SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION
Citation: *Reid v. Reid*, 2014 NSSC 276

Date: 2014-07-09
Docket: No. 1206-4207
Registry: Sydney

Between:

Gordon Reid

Applicant

v.

Bonney Reid

Respondent

DECISION - COSTS

Judge:	The Honourable Justice M. Clare MacLellan
Decision:	Oral, December 3, 2013
Decision - Costs:	Written, July 9, 2014
Counsel:	David Iannetti, Counsel for the Applicant Chis Conohan, Counsel for the Respondent

By the Court:

[1] This is the costs award following an oral decision given on December 3, 2013.

[2] The parties became a couple in 1993. They separated March 1, 2002. There were no children of the marriage.

[3] The delay in completing this matter is due to the difficulty locating or confirming the existence of the cash surrender value of Mr. Reid's insurance policy or policies.

[4] Ms. Reid (Ms. Rose) sought an equal division of property which, according to Mr. Conohan, consists of land, vehicles and policies with cash surrender value, for a total of $156,617.00, with Ms. Rose to receive $76,808.58, plus spousal support in a lump sum of $15,000.00. Costs were also sought.

[5] Mr. Reid opposed any division of property as he inherited the property. He opposed spousal support as Ms. Rose is self-sufficient.

[6] After the oral decision was rendered, the issue of insurance policies remained. The confusion centred around the cash surrender value of policy or policies. Mr. Conohan maintains the cash surrender value is $6,794.99, for three

(3) policies. Mr. Iannetti, on behalf of Mr. Reid, maintains the value is $10,000.00.

[7] Mr. Reid's statement of property states there are four (4) policies with a cash surrender value of $15,226.00 for three (3) policies (Exhibit #5) as of June 2013.

[8] Exhibit #7 from Sun Life Financial states the policies' cash surrender value as of September 15, 2011, was $13,134.81. This exhibit shows recent activity by Mr. Reid in relation to the current value. Exhibit#10 Tab #24 sets the cash surrender value of one policy only at $5,824.00 as of May 2002. This later exhibit is closer in time to the date of separation but reflects the existence of one policy only.

[9] Mr. Iannetti states Ms. Rose ought not to receive any portion of the life insurances. As no reliable evidence was provided to indicate the value, if any, of the policies at the date of separation; the Court granted additional time after the oral decision for counsel to provide information as to the cash surrender value of all three (3) policies at the date of separation. Subsequent material received from counsel did not clarify this issue, as this material relates to one policy with current activity referenced.

[10] In the oral decision, the following was determined:

1. The real property in question is valued at $128,600.00 currently;

2. The Respondent's bank account balance was $2,152.00;

3. Counsel were given thirty (30) days to find reliable data on the value of the insurance policies, and then prepare an evaluation sheet;

4. The vehicles and furniture have no set value, as no reliable evidence was provided.

[11] In the oral decision, I denied Mr. Reid's property claim. Ms. Rose was awarded one half (½) of sixty-six (66%) per cent of the property. Sixty-six (66%) per cent was found to be the portion of the property used and occupied by her and Mr. Reid during their time together.

66% of $128,600	$84,876.00	
Less:		
6% Real Estate Commission		(5,092.56)
15% G.S.T. on Commission		(763.88)
Migration Cost		(1,000.00)
Total Deductions	($6,856.44)	
Total Sale Proceeds	$78,019.56	
Less:		
Mr. Reid's half of proceeds ($78,019.56/2=$39,009.78)	($39,009.78)	
Ms. Rose's half of proceeds	$39,009.78	
[This sum is $528.68 more than that attributed in the Corollary Relief Order, which is to be amended.]		
Plus:		
Ms. Rose's half of bank account bal. ($2,152.00/2=$1,076.00)	$ 1,076.00	
Ms. Rose's half of the C.S.V. ($5,824.00/2=$2,912.00)	$ 2,912.00	
Spousal Support Lump Sum	$ 5,000.00	
	$47,990.00	

[12] I have not incorporated post-trial information as that material as stated is not helpful. I set the cash surrender value at $5,864.00, the value provided closer to the date of separation. The actual value may be higher and if left without subsequent contribution; Ms. Rose may deserve a higher value. Such a finding requires clear and cogent evidence on the issue. Such evidence was never provided.

