

SUPREME COURT OF NOVA SCOTIA
Citation: *Burghardt v Burghardt*, 2019 NSSC 174

Date: 2019-05-29
Docket: 1204-006639
Registry: Kentville

Between:

Tamara Ann Burghardt

Petitioner

v.

Adrian Edward Burghardt

Respondent

Judge: The Honourable Justice Gregory M. Warner

Heard: February 15, 2019, in Kentville, Nova Scotia

**Final Written
Submissions:** May 23, 2019

Counsel: Tanya Nicholson, counsel for the petitioner
Tyler Pulley, counsel for the respondent

By the Court:

Background

[1] This is the costs decision from a divorce heard February 15, 2019 (2019 NSSC 106). The issues were division of property and spousal support after a 17-year marriage. The divorce was heard seven years after separation.

[2] Because of their extreme positions at trial, neither party achieved success at trial.

Spousal Support

[3] Ms. Burghardt claimed spousal support of indefinite duration, retroactively and prospectively, based on imputing income to Mr. Burghardt of \$75,000.00 (in her post-trial brief reduced to between \$60,000.00 and \$75,000.00) and imputing no income to her. Her income was similar to his until about 3 years before their separation. Since separation, she has lived in subsidized housing on social assistance.

[4] Mr. Burghardt claimed that Ms. Burghardt had not established entitlement to spousal support, and that his income, as shown on his tax returns, averaged \$25,000.00 per year.

[5] The Court found entitlement to spousal support, then imputed income to Mr. Burghardt of \$40,000.00 and to Ms. Burghardt of \$18,000.00. The court awarded Ms. Burghardt \$623.00 per month for eight years beginning as of the date she filed her Petition for Divorce, September 1, 2017.

[6] In a settlement offer made February 4th (11 days before trial), Ms. Burghardt offered to settle for retroactive spousal support of \$10,000.00 and prospective support of \$1,500.00 per month indefinitely.

[7] Mr. Burghardt's claim that Ms. Burghardt had no entitlement to spousal support was without any merit whatsoever. Ms. Burghardt's basis for imputing income to Mr. Burghardt of \$75,000.00 (or, alternatively, post-trial of at least \$60,000.00) and imputing no income to herself were both unreasonable.

[8] Ms. Burghardt is entitled to some costs related to this issue because Mr. Burghardt lost on entitlement and paid nothing, and because she was awarded some spousal support.

Property Issues

[9] Ms. Burghardt claimed that, other than the proceeds from the sale of their home after payment of debts, Mr. Burghardt kept all their remaining assets and improperly retained or destroyed her personal property. She also claimed that Mr. Burghardt's tractor and trailer were divisible assets (he worked as a long-haul driver). She sought an unequal division in her favour (*Matrimonial Property Act* ("MPA"), s. 13) or, alternatively, an amount to compensate for her contribution to his trucking business (*MPA*, s. 18).

[10] Mr. Burghardt claimed that their assets and debts had been divided to their mutual satisfaction at the time of their separation and were essentially divided equally. If not equally, he claimed that he took responsibility for the mortgage and the family debts post separation. He claimed that his tractor and trailer were exempt business assets. He submitted that there was no evidence that the division of assets was unequal and noted that there was no evidence of values of the assets that existed at the time of separation in 2012.

[11] In her offer to settle, made 11 days before trial, Ms. Burghardt offered to accept \$25,000.00 for her share of these assets.

[12] In the decision, it was noted that there was an absence of good evidence of valuation. The obligation to provide values was on the party in possession of the assets post separation. For the most part, this was Mr. Burghardt. He did not provide values. The Court estimated values based mostly upon Ms. Burghardt's Statement of Property.

[13] The Court found that the tractor and trailer were exempt business assets, and his retention of these assets was the basis upon which spousal support was ordered. The Court awarded Ms. Burghardt \$3,000.00 for her contribution to his trucking efforts per *MPA*, s. 18. The Court also awarded Ms. Burghardt an equalization payment of \$5,550.00.

[14] Neither party's position on property division was realistic. Mr. Burghardt's actions in withholding or destroying Ms. Burghardt's personal property merits condemnation. Ms. Burghardt is entitled to some costs, even with her overreaching regarding the value of assets at the time of separation, because Mr. Burghardt was entrenched in his unwillingness to acknowledge that he basically retained all of their assets post separation.

Submissions

[15] Ms. Burghardt refers the Court to para. 3 of *L(ND) v L(MS)*, 2010 NSSC 159, for that Court's setting out of 12 principles applicable to costs awards in family proceedings. She points out that Mr. Burghardt did not acknowledge that Ms. Burghardt had any legitimate claim for spousal support or a property division.

[16] She submits that the "amount involved", including the equalization payment and grossing up the monthly spousal support for eight years, total about \$68,000.00. Application of Scale 2, Tariff A of this amount involved, based on a one-day hearing, is \$9,750.00.

[17] She states that her total solicitor – client legal fees are \$12,291.00. She seeks a "substantial contribution" of 85% to 95% of her solicitor – client fees.

[18] Mr. Burghardt says success was divided. The Court imputed income to him that was closer to his estimate than Ms. Burghardt's submission. In addition, the Court imputed income to Ms. Burghardt despite her claim of no income. Respecting property issues, Ms. Burghardt sought \$45,000.00 and was awarded \$8,550.00, a figure much closer to his position (no balancing payment).

Analysis

[19] Neither party was successful at trial. This is not unusual. It is seldom, if ever, that there is a "winner" in divorce proceedings that go to trial.

[20] In this case, Ms. Burghardt's claims were excessive and reflective of her view that Mr. Burghardt ruined her life; however, she did at least make an offer to settle and Mr. Burghardt made none. From the beginning, Mr. Burghardt denied her entitlement to spousal support in any amount, and any claim for the division of the personal property that he retained post separation. On a relative basis, his position was more unreasonable than Ms. Burghardt's.

[21] To repeat, the results were divided; there was no winner. In this matrix, Tariff A is not an appropriate yardstick for measuring party costs, and the principle of "substantial contribution" is not relevant.

[22] An order that "will do justice between the parties", recognizing that there was no winner, but that Ms. Burghardt was forced to proceed to trial absent any acknowledgment of entitlement by Mr. Burghardt, mandates payment of some costs. It is relevant that Mr. Burghardt has a marginal income, no savings or significant assets, and both a lump sum and periodic spousal support obligation, in assessing the ability of Mr. Burghardt to pay costs.

[23] The Court awards Ms. Burghardt costs of \$3,000.00.

Warner, J.