SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION
Citation: *Pelley v. Peters*, 2014 NSSC 277

Date: 2014-07-13
Docket: No. 1206-6212
Registry: Sydney

Between:

Darrell Pelley

Applicant

v.

Deborah Peters

Respondent

DECISION

Judge:	The Honourable Justice M. Clare MacLellan
Oral Decision:	March 28, 2014
Written Decision On Costs:	July 13, 2014
Counsel:	Chris Conohan for the Applicant Catherine MacDonald for the Respondent

[1] Mr. Pelley seeks payment of legal fees by his former wife. The matter took over three (3) days to complete. The issues in dispute were:

1. Division of assets and debts;
2. Child support, prospective and retrospective;
3. Spousal support, prospective and retrospective;
4. Determination of income for both parents, including whether or not the parents are working to their full potential;
5. Vacations with the children; counselling for the children
6. Pension division;
7. How much did Mr. Pelley contribute post separation;
8. Costs.

[2] At the start of trial, the parties agreed to shared custody and access terms and set-off of income for child support. The parties also agreed to the valuation of the home as $182,000.00.

[3] It was agreed Mr. Pelley's payment of the mortgage since separation would be divided evenly, and one half (1/2) of that amount is to be credited against any

retroactive child support. The Respondent, Ms. Peters, disagreed about how much money Mr. Pelley actually paid.

[4] On the first day (March 26, 2013), a pre-trial was held and the Court was advised that Ms. Peters would be seeking child support for the extra time the children were with her. Mr. Pelley notified the Court that although custody was settled (that is the parties were agreeing to shared custody) he wished to advise the Court as to the number of breaches of access and as this was, in his view, relevant in a determination of credibility and costs.

[5] At the end of the day, custody was settled and detailed terms were put on the record. Custody was to be shared as it was previously.

> **MR. CONOHAN:** Thank My Lady, My Lady Mr. And Ms. Peters, I'll say Mr. Pelley and Ms. Peters, shall have shared custody of the three children of the marriage namely Ainsley Grey Pelley, date of birth January 29th, 2002, Faith Ashlyn Pelley, date of birth May 13th, 2004 and Easten Chase Pelley, date of birth November the 2nd, 2006. Each party will have the children for seven consecutive days, commencing on Friday after school and ending on Friday, of the next following week at which point there be a turn around with the other parent.
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> During the summer months, the time of transfer on Friday shall be 4:00 pm instead of the end of school and both parents will be responsible for making appropriate child care arrangements for the children during their care week if they are unavailable.
>
> With respect to birthdays of the children My Lady, either party may plan a birthday celebration for the child during the time when the child is in their care. Notwithstanding any regular access, the children shall be with either parent on that parents birthday at the very least the access on the parents birthday shall occur between 4:00pm and 7:30pm or such other hours as may be agreed to between parties.

For Christmas access, the parties will rotate Christmas Eve and Christmas Day schedules each year. In year one, being parent A will have the children on December the 23rd at noon until December the 24th at 7:00pm and parent B shall have the children from December the 24th at 7:00pm until December the 25th at 7:00pm. In year two, the places of parent A and parent B will be exchanged. The parties will agree in writing prior to the children's school break commencing how they will divide the additional time during the Christmas break from school. In year one, Mr. Pelley will be parent A.

With respect to Easter there shall be a year one, year two schedule as well where parent A shall have the children on Good Friday at 12:00pm until Easter Saturday at 7:00pm along with Easter Sunday at 7:00pm until Easter Monday at 4:00pm. Parent B shall have the children from Easter Saturday at 7:00pm until Easter Sunday at 7:00pm, along with Easter Monday from 4:00pm until the next day at noon, at which time the normal schedule of the children shall continue. In year one, Mr. Pelley will be parent A.

During summer vacations the regular access schedule shall continue unless either party plans on taking the children outside of the area, the area being the Cape Breton. Any travel outside of the area either during summer vacation or at any other time shall be accommodated between the parties. In the event that said travel schedule requires flexibility, the parties will comply and permit the regular schedule to be interrupted.

The parties will ensure that the regular access schedule is interrupted no more than three or four days either before or after the regular schedule, and any additional time beyond the regular schedule required for this travel shall be made up in additional care time with the non-travelling parent. The make-up time shall be arranged and confirmed in writing no less than thirty days prior to the trip occurring. And notice of the vacation travel shall be provided within thirty days.

The parties will execute any and all documents that the other may require and pass them along to them as they were required for each other for purposes of travel, including but not limited to passports, birth certificates or travel permission forms.

