

IN THE SUPREME COURT OF NOVA SCOTIA  
(FAMILY DIVISION)

**Citation:** Sheppard v. Sheppard, 2005 NSSC 137

**Date:** 20050607

**Docket:** 1201-58102

**Registry:** Halifax

**Between:**

Ardith Cecilia Sheppard

Petitioner

v.

Roy Sheppard

Respondent

**Judge:**

The Honourable Justice Moira C. Legere-Sers

**Heard:**

March 2 & 3, 2005, in Halifax, Nova Scotia

**Final Written  
Submissions:**

April 22, 2005

**Counsel:**

Michele J. Cleary, for the Petitioner  
Cheryl C. Arnold, for the Respondent

**By the Court:**  
**Decision on Costs**

[1] Each party originally sought costs from the other in this Divorce proceeding. The Petitioner now argues against any cost award.

[2] Divorce is a common phenomenon in our society. Federal and Provincial Legislatures have responded to the realities of marital breakup by enacting and amending from time to time various pieces of legislation whose object is the appropriate peaceful resolution of marital conflict having due regard, as a priority, to the best interests of children.

[3] The *Divorce Act* requires that lawyers and judges first explore the possibility, if any, of reconciliation, preserving the option of a confidential counseling forum to resolve the marital dispute in a civil and harmonious manner (s. 9(1) and s. 10).

[4] Failing reconciliation, the *Divorce Act* mandates counsel to advise clients of options including mediation to resolve their legal issues (s. 9(2)). The explicit goal is to achieve a peaceful resolution of the conflict and issues between the parties.

[5] *As a priority throughout* the resolution of these outstanding issues, be it custody, access, support issues or division of property, the *Divorce Act* requires parties, their counsel, as well as the court to ensure reasonable arrangements have been made for the maintenance and support of the children (s. 11 and s. 15.3).

[6] The *Divorce Act* delineates criteria to assist counsel and courts in determining the legislative priorities by outlining the rights and responsibilities of parties to the divorce and the rights and responsibilities associated with the children of the union.

[7] When regarding spousal support orders, the legislation prohibits a court from considering the conduct of the spouse in relation to the marriage (s.15.2(5)), while specifically allowing for a consideration of other relevant facts including but not limited to the length of the marriage, the relative functions each played and any agreements of the parties.

[8] The *Matrimonial Property Act* guides married couples, parties, lawyers and judges in creating a presumption of equal division of matrimonial assets. This presumes an equal sharing unless either party convinces the court of their right to an unequal division.

[9] The *Federal and Provincial Child Support Guidelines* further emphasize and provide structure to the resolution of child support issues creating an assumption that the *Guidelines* will apply unless the couple or party can convince the court that reasonable arrangements have been made for the support of the children. Their explicit objectives include:

1. (a) to establish a *fair standard of support* for children that ensures they continue to benefit from the financial means of both spouses after separation;
- (b) to *reduce conflict and tension* between spouses by making the calculation of child support orders more objective ;
- (c) to *improve the efficiency of the legal process* by giving courts and spouses guidance in setting the levels of child support orders and encouraging settlement; and
- (d) to *ensure consistent treatment* of spouses and children who are in similar circumstances. (*My emphasis*)

[10] There is an abundance of case law that further interprets, defines and provides resolution where parties have been unable to resolve matters outside court.

[11] There are lawful expectations each party is entitled to assert in the resolution of their marital dispute.

[12] The foundation of the relevant legislation and the evolution of case authority implicitly and explicitly insists on peaceful resolution by whatever means the parties chose:

- providing the objectives of the legislation are realized;
- the interests of the children are adequately (as can be) addressed as a priority;

-the process of resolution is not patently unfair or contrary to public policy; -  
and that each party is competent and able to negotiate and arrive at an  
enforceable agreement.

[13] With the implementation of the Supreme Court Family Division there are aspects to the court process that provide further opportunities to promote peaceful, appropriate resolution in accordance with the law.

[14] The provision of parent information and conciliators, the availability of online information about the court process, the presence of duty counsel in HRM for limited purposes all promote opportunities to educate and inform the parties how to conduct themselves in order to achieve peaceful resolution.

[15] Our courts expect a high standard of civility in the practice of law and the conduct of barristers before our courts.

[16] We are a civilized society. Given the legislative framework in place, the structure of the court and, in particular, the Family Division; the court is *entitled to expect civilized behavior from litigants*.

