

File No. 1201-54791 (006253)

**SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)**

Citation: *Gardiner v. Gardiner*, 2002 NSSF 47

BETWEEN:

CHERYL LYNN GARDINER

PETITIONER

- and -

GREGORY ALAN GARDINER

RESPONDENT

**DECISION
(WITH RESPECT TO COSTS)**

HEARD BEFORE: The Honourable Justice Deborah K. Smith

PLACE HEARD: Halifax, Nova Scotia

FINAL SUBMISSIONS

RE: COSTS:

Received from the Petitioner: August 14, 2002

Received from the Respondent: August 16, 2002

DECISION RE: COSTS: November 5, 2002

COUNSEL: Sally B. Faught, counsel for the Petitioner
Richard G. Arab, counsel for the
Respondent

Smith, J.

This is a decision on costs arising from the divorce of Cheryl Lynn Gardiner and Gregory Alan Gardiner. Ms. Gardiner is advancing a claim for costs in relation to an application for child support which was heard before the Honourable Justice Deborah Gass as well as a divorce trial that was heard before me. Ordinarily, Justice Gass and I would each render a separate decision on costs, however, both parties have agreed that I will render a single decision on costs in relation to both the interim application heard before Justice Gass and the divorce trial heard before me.

HISTORY

The parties to this action were married on the 21st day of September, 1996 and separated on the 23rd day of October, 1999. No children were born of this marriage, however, the Respondent has custody of two children of a previous marriage, namely, Joseph Daniel Gardiner, who was born on [...], 1985 and Nicholas Alan Gardiner, who was born on [...], 1986.

In April of 2001, a hearing was held before the Honourable Justice Deborah Gass on the issue of whether the Petitioner stood *in loco parentis* to

Joseph and Nicholas. According to the Petitioner's submissions, this application was held over a period of two and a half days. Gass, J., concluded that the Petitioner did not stand *in loco parentis* to these children and accordingly, denied the Respondent's request for child support.

In December of 2001, the parties' divorce trial was heard before me. The issues that were to be determined by the Court were the division of matrimonial assets/liabilities, a claim for spousal support by the Respondent and costs. The divorce trial was heard over a period of one and a half days.

It appears from the materials filed on behalf of the Petitioner that during the course of the proceedings she made three Offers to Settle pursuant to *Civil Procedure Rule 67.06*. Copies of the Petitioner's offers and covering correspondence are attached as Schedule "A". The final offer (which was dated June 28, 2001) was intended to amend the previous offers, but was only open for acceptance until 5:00 p.m. on July 6, 2001. None of these offers were accepted by the Respondent.

The Respondent also forwarded an Offer to Settle pursuant to *Civil Procedure Rule 67.06*, a copy of which is attached as Schedule "B". This offer

was not accepted by the Petitioner.

CIVIL PROCEDURE RULES

There are a number of *Civil Procedure Rules* that relate to the issue of costs in matrimonial matters. Rule 57.27 provides:

Costs

57.27(1)Where the proceeding is for a divorce or matrimonial cause, the court may from time to time make such order as it thinks fit against a party for payment or security for the costs of the other of such parties.

(2) The costs of a matrimonial cause shall be recovered in the same way as in an ordinary proceeding.

Rule 70 deals with family proceedings and provides in part:

.....

70.03. (3) Where any matter of practice or procedure is not governed by statute or by this Rule, the other rules and forms relating to civil proceedings shall apply with any necessary modification.

Rule 63 dealing with costs in general provides in part:

.....

Costs in discretion of court

63.02(1)Notwithstanding the provisions of rules 63.03 to 63.15, the costs of any party, the amount thereof, the party by whom, or the fund or estate or portion of an estate out of which they are to

be paid, are in the discretion of the court, and the court may,

- (a) award a gross sum in lieu of, or in addition to any taxed costs;
- (b) allow a percentage of the taxed costs, or allow taxed costs from or up to a specific stage of a proceeding; [E.62/9(4)]
- (c) direct whether or not any costs are to be set off.