Halloween and Thanksgiving shall be rotated, notwithstanding the regular access schedule. The party that has the children for Halloween in year one shall have the children for Thanksgiving in year two. The party that has the children for Thanksgiving in year one shall have the children for Halloween in year two. Mr. Pelley shall have the children for Halloween in year one.

Under education and medical provisions, in less than a case of emergency neither parties shall make any changes to the medical, education or general well-being aspects of the children's lives unilaterally. This includes changes to any doctors, dentists or other caregivers, in addition, both parties shall be made aware of any appointments for any doctors, dentists, orthodontists or other specialists in ample

time so that they may arrange their schedule to attend. Notification shall be measured based on reasonableness in the case of an emergency.

The parties will confirm meaningfully about any decisions of importance concerning the children. Both parties shall make reasonable efforts to notify the other parent as soon as possible in the event of any emergency medical issue that may arise. Both parties will have free, unfedered discretion to contact any health care providers, teachers, or third parties pertaining to the children and their well-being.

The parties will also arrange to make copies of any of the children's portrait pictures and family albums that are in their possession currently that were created during the course of the marriage and provide them to the opposing party. The cost of production of these photos or portraits shall be borne by the person requesting them.

Mr. Pelley will also continue to maintain the children on his medical plan available from, for him, from his place of employment.

And those are the agreements on the custody and care My Lady, I'm just wondering whether or not your Ladyship, pardon my friend of green, does you Ladyship want me to put the agreement of evaluation on record or is that?

THE COURT: We'll just deal with custody first and then we'll go on to the property of concerns.

MR. CONOHAN: Ok sure, ok.

THE COURT: Mr. Raniseth, do you agree with the terms as put forward by Mr. Conohan?

MR. RANISETH: Yes.

THE COURT: Thank you, alright now we'll hear any agreements you have in relation to the property aspects.

MR. CONOHAN: Yes My Lady. The parties have agreed that for purposes of this matter that the court can accept a valuation of the matrimonial home of $182,000.00. Thereby not requiring either the appraisers who were originally retained to provide evidence in this matter.

There's been another agreement with respect to payments that have been made by Mr. Pelley since the date of separation; and that agreement is that half of those payments will be attributed towards maintaining his equity in the home, and therefore the equity that the court will determine will be from currently as opposed to the date of separation. And the other half will be applied to whatever the court determines as the appropriate quantification of spousal and child support retroactively.

And I believe the other aspect of that, and my friend can correct me because I'm not 100 percent clear on this, is that I believe that his client has also conceded during times of interrupted access that the child support issue to be calculated by

> the court will be based on shared custodial regime as opposed to his client solely. I think those are the agreements My Lady.
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> **THE COURT:** So, if I read your briefs correctly you are approximately $2,000.00 apart on the amount that Mr. Pelley paid?
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> **MR. CONOHAN:** Oh yes, in terms of the amount he paid we had indicated in our brief that it was approximately $1,300.00 and change and I believe my friend's was a little different, although my friend did his, My Lady, prior to receiving our book of exhibits so he may not have been able to do the math at the time.
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> **THE COURT:** So, perhaps you can advise me that whether or not that exact amount is still in dispute after lunch.
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> **MR. CONOHAN:** Ok.
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> **THE COURT:** Mr. Raniseth, is that do-able for you?
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> **MR. RANISETH:** I think so.
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> **THE COURT**: You are quite close. That's why I'm putting one issue away, maybe we can't, maybe we'll have to hear evidence on that $2000.00 variation between your briefs, but if there can be some acceptance of figures that would be good, if not we'll hear evidence.
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> **MR. CONOHAN:** Ok.

[6] Towards the end of the first day of hearing, counsel were able to settle on pensions, credit cards and vehicles.

[7] The parties agreed to a 50/50 split of their pensions which requires Mr. Pelley to pay Ms. Peters $2,326.00.

[8] The furniture was to be divided and it was acknowledged Mr. Pelley received less. As a result, I ordered that Mr. Pelley's surrender of $4,884.00 in R.R.S.P. would not be divided between the parties, but that he be permitted to use that sum to equip his new accommodations suitable for the children.

[9] The remainder of the court time was spent primarily on custody, past breaches and reasons for past breaches. The second largest issue was whether or not Ms. Peters was working to her full potential since separation.