[13] Ms. Rose is entitled to her costs.

[14] Costs are covered by *Rule* 77 of the *Civil Procedure Rules*.

[15] Pursuant to *Civil Procedure Rule* 77.02, costs are a discretionary decision of the Court:

> **77.02 (1)** A presiding judge may, at any time, make any order about costs as the judge is satisfied will do justice between the parties.
>
> **(2)** Nothing in these Rules limits the general discretion of a judge to make any order about costs, except costs that are awarded after acceptance of a formal offer to settle under Rule 10.05, of Rule 10 – Settlement.

[16] *Rule* 77.03 provides direction as to the nature of the decisions on costs that a court may make:

> **77.03 (1)** A judge may order that parties bear their own costs, one party pay costs to another, two or more parties jointly pay costs, a party pay costs out of a fund or an estate, or that liability for party and party costs is fixed in any other way.
>
> **(2)** A judge may order a party to pay solicitor and client costs to another party in exceptional circumstances recognized by law.

> **(3)** Costs of a proceeding follow the result, unless a judge orders or a Rule provides otherwise.
>
> **(4)** A judge who awards party and party costs of a motion that does not result in the final determination of the proceeding may order payment in any of the following ways:
>
> > **(a)** in the cause, in which case the party who succeeds in the proceeding receives the costs of the motion at the end of the proceeding;
> >
> > **(b)** to a party in the cause, in which case the party receives the costs of the motion at the end of the proceeding if the party succeeds;
> >
> > **(c)** to a party in any event of the cause and to be paid immediately or at the end of the proceeding, in which case the party receives the costs of the motion regardless of success in the proceeding and the judge directs when the costs are payable;
> >
> > **(d)** any other way the judge sees fit.
>
> **....**

[17] *Rule* 77.06(1) provides for assessment of costs under tariff at the end of a proceeding:

> **77.06 (1)** Party and party costs of a proceeding must, unless a judge orders otherwise, be fixed by the judge in accordance with tariffs of costs and fees determined under the *Costs and Fees Act*, a copy of which is reproduced at the end of this Rule 77.

[18] *Rule* 77.07(2) directs factors that may affect the determination of a cost award:

> **77.07(2)** The following are examples of factors that may be relevant on a request that tariff costs be increased or decreased after the trial of an action, or hearing of an application:
>
> > **(a)** the amount claimed in relation to the amount recovered;
> >
> > **(b)** a written offer of settlement, whether made formally under Rule 10 – Settlement or otherwise, that is not accepted;
> >
> > **(c)** an offer of contribution;

> **(d)** a payment into court;
>
> **(e)** conduct of a party affecting the speed or expense of the proceeding;
>
> **(f)** a step in the proceeding that is taken improperly, abusively, through excessive caution, by neglect or mistake, or unnecessarily;
>
> **(g)** a step in the proceeding a party was required to take because the other party unreasonably withheld consent;
>
> **(h)** a failure to admit something that should have been admitted.

[19] Justice Beryl MacDonald has written a number of cases to summarize and clarify the types of conduct and facts a judge may consider in a costs consideration. In **Fermin v. Yang**, [2009] N.S.J. No. 334, at para.3, and **Harris v. Harris**, [2011] N.S.J. No. 617, at para.3 and **Lubin v. Lubin**, [2012] N.S.J. No. 145, at para. 3, as follows:

> **3** Several principles emerge from the Rules and the case law:
>
> 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 on 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 cost 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".
>
> 6. The ability of a party to pay a cost award is a factor that can be considered; but as noted by Judge Dyer in **M.C.Q. v. P.L.T.** 2005 NSFC 27:
>
> > "Courts are also mindful that some litigants may consciously drag out court cases at little or no actual cost to themselves (because of

> public or third-party funding) but at a large expense to others who must "pay their own way". In such cases, fairness may dictate that the successful party's recovery of costs not be thwarted by later pleas of inability to pay. [See **Muir v. Lipon**, 2004 BCSC 65]."