.....

When costs follow the event or are determined by the Rules

63.03.(1) Unless the court otherwise orders, the costs of a proceeding, or of any issue of fact or law therein, shall follow the event.

.....

Party and party costs fixed by court

63.04. (1) Subject to rules 63.06 and 63.10, unless the court otherwise orders, the costs between parties shall be fixed by the court in accordance with the Tariffs and, in such cases, the “amount involved” shall be determined, for the purpose of the Tariffs, by the court.

(2) In fixing costs, the court may also consider

- (a) the amount claimed;
- (b) the apportionment of liability;
- (c) the conduct of any party which tended to shorten or unnecessarily lengthen the duration of the proceeding;
- (d) the manner in which the proceeding was conducted;
- (e) any step in the proceeding which was improper, vexatious, prolix or

unnecessary;

- (f) any step in the proceeding which was taken through overcaution, negligence or mistake;
- (g) the neglect or refusal of any party to make an admission which should have been made;
- (h) whether or not two or more defendants or respondents should be allowed more than one set of costs, where they have defended the proceeding by different solicitors, or where, although they defended by the same solicitor, they separated unnecessarily in their defence;
- (i) whether two or more plaintiffs, represented by the same solicitor, initiated separate actions unnecessarily; and
- (j) any other matter relevant to the question of costs.

The Tariffs provide as follows:

In these Tariffs, the amount involved shall be

- (a) where the main issue is a monetary claim which is allowed in whole or in part, an amount determined having regard to
 - (i) the amount allowed,
 - (ii) the complexity of the proceeding, and
 - (iii) the importance of the issues;
- (b) where the main issue is a monetary claim which is dismissed, an amount determined having regard to
 - (i) the amount of damages provisionally assessed by the court, if any,
 - (ii) the amount claimed, if any,
 - (iii) the complexity of the proceeding, and
 - (iv) the importance of the issues;

(c) where there is a substantial non-monetary issue involved and whether or not the proceeding is contested, an amount determined having regard to

(i) the complexity of the proceeding, and

(ii) the importance of the issues;

.....

Civil Procedure Rule 41A deals with Offers to Settle and provides:

.....

Where available

41A.02. A party may serve upon an adverse party an Offer to Settle (Form 41A(A)) any claim between them in the proceeding and, where there is more than one claim between them, to settle one or more of them, on the terms therein specified.

.....

When offer to settle may be revoked

41A.04. (1) A party may revoke an offer to settle at any time before acceptance by serving upon the party to whom the offer was made a notice of revocation (Form 41 A(B)).

(2) Where an offer to settle stipulates a time for acceptance and is not accepted within that time, it shall be deemed to have been revoked.

(3) The cost consequences prescribed by this rule shall not apply to an offer to settle that has not been accepted and which has been revoked before the commencement of the trial or hearing.

.....

Effect of failure to accept

41A.09. (1) Unless ordered otherwise, where an offer to settle was made by a plaintiff at least seven (7) days before the

commencement of the trial or hearing of the proceeding and was not revoked or accepted prior to the commencement of the trial or hearing, and where that plaintiff obtains a judgment as favourable or more favourable than the terms of the offer to settle, that plaintiff shall be entitled to party and party costs plus taxed disbursements to the date of the service of the offer to settle and thereafter to taxed disbursements and double the party and party costs.

(2) Unless ordered otherwise, where an offer to settle was made by a defendant at least seven (7) days before the commencement of the trial or hearing of the proceeding and was not revoked or accepted prior to the commencement of the trial or hearing, and where the plaintiff fails to obtain a judgment more favourable than the terms of the offer to settle, the plaintiff shall be entitled only to party and party costs plus taxed disbursements to the date of service of the offer to settle and the defendant shall be entitled to party and party costs plus taxed disbursements from the date of such service.

.....