SECTION 7'S

[10] Mr. Pelley agreed to a 60/40 split. He was reimbursed on some section 7's. He will pay 60% on agreed to extracurricular activities. I ordered the party responsible for the agreed to sports to send the invoice immediately to the other party who is to pay the same, 40% within ten (10) days.

MATRIMONIAL HOME

[11] The parties agreed that Ms. Peters would purchase Mr. Pelley's interest in the former matrimonial home. I accept the post-trial submissions as to the disposition costs and balance. The parties agreed that the value of the matrimonial home is $182,000.00. The mortgage at the time of the decision was $111,687.50. With real estate commission of six (6%) percent, HST, plus $1,500.00 for migration, gives a subtotal of $12,558.00. The equity to be divided between the parties was $57,754.50, which is divisible between the parties. Ms. Peters is to pay to Mr. Pelley the amount of $28,877.55.

[12] The parties were able to work through the division of credit cards and vehicles. Each were to retain their own vehicle that they used at the time of separation, and to assume the debt associated with that vehicle.

INSURANCE

[13] The parties agreed that they received insurance for the collapse of the garage in the amount of $17,358.00, which vested before separation, but was received by Ms. Peters after separation. I accepted Ms. Peters' version that the money was used to improve the house primarily renovations to the bedroom. Ms. Peters advised that renovations were necessary to allow the oldest child to have a bedroom of her own. Elsewhere, she indicated the monies were used to renovate the basement to make it suitable for rental purposes. At the time of hearing, the child had still not occupied the new bedroom. I accept that Mr. Pelley knew that renovations were taking place, however, was unaware what the actual renovations were. Shortly after the monies were received, Ms. Peters discussed Mr. Pelley doing the work himself. Mr. Pelley does not deny that this conversation took place. I have found at trial that Ms. Peters was entitled to use the materials to improve the home in the amount of $7,085 (material only), leaving a balance of $9,915. The Court ordered each party is to be accredited with a figure of $4,957.50. This is the sum that Ms. Peters is ordered to provide to Mr. Pelley.

ALLEGED CUSTODY BREACHES

[14] Although the parties had agreed to shared custody, Mr. Conohan asked the court to hear evidence of previous breaches as such is relevant to issues of credibility and costs.

[15] During the oral decision, I advised the parties that given the evidence I heard, I had concerns in relation to ordering shared custody, which is one point they agreed upon. At that time, I found that Ms. Peters' behaviour may cause the shared custody to be unsuccessful. I reviewed instances of her propensity to stop access with Mr. Pelley when it suited her. I excepted the evidence of the family babysitter that Ms. Peters frequently denied access between the children and their father, causing the children to miss their father. Ms. Allen, the babysitter, confirmed that during the time that access was stopped by Ms. Peters, and Ms. Allen was babysitting, she saw no reason for the cancellation.

[16] Ms. Peters' allegations for cessation were numerous, including that Alicia was tired in school and doing poorly during the shared access regime. This was not supported by her teacher who viewed Alicia's performance in school was very positive.

[17] Ms. Peters' allegations that Mr. Pelley had wrongly touched their son during a shower caused another disruption in access, which, when investigated by the Children's Aid Society, were found to be unsubstantiated. Similar complaints by Ms. Peters in relation to Mr. Pelley's friend, who I will refer to as T.W., that he posed a risk of sexual abuse to the children, given his alleged past history. This is also found to be unsubstantiated. Ms. Peters' references to Mr. Pelley drinking excessively during access were also unsubstantiated. At one point, when the court asked Ms. Peters' source for these harsh allegations, she advised they were located on a piece of paper at the foot of her driveway. She later retracted this comment. None of the allegations were ever substantiated.

[18] On one occasion, Mr. Pelley agreed to extend Ms. Peters' Christmas access as she had company and wanted the children during Mr. Pelley's time. He agreed. At the end of this extension, she did not agree to return the children even though her turn for shared custody occurred the next day. In this particular case, she involved the children in the decision making as to whether or not they would go with their father. In the allegation of sexual touching, Mr. Pelley went five weeks without access. He understood that Children's Aid were involved. He was not asked for input, nor was he told of the nature of the allegation, which, if shared, would have permitted him to defend himself and perhaps provide information. I

accept it was necessary for the Children's Aid Society to investigate. In any event, that allegation was unsubstantiated.

[19] On another occasion, the parties agreed that Dr. Lynk advised that the children could do with a break from the stressful situation existing between the parents and so time with Mr. Pelley was suspended. Dr. Lynk was not called, however, both parties agreed to this break and this resulted in an approximately five week period, when the children remained with Ms. Peters without visitation with their father.

