:**

November 15 and 22, 2013

Counsel:

Dianne E. Paquet, for the Petitioner
Kay L. Rhodenizer, for the Respondent

By the Court:

[1] Lissa Risk, the Respondent in this Divorce proceeding seeks an order for costs to be paid by the Petitioner, Michael Risk. Counsel on behalf of the parties attempted to resolve the issue first, but subsequently filed written submissions for the court's consideration.

[2] This was a lengthy proceeding, fraught with complexities and delays.

[3] The parties separated in 2010 and entered into a detailed partial agreement and minutes of settlement April 19, 2010.

[4] A Petition for Divorce was issued in April, 2011. The Respondent sought a date assignment conference in August, 2011 and a Direction to Disclose was issued in September, 2011 due October 11, 2011.

[5] The court received from the Petitioner, a Notice of Intention to Act in person dated August 30, 2011 which purports on its face to discharge counsel at the request of his then counsel, Ms. Chiasson, who had issued the Petition on his behalf. On October 14, 2011 Notice of New Counsel was filed and the parties

appeared at the date assignment conference on October 17, 2011, with Mr. Jewett having just been retained by the Petitioner. The Petitioner had not complied with the Notice to Disclose and further deadlines were set for disclosure as well as his reply to interrogatories. Costs were sought by the Respondent at that time but not dealt with.

[6] Dates were set for a settlement conference (February 14, 2012) and for trial (June 20-21, 2012). The filing requirements were set out in a Pre-Trial Memorandum which has the force and effect of an order pursuant to *Civil Procedure Rule 26.05*.

[7] The settlement conference set for February, 2012 was not the first scheduled conference. The settlement conference set for July 12, 2011, was removed at the Respondent's request because she had not received requested disclosure nor did she receive the Petitioner's settlement letter in sufficient time to respond. It was adjourned with consent. It was then set for October 31, 2011. That date was removed at the Petitioner's request.

[8] The settlement conference set for February, 2012 was again adjourned because of "disclosure issues".

[9] A further settlement conference was set for April 12, 2012.

[10] The Respondent filed a Notice of Motion which was heard February 13, 2012, in which she was seeking an order for disclosure emanating from requests made by correspondence on December 11, 2011 and January 5, 2012. An Order to Disclose was issued along with an order for costs of \$1,000.00.

[11] The settlement conference set for April did not proceed and the June trial dates were moved to September 18 & 19, 2012. On September 7, 2012 a telephone conference on the record dealt with late filing of disclosure. The court determined that it was too late to file material not provided in accordance with previous filing directions but oral evidence would be permitted and a pre-trial brief could still be filed no later than September 12, 2012 with a responding brief by September 14, 2012.

[12] The Petitioner's direct and cross-examination encompassed the two day trial, requiring a further adjournment to complete the proceeding. The adjourned dates were not until May, 2013 and a telephone conference was convened to discuss finding earlier dates. Counsel consented to October 2 and 3, 2012 for completion of evidence with counsel to file written closing submissions, but Mr. Jewett had to confirm dates with his client and subsequently advised that the Petitioner was unavailable for the October dates and the matter was moved back to May, 2013.

[13] The court directed that earlier dates be obtained. Disclosure of updated material was still in issue. Dates in November and December, 2012 were obtained. At the continuation of the trial there were still issues surrounding late filing of the Answers to Interrogatories and the Notice to Admit.

[14] It was revealed at the continuation of the trial in November 2012 that the Petitioner had withdrawn \$40,000.00 from an RRSP at some point notwithstanding the provisions of the separation agreement and an interim order made earlier in September, 2012.

[15] He was ordered again to provide particulars within seven days, although there had already been an earlier order freezing two accounts, and a previous order for disclosure of activity by September 28, 2012.

[16] This summary is merely to illustrate that disclosure was an ongoing issue from the outset. The time required to complete the evidence was much greater than anticipated. Notwithstanding whatever may have transpired between the Petitioner and his lawyers, the Petitioner himself appeared to be in a state of avoidance or denial throughout the months leading up to the trial. Even before Mr. Jewett took over the file, there were issues with disclosure that impeded any efforts to settle.

[17] The Respondent was substantially, although not completely successful in the result.

[18] I am not going to review the oft cited *Civil Procedure Rules* and the case law on costs. The law is not in dispute. Nor is the fact that delay and disclosure were a continuing impediment to the resolution of this matter.

[19] Whether or not these problems rest at the feet of the Respondent's lawyer, or the Respondent personally, or a combination of the two, the reality is that the result was costly to all involved in many respects.

[20] Clearly the Respondent incurred significant costs in pursuit of her claims and for the most part, she was in the untenable position of not knowing the Petitioner's position on any of the issues throughout, until the Petitioner testified.

[21] It is not for this court to decide on, or apportion responsibility as between the Petitioner and his counsel, given that the court is not privy to what materials the Petitioner provided to his counsel to comply with the court's orders. He did seek unsuccessfully to further adjourn the proceedings and to file material after the disclosure deadlines had lapsed.

[22] While I have some sympathy for the Petitioner, given the outcome and the fact that substantial costs have been incurred which will to some extent be his to bear, I am also mindful of the considerable time and expense expended by the Respondent to pursue her claims, including those already established through their partial agreement, which she should not have had to expend further resources to recover.

[23] It is clear that even since the decision she incurred further costs in carrying out the order.

[24] Costs are ultimately in the discretion of the court, and any order I make cannot sufficiently compensate the Respondent for all the costs to which she is properly entitled, given the unusually protracted circumstances of this case. I balance this with my awareness of the challenges and limitations the Petitioner now faces as a result of the court's decision in this matter.

[25] The Respondent seeks an order for costs of \$73,000.00 inclusive of disbursements, which is not unreasonable given the facts and the law. However, considering all the factors and circumstances relating to both parties, I am ordering the Petitioner to pay costs of \$50,000.00 inclusive of disbursements. Failure to pay costs in accordance with the order can be the basis for an application for contempt,

among other remedies. In accordance with the decision of Jollimore, J. in *Lockerby v. Lockerby* [2011] N.S.J. No. 131, I am prepared to assign fifty percent of the trial time to the issue of spousal support and direct that \$25,000.00 of this costs order therefore relates to spousal support and the consequences that flow therefrom.

Gass, J.