> 7. The tariff of costs and fees is the first guide used by the Court in determining the appropriate quantum of the cost award.
>
> 8. In the first analysis the "amount involved", required for the application of the tariffs and for the general consideration of quantum, is the dollar amount awarded to the successful party at trial. If the trial did not involve a money amount other factors apply. The nature of matrimonial proceedings may complicate or preclude the determination of the "amount involved".
>
> 9. When determining the "amount involved" proves difficult or impossible the court may use a "rule of thumb" by equating each day of trial to an amount of $20,000.00 in order to determine the "amount involved" .
>
> 10. If the award determined by the tariff does not represent a substantial contribution towards the parties' reasonable expenses "it is preferable not to increase artificially the "amount involved", but rather, to award a lump sum". However, departure from the tariff should be infrequent.
>
> ….

[20] The difficulty in applying *Rule* 77 in family matters is recognized by A.C.J. O'Neil in Robar v. Arseneau, [2010] N.S.J. No. 593, at para. 17:

> **17** Arriving at a costs assessment in matrimonial matters is difficult given the often mixed outcome and the need to consider the impact on an onerous costs award on the families; and the children in particular. The need for the court to exercise its discretion and to move away from a strict application of the tariffs is often present.

[21] A.C.J. O'Neil summarizes the findings in a number of N.S. cases:

> **18** The court considered the decision of Justice Legere-Sers in **Shurson**, 2007 NSSC 101, and the decision of Justice MacDonald in **Conrad v. Bremner**, 2006 NSSC 99. The court has also considered the decisions of Justice Goodfellow in **Gardiner v. Gardiner**, 2007 NSSC 282 and Justice Williams in **Grant v. Grant** [2002] N.S.J. No. 14.

19 It is settled that costs can be granted in matrimonial matters. Justice Williams in **Grant** at paragraph 3 reviews the Rules and the considerations for the court when considering an award of costs. In particular, he references the factors outlined in [then] Rule 63.04(1) and (2).

20 In **Grant**, Justice Williams was considering costs flowing from a proceeding that included numerous applications and interlocutory notices over four years. There was also a trial and a pre-trial. He found that the conduct of the wife had unnecessarily lengthened the matter and that the proceedings contained many unproven allegations and untrue assertions. These were significant factors Justice Williams considered when he awarded costs of $12,000 and $2,250 for disbursements. I agree with Justice Williams in **Grant**, who stated at paragraph 42 that an "amount involved" analysis has limited applicability in complex, multi-issue matrimonial proceedings.

21 As stated at paragraph 13 in **Grant**, Justice Williams observes that divorce and family law proceeding "often involve a multitude of separate and inter-related problems". The result is that determination of success is also more complex.

22 In **Shurson**, Justice Legere-Sers was considering costs in the context of an offer to settle. The case report does not detail the particulars of the outcome. She ordered $10,000 in costs.

23 In **Conrad**, Justice MacDonald was dealing with costs following a trial and once again the case involved an offer to settle as provided by Rule 41.09(a). The case also involved discoveries, pre-trial court appearances and a two day hearing. Justice MacDonald awarded party and party costs of $5,000.00. Justice MacDonald in **Conrad**, supra, at paragraph 11, has a helpful discussion of principles emerging from the Rules and the Case Law.

24 Justice Goodfellow in **Gardiner**, declined to order costs. Justice Goodfellow conducted an interim hearing that lasted one half day, other proceedings occurred over the following year. Citing Mr. Gardiner's financial difficulties as a partial reason for the delay in having matters concluded and the mixed success of the parties, he directed that each party bear their own costs.

