

SUPREME COURT OF NOVA SCOTIA
Citation: *Devereaux v. Taylor*, 2014 NSSC 397

Date: 20141110
Docket: SYD-089233
1208-003322
Registry: Sydney

Between:

Carol Ann Devereaux

Petitioner

v.

Roger Loran Taylor

Respondent

DECISION ON COSTS

Judge: The Honourable Justice Kevin Coady

Final Written Submissions September 19, 2014, by the Petitioner
September 19, 2014, by the Respondent
September 29, 2014, Reply by the Respondent

Decision: November 10, 2014

Counsel: Jessica Chapman, for the Petitioner
Celia Melanson, for the Respondent

By the Court:

[1] Ms. Devereaux applies for costs following a one day trial in which the only issue was spousal support. In 2014 NSSC 318 I ruled that Mr. Taylor must pay Ms. Devereaux \$2,500 per month indefinitely. Additionally I ruled that Mr. Taylor's pension income qualified as income for the purpose of determining the quantum of spousal support. Issues of property division and retroactive spousal support were resolved by consent order following a judicial settlement conference.

[2] *Civil Procedure Rule 77.03(3)* directs that the costs of a proceeding follow the result, unless a judge orders or a *Rule* provides otherwise. In this case Ms. Devereaux was clearly the successful litigant.

[3] Counsel for Ms. Devereaux submits that several offers to settle spousal support were made. In a letter dated March 14, 2013 Ms. Devereaux made the following offer:

Ms. Devereaux is willing to accept spousal support in the amount of \$2,500.00 per month for ten years, decreasing to \$2,000.00 in April, 2023, to continue indefinitely thereafter. As you are aware, spousal support is tax deductible for Mr. Taylor and Ms. Devereaux would be taxed on that income. Ms. Devereaux also seeks to remain beneficiary on Mr. Taylor's life insurance/pension and to stay on his medical and dental plan for as long as legally possible.

In a letter dated April 12, 2013 another offer to settle was advanced:

In order for Ms. Devereaux to cover her basic necessities, she will require \$1,500.00 for rent/mortgage, \$300.00 for heat and electricity, \$250.00 for phone, cable, and utilities, \$400.00 for food, \$150.00 for gas and \$100.00 for toiletries and household supplies. Ms. Devereaux's expenses total \$2,800.00. These expenses only cover Ms. Devereaux's basic necessities and would not provide a standard of living to which she experienced during the 20 year marriage, nor a standard of living to which Mr. Taylor is currently enjoying. Nonetheless, Ms. Devereaux, for the purposes of moving this matter forward is willing to accept monthly spousal support in the amount of \$2,500.00. In addition, Ms. Devereaux requests that she remain on Mr. Taylor's medical and dental benefits plan until further agreement or Order of the court.

On November 26, 2013 Ms. Devereaux once again advanced the same settlement offer:

Please note that my client has yet to receive any spousal support from Mr. Taylor. Since the separation, Ms. Devereaux has been forced to borrow thousands of dollars from her elderly mother and friends in order to get by, day to day. As you are aware, she makes minimal income working at the local liquor store. We respectfully requests that Mr. Taylor begin providing spousal support in the amount of \$2,500 per month, as soon as possible.

[4] Mr. Taylor did not accept these offers and was unwilling to discuss a resolution unless it included a termination date. All offers were made before Ms. Devereaux negotiated a property settlement. I conclude that Mr. Taylor's position on a termination date was unreasonable. The evidence at trial clearly established that Ms. Devereaux was economically disadvantaged by the marriage breakdown, and at 63 years of age, that would not change.

[5] I also conclude that Mr. Taylor's position that his pension income should not be considered income for spousal support purposes was as equally unreasonable. He was unable to provide any authority to support his position. Mr. Talyor's pension income represented approximately two-thirds of his \$90,000 annual income.

[6] Mr. Taylor advanced an unreasonable position respecting Ms. Devereaux's disposal of a rental property in St. John's, Newfoundland. In the trial decision at paragraph 12 I commented as follows:

[12] In 2003 Ms. Devereaux sold her St. John's building to her son who had been residing in one of the units. Mr. Taylor argues she undervalued the property and deprived herself of rental income into the future. Essentially he argues these were imprudent choices and he should not have to pay support as a consequence of those choices.

Similar misguided arguments were made respecting the disposal of failed enterprises that pre-dated separation.

[7] I conclude that family spousal support cases are not well suited to the application of the tariff system. *Civil Procedure Rule 77.08* provides as follows:

A judge may award lump sum costs instead of tariff costs.

I recognize that an award of lump sum costs must represent a substantial contribution towards the reasonable expenses of defending a proceeding. Ms. Devereaux reports that her legal fees for the entire divorce proceeding amounted to

\$31,741.52 plus \$2,197 in disbursements. She seeks a cost award of \$20,000, inclusive of disbursements.

[8] Mr. Taylor suggests that Ms. Devereaux was inordinately slow in providing her disclosure and, as such, was not in a position to respond to Ms. Devereaux's offers to settle. He further suggests that this reticence delayed, or precluded, a comprehensive settlement. With respect I do not accept these submissions. In the trial decision at paragraph 13 I made the following finding:

I am satisfied that Mr. Taylor was involved in every financial transaction conducted by Ms. Devereaux. Notwithstanding Mr. Taylor's evidence to the contrary, I am satisfied that he was a partner in all of Ms. Devereaux's ventures. I am further satisfied that no financial decisions were made without Mr. Taylor's substantial input and approval.

I am satisfied that Mr. Taylor was keenly aware of Ms. Devereaux's financial property circumstances.

[9] Mr. Taylor relies on Justice Jollimore's decision in *Peraud v. Peraud*, 2011 NSSC 80 and specifically the following which appears at paragraph 19:

[19] The amount of fees, disbursements and taxes billed to a party are not necessarily the same as the amount the party pays when the expenses are incurred in matters relating to support. The *Income Tax Act*, R.S.C. 1985 (5th Supp), c. 1, s. 18, allows that legal and accounting fees may be deducted from total income to determine taxable income. Canada Revenue Agency's Income Tax Technical News Release Number 24 of October 10, 2002 changed the terms of the Agency's *Interpretation Bulletin IT-99R5: Legal and Accounting Fees*, making it possible for a party to deduct expenses incurred to obtain spousal support under the *Divorce Act*, R.S.C. 1985 (2nd Supp.), c. 3, the *Maintenance and Custody Act*, R.S.N.S. 1989, c. 160 and other similar provincial legislation across Canada. If a litigant is able to deduct legal expenses from total income,

the resulting reduction in total income serves to diminish the litigant's tax bill.

I find this principle relevant to this application.

[10] Mr. Taylor submits that in all the circumstances scale 1 of the tariff be applied and the costs be set at \$3,000 to \$5,000.

[11] Cost awards are discretionary. I have concluded that an award of \$10,000 would do justice between the parties and I order that amount. I also award Ms. Devereaux \$1,000 towards her disbursements.

Coady, J.