IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Gardiner v. Gardiner, 2007 NSSC 282

Date: 20071016
Docket: 1204-003919
Registry: Kentville

Between:

D. Mark Gardiner

Petitioner

v.

Lisa Gardiner

Respondent

Judge:	The Honourable Justice Walter R.E. Goodfellow
Heard:	June 13, 2007, *(Trial)* in Windsor/Kentville, Nova Scotia
Written Decision:	October 16, 2007 *(re costs)*
Counsel:	D. Mark Gardiner, self-represented for the Petitioner
	Kate Seaman, for the Respondent

Goodfellow, J.:

DIVORCE

Background

[1] Mark Gardiner, now 42, and Lisa Gardiner, now 29, were married June 15, 2002, separated in June 2004 and then reconciled in early June 2006. They have one child, their daughter Emily Marie Gardiner, born July 5, 2003.

[2] There was an interim application which I heard November 8, 2006. The two main issues at that time were:

1. Mr. Gardiner's claim for a declaration of shared custody; and

2. Ms. Gardiner's request for an Order to list the matrimonial home for sale.

The interim hearing lasted the better part of the day and I concluded that there had not been established Mr. Gardiner was in a position of shared custody of their daughter, and further, that there was insufficient equity in the matrimonial home to warrant placing the property for sale by real estate listing. I decided to case manage the file and at one point directed that the matrimonial home be advertised for sale on assumption of the mortgage, and throughout the case management there

were repeated requests to have Mr. Gardiner comply with mortgage payments, etc.

[3] The trial lasted one day June 13, 2007 and Mr. Gardiner again raised the issue of shared custody. Ms. Gardiner raised the issue of directing Mr. Gardiner to make more remunerative employment and there were the questions of the quantum of child support, retroactive child support, etc.

COSTS IN MATRIMONIAL MATTERS

[4] The court commented on this issue in *Day v. Day,* [1994] N.S.J. No. 112:

> There is nothing in the **Divorce Act of 1985**, the **Matrimonial Property Act of 1980,** the **Judicature Act** or the **Civil Procedure Rules** that mandates any suggestion that there is a policy that costs are not to be awarded in a matrimonial cause. What is required of the trial judge in exercising her/his discretion judicially is a clear recognition that the matrimonial cause "following the event" is rarely as clear cut and obvious as it is in most civil causes.
>
> The fact that a divorce is granted means the applicant has been successful in obtaining a divorce, however, on examination in this case, as in most cases, there is no dispute on this issue and costs cannot be awarded to person who happened to make the application solely because that uncontested event was achieved. Similarly, in the area of designation and division of property, rarely are all aspects in dispute and often success in this area is divided. The same frequently applies to the determination of maintenance, which in itself is a separate issue and one that

cannot be determined in isolation to the division and determination under the **Matrimonial Property Act**, which invariably must precede the determination of maintenance.

If an award of costs would create undue financial hardship, that can be taken into account in the exercise of discretion, **Kaye v. Campbell** (1985), 65 N.S.R. 173. I would suggest that this is particularly so if the court senses an adverse impact on a child's emotional or material welfare is likely to result. More often this factor would be of some influence in limiting the quantum and possibly call for the introduction of a time frame for payment. Whether or not this factor exists and the extent to which it should be given any consideration in the discretion or exercise of costs will depend upon the factual situation in each case.

Having acknowledged that there is much more involved in determining what constitutes a "following the event", this fact does not warrant avoiding such an examination and not doing so would amount to a failure to recognize the basic entitlement mandated by the **Civil Procedure Rules.**

In **Bennett v. Bennett** (1981), 23 R.F.L. (2d) 302, Hallett, J. (as he then was) indicated that in Family Law matters costs need not always follow the event but that the usual practice of this court is to award to the successful party. He stated, at p.306:

> " There is no doubt that a well behaved successful party to a law suit in Nova Scotia is generally awarded costs. I would refer to **Spencer v. Benjamin** (1975), 11 N.S.R. (2d) 123 (C.A.), and **MacLean v. Can. Kawasaki Motors Ltd.**, a decision of the Appeal Division dated 11th March 1981, reported in vol. 131 at p.87. In both these cases, the Appeal Division reversed the trial judge's decision not to award costs to the successful party."

Hallett, J. concluded Mrs. Bennett was entitled to her costs in proceedings to vary the maintenance provisions of an existing decree.

