

SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: Anderson v. Anderson, 2011 NSSC 90

Date: 20110304

Docket: 1201-063876

Registry: Halifax

Between:

Beverleigh Rae Anderson

Petitioner

v.

Mark William Anderson

Respondent

Judge:

The Honourable Justice Deborah Gass

Written Submissions: December 10 & 20, 2010

Counsel:

Peter Crowther, for the applicant
Brian Bailey, for the respondent

By the Court:

[1] This matter was set for a one day hearing to decide parenting arrangements and child support. A week before the scheduled date, the parties were able to settle the matter, except for the question of costs.

[2] This proceeding began by way of a Petition for Divorce which was served on the Respondent in September, 2009. They had been separated since May, 2004. They had previously entered into a consent order under the *Maintenance and Custody Act*, addressing parenting and support issues and they had divided their marital assets and debts. The Petitioner sought only to confirm what had been previously resolved in a proposed Consent Corollary Relief Judgment. The Petitioner also sought updated financial information. Following this request in September, 2009 a further request was made in January, 2010. As a result of non-disclosure, a Notice to Disclose was obtained and personally served on the Respondent. He failed to comply with the Notice, requiring the Petitioner to obtain an Order to Appear and Disclose which was issued June 9, 2010. This order was personally served on the Respondent and he failed to appear and disclose on July 5, 2010 pursuant to the Order. As a result an order for costs of \$250.00 was granted in favour of the Petitioner.

[3] A date assignment conference date was secured. Attempts were made to serve the Respondent without success. He failed to appear. The matter was set for a pre-trial conference on September 14, 2010 and a subsequent trial November 30, 2010. Notices of these dates were personally served on the Respondent. The Respondent failed to appear at the pre-trial conference. On September 15, 2010, the day after the pre-trial, the Petitioner's counsel was advised that the Respondent had just retained counsel. Disclosure was not provided until October 18, 2010.

[4] The offer to settle made October 30, 2010 contained the same terms as the proposed Corollary Relief Judgment provided to the Respondent in September, 2009. This offer was accepted, except for the provision that each party bear their own costs.

[5] Civil Procedure Rule 77 governs costs. Costs are in the discretion of the Court, and the Court can consider the terms of a formal offer to settle.

[6] The following very accurate and concise summary of the case law is quoted directly from the brief provided to the Court by the Petitioner:

The issue of costs was addressed in the family law case of *Bennett v. Bennett* (1981), 45 N.S.R., as referenced in *Gardiner v. Gardiner*, 2002 NSSF 47 (Tab “H”), wherein Justice Smith indicates at Page 6 that:

The decision of Hallett J. (as he then was) in *Bennett v. Bennett* (1981), 45 N.S.R. (2d) 683 (N.S.S.C.) sets out the general principles surrounding the law of costs in matrimonial proceedings. At p. 685 the learned justice stated:

Costs are a discretionary matter. **It is normal practice that a successful party is entitled to costs and should not be deprived of the costs except for a very good reason.** Reasons for depriving a party of costs are misconduct of the parties, miscarriage in the procedure, oppressive and vexatious conduct of the proceedings or where the questions involved are questions not previously decided by a court or arising out of the interpretation of new or ambiguous statute (*Orkin’s Law of Costs*).

[Emphasis Added]

Justice Legere-Sers further commented on the use of costs in *Sheppard v. Sheppard*, 2005 NSSC 137 (Tab “I”), wherein she stated at paragraph 56 that:

Costs 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.

More recently, Justice MacDonald in *Fermin v. Yang*, 2009 NSSC 222 (Tab “J”) has provided a summary of the principles of costs that have emerged from the Rules and the case law. At paragraph 3 she lists these principles to be the following:

1. Costs are in the discretion of the Court.
2. A successful party is generally entitled to a cost award.

3. **A decision not to award costs must be for a “very good reason” and be based upon principle.**
4. **Deference to the best interests of a child, misconduct, oppressive and vexatious conduct, misuse of the court’s time, unnecessarily increasing costs to a party, and failure to disclose information may justify a decision not to award costs to a otherwise successful party or to reduce a cost award.**
5. **The amount of a party and party costs award should “represent a substantial contribution towards the parties’ reasonable expenses in presenting or defending the proceeding, but should not amount to a complete indemnity”.**

[Emphasis Added]

[7] The Respondent argues that the Petitioner is not the “successful party” in that the result was in essence what they had agreed upon at the outset and thus they were equally successful. The only thing further that had been sought by the Petitioner was updated financial disclosure. Further, it was argued that final settlement was achieved about three months after costs of \$250.00 were awarded against the Respondent and no further costs should be considered.

[8] In terms of “success”, while the parties ultimately reached agreement confirming the status quo, that agreement is a mere reflection of what the Petitioner asked for at the outset. The Respondent’s delay in responding and in providing financial disclosure resulted in the Petitioner incurring unnecessary expenses to achieve the result she began seeking one year prior to the agreement ultimately being reached.

[9] Thus, she is entitled to some compensation for same, and there is no compelling reason to deny her that.

[10] She incurred legal fees of \$8,000.00, exclusive of disbursements. Some of this expense she would have incurred in any event.

[11] However, a substantial expenditure involved efforts to compel the Respondent to disclose his updated financial information. The disbursements, including personal service on four occasions, were approximately \$1,100.00.

[12] The delay was unnecessary and costly, caused by the Respondent's failure to act on what was clearly an uncontentionous proposition from the outset.

[13] Under all the circumstances, and considering the previous costs award of \$250.00, I am ordering costs of \$2,500.00.

J.