[17] There is *no excuse* for unlawful surreptitious removal of family possessions; inadequate, incomplete or unreasonable valuations of personal and real property that bear no relation to the truth; wasting of the assets to frustrate an equal division; selling of the assets at less than their fair market value without the consent of the owners of the property; gifting the other partner's assets away without their consent; failing to pay interim child support; failure to sustain the financial underpinnings of the children; involving the children in the conflict and assisting them in uncivilized behavior; or failing to take reasonable means to mitigate indebtedness.

[18] In the unusual event there is an immediate need to preserve assets for final evaluation and disposition, surely there is a burden on the person removing the assets from joint use to immediately seek proper authorization and to show a proper and full accounting for the assets.

[19] Unless authorized lawfully by agreement or court order, surely there is a duty to preserve the assets for fair and equal division, unless the court or the parties agree on unequal division.

[20] The courts are entitled to expect responsible decision making in the resolution of marital disputes that provides as much as possible for a secure financial base for children within the parties' means.

[21] The objective of the legislation provides for the removal of children from the resolution of the issues as much as possible to avoid exposing them to the inevitable anger and grief experienced between the parties associated with separation and divorce.

[22] The facts of this case run contrary to the express intent of the legislation available to the parties. Conduct such as was exhibited in this case is contrary to the spirit and intent of the legislated framework provided to achieve peaceful resolution.

[23] The parties were married February 15, 1974 and separated August 26, 2003, after 29 years of marriage. Two children were born of this union. At divorce the Petitioner was 52 and the Respondent 54 years of age.

[24] The Respondent commenced an application on October 7th, 2003 for interim exclusive possession of the home. The Petitioner commenced the Divorce proceedings on October 17, 2003. She sought the authority to sell the matrimonial home and divert the proceeds to her. She sought recovery of certain matrimonial property, presumably the paintings, security for costs and suit money.

[25] The home had been vacated by both parties in August, 2003. The Petitioner signed a listing agreement in September. The Respondent eventually signed in November 13, 2003.

[26] The timing of the applications must be seen in the context of the conduct of the parties at and around the separation.

[27] The Respondent first moved out of the home leaving the Petitioner and the youngest child living there. He left without actual notice leaving no information as to his whereabouts. He phoned the Petitioner sometime shortly after he left advising her he was going to return that evening to retrieve his business computer and a few other business related items.

[28] She advised him she would not be home. Upon his arrival, he discovered the doors locked and a note advising he was not allowed entry. He was directed to his computer in the shed. The computer was damaged and a monitor missing. The monitor found its way into the possession of his adult son.

[29] The Respondent then gained entry into his home by disabling the alarm. He advised the police that he was there and that the Respondent was welcome to return. He packed their possessions in boxes. Presumably, it was about this time that he removed the paintings, one of the primary assets in dispute in this proceeding. He feared she would remove the possessions if he did not sort and secure them.

[30] The Petitioner returned the next day escorted by police and she retrieved some of her personal belongings.

[31] The Respondent monitored the home and returned to live (as he indicated) with his sister, leaving the home vacant.

[32] The Petitioner then obtained the assistance of some friends and, during the early hours of the morning some days later, removed as many possessions as she could, including appliances furniture dishes, et cetera. She said she was afraid the Respondent would remove the possessions.

[33] The Respondent was advised by a neighbor of this surreptitious removal of their possessions. He returned to the home. He says she left him nothing. The Petitioner managed to remove the bulk of their possessions. I presume that the paintings had already been removed by the Respondent when he arrived at the home to pick up his business computer and found himself locked out. If the paintings had been there when the Petitioner removed the bulk of the furnishings, I presume they would have been removed.

[34] Upon seeing the state of affairs in the matrimonial home, the Respondent contacted the Petitioner by phone. He apparently left enough of a threatening message to provide the foundation for a Domestic Violence Order which she applied for and received on an **ex parte basis**. I heard no evidence in this proceeding of historic abusive or threatening behavior from either party.

[35] Counsel for the Petitioner argues that both parties displayed inappropriate conduct commencing with the application for the Emergency Protection Order.

[36] This is not the whole truth.

[37] The marriage was not discussed at the Divorce hearing.

[38] Mr. Shepherd left the matrimonial home without explanation or information as to his plans. When a child is involved this is not responsible behavior.