Discretion of court

41A.11. Notwithstanding the provisions of this rule, the court, in exercising its discretion as to costs, may take into account any offer to settle made in writing, the date the offer to settle was served, the terms thereof and any other relevant matters.

.....

Application to counterclaims, cross-claims, or third party claims

41A.13. This rule applies, with any necessary modification, to a counterclaim, cross-claim, third party claim, and to proceedings under the **Matrimonial Property Act** or the **Divorce Act**.

Civil Procedure Rule 67.06 deals with Offers to Settle in *Matrimonial Property Act* proceedings and provides:

67.06. (1) A party may serve on another party an offer to settle any claim made in an application under the Act or joined with a claim for divorce in a petition.

(2) An offer may be accepted at any time before the court makes an order disposing of an issue in respect of which the offer is made by serving notice of acceptance on the party who made the offer.

(3) An offer may be withdrawn at any time before the offer is accepted by serving a notice of withdrawal on the party to whom the offer was made.

(4) Where an offer is accepted, the court may incorporate any of its terms into an order and, in exercising its discretion as to costs, may take into account the terms of the offer and the date on which the offer was served.

(5) Where an offer is not accepted, no communication respecting the offer shall be made to the court until the question of costs comes to be decided, and the court, in exercising its discretion as to costs, may take into account the terms of the offer and the date on which the offer was served.

(6) Where an offer is withdrawn no communication respecting the offer shall be made to the court at any time.

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*).

His Lordship continued at pp.686-687:

The law relating to the exercise of a judge's discretion as to costs is summarized in Orkin's *Law of Costs* in the following paragraphs.

At p. 12:

A successful litigant has by law no right to costs. Although he may have a reasonable expectation of receiving them, this is subject to the court's absolute and unfettered discretion to award or withhold costs. This discretion, which is absolute, is a judicial one to be exercised according to the circumstances of each particular case and based upon material before the court. It is the discretion of the trial judge and its exercise is not to be referred to [sic] delegated; nor can it be fettered by any consent of the parties, even though great weight should be given to such consent; nor should it be interfered with on appeal.

At p. 16:

As a rule costs should follow the result. That is to say, it is well settled that where a plaintiff is wholly successful in his action and there is no miscontract on his part, he is entitled to costs on the ground that there is no material on which a court can exercise a discretion to deprive him of costs.

And at p.18:

The rule that a successful party is entitled to his costs is of long standing, and should not be departed from except for very good reasons.

His Lordship continued at p.687:

It is recognized that in matrimonial causes it may be inappropriate to make an order that costs should follow the event. This concept was discussed in *Povey v. Povey*, [1970] 3 All E.R. 612, in which case the court noted that despite the general rule that costs follow the event, a successful party to a matrimonial dispute may be denied costs even though he behaved impeccably.

Ormrod, J., put the matter this way at p.626:

While 'costs follow the events' represents what is generally thought to be just in cases in other divisions, it does not necessarily represent what is just in many cases which have to be dealt with in a Family Division. In some cases it undoubtedly does, in others it would be plainly unjust, sometimes to the husband, sometimes to the wife, and in some, gravely damaging to the interests of the children. The work in this division is more

often an essay in shades of grey than in black and white. Moreover, in this division the parties remain bound to one another by ties which are not severed on divorce. They continue to be parents, and in many cases the wife remains dependent on the husband. These are all matters to be taken into account in exercising the discretion as to costs in each individual case: per Diplock and Widgery, L.J.J., in *Gooday v. Gooday*, [1968] 3 All E.R. at 615, 616, [1969] P at 8, 9. The 'event', in my judgment, is not a sufficiently sensitive indicator in the Family Division.

See also *Kaye v. Campbell* (1984), 65 N.S.R. (2d) 173 (N.S.C.A.); *Nolet v. Nolet* (1985), 68 N.S.R. (2d) 370 (N.S.C.A.) and *Day v. Day* (1994), 129 N.S.R. (2d) 186 (N.S.S.C.).