25 Justice Gass in **Pelrine v. Pelrine**, 2007 NSSC 123, a decision of this court dated April 18, 2007, considered the issue of costs claimed by both parties, following a divorce proceeding which was heard over four days. Post trial submissions were filed. The Petitioner sought approximately $11,000 in costs including HST and disbursements and the Respondent sought approximately

> $9,000 plus disbursements of approximately $3,600. Justice Gass reviewed Rule 63.04; the decision of Justice Campbell in **Kennedy-Dowell** 209 N.S.R. (2d) 392 and the decision of Justice Goodfellow in **MacLean** 200 N.S.R. (2d) 34.
>
> **26** Of particular interest is that Justice Gass found a failure to timely disclose on the part of the Petitioner. She also assessed the relative "success" of the parties and the presence or absence of offers to settle. Justice Gass ordered costs to the Respondent in the amount of $3,031.00 plus $2,000 towards disbursements.
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> **27** In **Hanakowski v. Hanakowski**, [2002] N.S.J. No. 364, Justice Dellapinna awarded costs of $2, 500 to the husband where the wife's failure to provide full financial disclosure added to the husband's legal costs and hampered the settlement process.
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> **28** In **Guillena v. Guillena** [2003] N.S.J. No. 76 Justice Dellapina ordered costs of $4,000 in a case where the matrimonial assets were divided equally. The Respondent had failed to comply with disclosure obligations. The Respondent failed to comply with orders to disclose dated March 15, 2001; May 14, 2001; April 4, 2002; September 4, 2007 and December 10, 2002. The Respondent husband did not attend trial in **Guillena**, nor did he consent to any of the corollary relief.
>
> **29** Justice Coady in **Ghosn** [2006] N.S.J. No. 272 assessed costs against the husband after finding that his non-disclosure and obstruction increased the wife's legal costs. He found that the tariffs were not drafted with family law in mind. He awarded a lump sum of $10,000 plus 75% of the wife's disbursements. Ms. Ghosn's conduct was found to be aimed at frustrating Mr. Ghosn's application to vary. He was found to have mislead both Ms. Ghosn and the Court. Ms. Ghosn was found to have pursued 15 avenues to obtain financial information Mr. Ghosn refused to provide. In addition, Ms. Ghosn made two offers to settle. (emphasis added)

[22] This review of the case law by A.C.J. O'Neil shows the cost assessment in family matters is not easy or predictable. Often a matter must proceed to hearing because all other avenues have been tried and failed. The parties are entitled to justice. Often the only asset they have is a modest home. The more difficult cost

assessment occurs when the case involves custody of the children and both parents, of limited means, truly believe they are the better parent.

[23] While not quantified, Mr. Reid did file an answer and counter suit where the Applicant claimed spousal support on September 11, 2002. Little was made of this claim during the hearing. He did oppose all requests by Ms. (Reid) Rose. No offers to settle were made.

[24] The case took two (2) days, including a number of pre-trials and reminders to counsel to provide information re: cash surrender value.

[25] The total amount ascertainable is $141,576.00. Ascertaining an amount was challenging due to Mr. Reid's evidence and his manner in giving evidence. The amount allowed for Ms. Rose is $47,990.00. Ms. Rose was forced to court, as her husband would not negotiate. He failed to provide relevant documents to the Court in a timely manner. Mr. Reid would not negotiate any point and so Ms. Rose had no choice but to engage counsel. She could no longer live in the home he and she built, due to his physical abuse. I accepted physical abuse occurred. Mr. Reid sought a s. 13 *Matrimonial Property Act* division, which expanded the court time. During the main decision, I found Mr. Reid to be evasive on several material matters, including his real property, his income, his work history, and his evidence

that the land; eg. he stated the land could not be subdivided when he already done so.

[26] I accept Ms. Rose left the marriage with her personal belongings and vehicle. I accept Mr. Reid gave her no support whatsoever, excepting some car payments. Ms. Rose was able to become self-sufficient, obtaining her long distance trucker's license, only through her own efforts against a backdrop of negativity and abuse.

[27] I find it is only appropriate, given the lengths Ms. Rose had to go through, that Mr. Reid pay using Scale 2 on $141,576.00, which is $16,750.00, which is the costs award in this matter. Mr. Reid will pay Ms. Rose the sum of $47,997.78 (division of assets) + $16,750.00 = $64,747.78. This total sum is to be paid by August 20, 2014.

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M.C. MacLellan, J.