[39] Appropriately, he gave notice to the Petitioner that he intended to return to retrieve his business assets. Either intentionally or carelessly, his business computer was damaged. The Respondent then entered his home and began to pack and label the contents. I *assume* this is when he took the paintings.

[40] The damaged computer ignited a steady pattern of escalating behavior (deteriorating conduct) by both. They sold many of their joint possessions, he in a local bar and she to family, friends and others. To rub salt in their mutual wounds they then gifted away items of particular personal interest and attachment. In the end, his and her prized pieces of jewelry were missing, her china, his prized paintings apparently sold.

[41] Costs were incurred when, occasionally, both sought the assistance of the court: the Petitioner to compel the sale and to seek exclusive possession of the abandoned home; the Respondent to obtain sufficient monies from the funds in trust to pay Revenue Canada and, on one occasion, to obtain an advance to take a course to retrain due to the financial failure of his business. I was not clear on why an exclusive possession order was necessary if both had left the home, until after the Petitioner removed all the contents from the home surreptitiously.

[42] The Petitioner argues she was required to make unnecessary applications and pay an additional three month's mortgage, due to the Respondent's refusal to sign the listing agreement. This relief was not requested originally or properly proven.

[43] In June, the Petitioner commenced an interim application to preserve the assets. She had been informed that the paintings had been sold. This was after her removal of most of the household possessions. It was difficult to know when each had disposed of assets. The appraisals did not show complete assets held by the

Petitioner. She admitted giving personal assets of the Respondent and he admits selling off everything he had to get fast cash.

[44] The only interim order that was issued by the court related to the release of sufficient funds to pay the Revenue Canada Debt. The parties had agreed to this on August 4, 2004, on the record in Court. The order was finally returned to be issued by the court on January, 2005.

[45] At the August 4th pretrial organizational conference the parties also agreed to buy back the paintings to hold for valuation and division at the final Divorce hearing. They agreed to do this by advancing some of the remaining house proceeds held in trust.

[46] Subsequently, the Petitioner withdrew her consent and refused to agree to advance sufficient funds to buy back the paintings at what she considered a nominal price in relation to their actual value.

[47] The Respondent asked for an advance of his interest in the funds in trust to take a course to retrain. When no cooperation was achieved regarding the advance for his course, the Respondent took his own most prized possession and arguably the only remaining asset of value and sold them to someone in a local bar for the price of the course.

[48] This behavior between the two endured from separation in August, 2003 to the Divorce, March 28, 2005. The mother spent their Air Miles plan points on airfare and hotel by taking the youngest child on a vacation to Newfoundland.

[49] The mother refused to disclose any information to the father regarding their child's marks, attendance at school. The dependant daughter was encouraged to confide in her mother that she no longer wanted a relationship with her father.

[50] Both children were involved in the conflict. Somehow the son obtained possession of the business monitor. It had not been returned as of the hearing.

[51] Neither party was or is on solid financial footing. The parties' had suffered financial loss as a result of the failure of the Respondent's business. They had already experienced a significant reduction in their standard of living. The Respondent sought other work. He was injured on the job. In the intervening

months he was on Worker's Compensation. During that time no child support was paid.

[52] It is not surprising that their dependant child experienced a significant decline in her academic record and attendance.

[53] It was not the best of times for this family.

[54] After the father left without disclosing his whereabouts, it appears that the triggering incident was the damage to the Respondent's property. If the Respondent had not reacted in kind I would have no difficulty in imposing costs against the Petitioner regardless of her impecuniosity (*Ellis v. Ellis* (1999), 45 R.F.L. (4<sup>th</sup>) 234 (NSCA)), having regard to *Civil Procedure Rule* 63.04(2)(c), (d), (g) and (j), the conduct of the Petitioner in removing assets, gifting assets damaging assets and providing assessments that were incomplete and inaccurate.

[55] The Respondent, however, also sold assets, failed to maintain and properly value the assets, failed to pay child support aggravating their economic hardship, and unreasonably delayed the sale of the home when he had previously agreed to sell it.

[56] Cost can be an effective instrument used to compensate a party in accordance with *Rule 63* and prevailing case law when the conduct of one party unreasonably escalates the costs of trial and ultimately the appropriate resolution of the issues needing to be resolved.

[57] In this case the conduct of each of the parties was absolutely unacceptable.

[58] Costs are denied to both parties.

**J.**