

SUPREME COURT OF NOVA SCOTIA

Citation: Cunningham v. Cunningham, 2012 NSSC 134

Date: 20120402

Docket: Amh. 1202-001904(073766)

Registry: Amherst

Between:

Michael Anthony Cunningham

Petitioner

v.

Nancy Kathleen Cunningham

Respondent

DECISION ON COSTS

Judge: The Honourable Justice Cindy A. Bourgeois

Heard: December 20 and 21, 2011 in Amherst, Nova Scotia

**Final Written
Submissions:** March 26, 2012

Written Decision: April 2, 2012

Counsel: Peggy Power, for the Petitioner
Lloyd Berliner, for the Respondent

By the Court:

[1] On December 20 and 21, 2011, this Court heard evidence on an number of issues arising from the breakdown of the Cunningham marriage. A written decision was subsequently released (2012 NSSC 91) wherein the parties were given the opportunity to address the issue of costs, should they be unable to reach agreement.

[2] This Court has received submissions from both parties, each seeking an award of costs flowing from the decision.

[3] I have reviewed the submissions of both parties. Although both acknowledge that the outcome was somewhat divided, each assert that they were primarily successful, and should be awarded costs accordingly. Ms. Cunningham further asserts that failing to award her costs would “have an adverse impact on her ability to provide for A.J. while he is in her care.” She is seeking costs in excess of \$6,000.00, although the exact amount is not articulated. Mr. Cunningham is seeking lump sum costs of \$8,000.00.

[4] Both parties acknowledge that an award of costs is discretionary, and have extensively cited to the Court various provisions of Civil Procedure Rule 77. In addition to the Rule, I have carefully considered the authorities presented by each party.

[5] As was noted in the earlier decision, it was the Court's view that the custody determination was the issue of greatest importance to the parties. It was however, not the only significant issue before the Court. In my view, an equivalent amount of trial time was spent addressing the argument that Mr. Cunningham should have income imputed to him for the purpose of child support considerations. The parties also advanced opposing arguments regarding the characterization of certain assets, as well as the division of marital assets.

[6] At the conclusion, the Court rendered a decision which split "success" between the parties. Each was successful on a "major" issue (the custody determination and imputation of income), and each convinced the Court to accept their position on other issues (the garage and lot being "business assets" and remaining assets to be divided equally). Mr. Cunningham also was successful in

responding to a claim for spousal support. Ms. Cunningham was successful in having retroactive child support awarded.

[7] I am not inclined, given the divided success at trial, to award costs to either party. Ms. Cunningham has not provided this Court with anything to found her claim that without an award of costs, her ability to care for A.J. will be impaired.

[8] Each party shall bear their own costs.

J.