In the case at bar, the Petitioner was the successful litigant and as such would have a reasonable expectation of receiving costs subject to the Court's discretion whether or not to award such. This discretion must be exercised based on principle. (See: *Kaye v. Campbell*, supra).

In the *Bennett* case Justice Hallett referred to possible reasons for depriving a successful litigant of costs. Included in his review is the misconduct of the party seeking costs. See also *Civil Procedure Rule* 63.04(2) which sets out a variety of factors that the Court may consider when fixing costs.

In this case, I find that there are circumstances which warrant the Court denying costs to the Petitioner. I refer in particular to the Petitioner's testimony at the time of the hearing before Justice Gass and at the trial heard before me.

It is clear from a review of Justice Gass' decision that she had difficulty with many aspects of the Petitioner's testimony. Reference is made to p.240 of Justice Gass' decision (reported at (2001), 194 N.S.R. (2d) 233 (N.S.S.C. F.D.) in which she states:

I concluded that on many aspects of Ms. Gardiner's evidence I did not believe what she was saying. It is particularly tragic when the evidence is reduced to attempting to establish whether or not she actually sang happy birthday to the boys at family birthday gatherings. I found it difficult to believe that she did not want them at her parents' home. Her parents did treat the children as their grandchildren. I do not believe her evidence that no relationship ever developed between the boys and her parents. In one of her letters she described how Joey followed around her father.

I found her evidence to be unsubstantiated and contradictory in many aspects.

She used words and comments that were outrageous and cruel and which the Court finds hard to accept as being a real characterization of the relationship. I do not accept her evidence in that regard.

[Emphasis added]

I, too, had difficulty with portions of the Petitioner's evidence. For example, the Petitioner testified that she and her husband did not have any significant discussions with one another during their marriage. She denied that she and the Respondent discussed marriage during the time that they were cohabiting. She also denied that she and the Respondent discussed the possibility of the Respondent leaving the military prior to his retiring. While the Petitioner acknowledged that she and the Respondent had discussed the idea of purchasing or building a house together she later denied having discussions with the Respondent concerning the acquisition of their matrimonial home (she testified that they saw a house -- went out and looked at it -- decided they wanted it and went out and bought it. She denied that they discussed the purchase of this property). Further, in the Petitioner's evidence she minimized any discussions that she and her husband had concerning the artificial insemination that they underwent and suggested that while they might have talked about

reversing the Respondent's vasectomy, she denied that they discussed the matter in detail. Much of the Petitioner's evidence in this regard I did not accept.

I had the distinct impression when listening to portions of the Petitioner's evidence that she was prepared to say what she felt would advance her position regardless of whether it was truthful. This forced the Respondent's counsel to cross-examine the Petitioner in detail and thereby unnecessarily lengthened the duration of the proceedings (Rule 63.04(2)(c)).

In many cases the parties/witnesses to an action have differing recollections of how events occurred. Different parties/witnesses recollect matters differently and yet each is being forthright when giving their evidence. In my view, this was not such a case.

Our court system relies on witnesses being forthright when giving their evidence. A witness that is less than forthright with the Court runs the risk of being denied costs regardless of whether they are successful at trial.

In this case, after considering the relevant Rules (including the factors set out in *Civil Procedure Rule* 63.04(2)) as well as the case law referred to previously, I find that it is appropriate that the Petitioner be denied her costs.

After receiving initial submissions from counsel on the issue of costs, the Court raised a concern as to whether the Petitioner's offers should be before the Court in light of *Civil Procedure Rule* 67.06(6) which reads:

67.06(6) Where an offer is withdrawn no communication respecting the offer shall be made to the court at any time.

The Petitioner's final offer was only open for acceptance until July 6, 2001 and accordingly the issue arose as to whether this offer should be before the Court. I have determined that it is unnecessary for me to decide this issue as I have concluded that it is appropriate not to award costs to the Petitioner in this action regardless of whether the various offers are taken into account.

J.

Halifax, Nova Scotia