The Court of Appeal, in **Kaye v. Campbell**, (1985), 65 N.S.R. 173, MacDonald, J.A. at p. 174 states:

> "[6] Rule 810 of the Ontario **Rules of Practice** is similar in pith and substance to **Civil Procedure Rule**, Rule 57.27. In **Andrews v. Andrews** (1980), 20 R.F.L. (2d) 348, the Ontario Court of Appeal in a judgment delivered by Houlden, J.A., agreed with the following statement made by a High Court justice in an earlier case (p. 355):
>
> 'Notwithstanding that in matrimonial causes there is justification for the departure from the general rule that the costs should follow the cause, it is my view that there is still an obligation on the Court under Rule 810 to exercise its discretion in each case and determine whether costs should be awarded in accordance with the particular circumstances of that case. It is wrong, in my respectful opinion, to adopt as a settled practice that no costs should be awarded in matrimonial matters unless there were unusual circumstances dictating otherwise. Such a practice ignores the responsibility of the Court to exercise its discretion in each case.'"

In dismissing the appeal, MacDonald, J.A. went on to state, at p. 175:

> "[10] As Mr. Justice Hallett pointed out in **Bennett v. Bennett** (1981), 23 R.F.L. (2d) 302, there must be a good reason not to award costs to a successful party in a matrimonial cause. I would but add such reason must be based on principle. Here Mr. Justice Richard obviously felt that the additional hardship of costs was a burden the respondent under the circumstances should not be called upon to bear."

In **Travis v. Travis** (1974), 17 R.F.L. 324 N.S.C.A. a panel, comprised of MacKeigan, C.J.N.S., Cooper and Macdonald, J.J.A. reviewed the principle of costs in divorce actions, and Cooper, J.A., speaking for the court, at p. 325:

> " It is my opinion, with great respect, that the exercise of discretion in the matter of costs in divorce proceedings should not be determined by what is done in another jurisdiction under different legislation despite the

> fact that it may be similar in many respects to our own Divorce Act. We must look to our own principles and practice. It is admittedly difficult to lay down any general rule in this respect. So much depends upon the facts and circumstances of each particular case. It is, however, well settled that in the absence of special considerations a successful party is entitled to costs."

The court went on to conclude that the Trial Judge was in error in not providing Mrs. Travis with her costs in the action on the issue of maintenance and awarded her costs on the party and party scale.

The exercise of a judges' discretion as to costs is commented upon in **Orkin's Law of Costs**, 1993, p. 2-17, para. 205.2, as follows:

> "...a successful party has no legal right to costs but only a reasonable expectation of receiving them, subject to the court's discretion in that regard. It has been said that costs should follow the result. That is to say, as a general rule a successful party may expect to receive an award of costs and, as a corollary, should not expect to be ordered to pay the costs of an unsuccessful party."

...

> To simply say that there is a policy that no costs will be awarded in a matrimonial cause is wrong in law and counterproductive. ... The policy of the court is one of reconciliation and settlement and costs are a proper feature when a reasonable offer to settle is not accepted.

[5] See *Grant v. Grant* 2002 NSSF 2, a decision of Justice R. James Williams for a review of the considerations in determining the costs issue. Justice Williams determined that after reviewing the issues of relative success and especially the

"conduct of the litigation", compelling reasons existed for Mr. Grant to receive an award of costs.

DETERMINATION

[6] Mr. Gardiner acted as his own solicitor throughout and that did create some difficulties in that he was lacking considerably in objectivity. On the other hand, there was no clear cut proposal for settlement adopted by the Court advanced by Ms. Gardiner. Quite often a self-represented party ends up taking a considerable amount of the court's time adding to the expense of litigation, and in such circumstances, that is a factor to be taken into account in determining not only whether costs should be allowed, but also with respect to the quantum. See *Gilfoy et al v. N. Bruce Kelloway* (2000), 184 N.S.R. (2d) 226.

[7] While there were extreme difficulties in getting the mortgage payments paid, income tax returns, etc., in the final analysis these difficulties occurred not so much because of Mr. Gardiner's less than objective attitude, but more because of his serious financial difficulties. This fact coupled with the measure of mixed

success convinces me in the final analysis that the fit and proper disposition with respect to costs is that each party shall bear their own costs.

J.