[20] Mr. Pelley had to make recourse to legal counsel to reactivate his custody on a number of occasions.

[21] During the oral hearing, I found that Mr. Pelley was prevented from scheduled access on numerous occasions, and that according to their babysitter this saddened the children. With the exception of Dr. Lynk's recommendation, which both parents accepted, and the unsubstantiated referral to Children's Aid, which had to be investigated, all other access breaches by Ms. Peters I found were without basis. Furthermore, I found that Ms. Peters would go to great lengths to frustrate access when she chose to do so. On one occasion Ms. Peters went to the babysitter's, Ms. Allen's, work place without notice and had her sign an affidavit.

Ms. Allen did sign the affidavit but was uncomfortable afterwards as some of the comments, negative towards Mr. Pelley were not accurate. Ms. Allen then attended Mr. Conohan's office with the affidavit and another proper affidavit was executed. She believes that she saw Ms. Peters deny access without cause between five to nine times during her babysitting at Ms. Peters' home.

[22] Ms. Peters' behaviour in relation to the children's access with their father is difficult to understand. Furthermore, at one point Ms. Peters' called Mr. Pelley's new employer to advise him that Mr. Pelley was leaving work early. Apparently, Mr. Pelley was leaving work early to pick up the children. His employer knew and agreed to this practice. These are some of the factors which consumed court time, and caused difficulty in deciding whether or not shared custody could work between these parents.

EMPLOYABILITY

[23] I reviewed the parties' income and concluded, based on the evidence, Mr. Pelley's income was as follows:

- 2010 - $72,668.00
- 2011 - $81,606.00 (year of separation – worked overtime)

- 2012 - $73,096.00
- 2013 - $73,500.00

[24] Mr. Pelley alleges Ms. Peters now works fewer hours at Marine Atlantic than she did when the couple were together. Mr. Pelley advised Ms. Peters used to earn between $40,000.00 and $45,000.00, and he was the person who completed her tax returns. Ms. Peters advised she planned to earn $38,000.00 in the future. Ms. Forgeron, a witness from Marine Atlantic, was called to give evidence in relation to Ms. Peters' employment history. She confirmed that if Ms. Peters earned $38,000 that was the equivalent to 40 weeks worked at her seniority level. Ms. Forgeron advised if an employee works full time the salary would be closer to $40,000 and $45,000, and that pensionable overtime was available for the employees. The time keeping call out methods of the company were hard to understand. The witness could tell how many calls Ms. Peters received and rejected. The system allows Ms. Peters to accept a later shift that day; however, no record is maintained as to how many shifts Ms. Peters initially refused but accepted a later shift the same day.

[25] Ms. Forgeron was able to confirm that Ms. Peters had three (3) lengthy periods when she did not work. In the 27 months since separation, Mr. Peters was

absent from the job 17.5 months. This witness had possession of Ms. Peters' personnel file only. Ms. Forgeron advised Ms. Peters has a medical file which Ms. Forgeron does not have access. Ms. Forgeron did not know why Ms. Peters was on leave, but could only confirm that she was not at work. Ms. Forgeron advised Ms. Peters is midpoint on the seniority list and she is a permanent employee.

[26] I found Ms. Peters' income was as follows:

- 2009 - $39,369.00 – with dues $35,220.00
- 2010 - $39,969.00 – with dues $39, 248.00
- 2011 - $34,585.00
- 2012 - $18,559.00 (various sources)
- 2013 - $38,000.00

[27] Ms. Peters expects to earn $38,000.00 annually in 2014 onward. She advised she missed work due to illness and Celiac disease. Ms. Peters' Canada Tax Credit is $8,000.00. Contrary to Mr. Pelley's evidence, Ms. Peters denied she ever missed work without cause. No medicals were provided by Ms. Peters. The witness from Marine Atlantic stated there was a medical file for Ms. Peters at Marine Atlantic. No medical evidence was provided. This evidentiary void was

never filled. Ms. Peters had three (3) or four (4) leaves, totalling 17 ½ months since separation.

[28] Ms. Peters countered the allegations by Mr. Pelley that she was unemployed, indicating that she was ill suffering from Celiac disease and other illnesses. At an earlier pretrial, held on March 19, 2014, Mr. Conohan on behalf of Mr. Pelley indicated that Ms. Peters' lack of employment would be an issue to be raised at court.

[29] At trial, I analysed the evidence relating to section 3, *Guidelines* 16 to 20, and schedule III. I found that it was necessary to impute Ms. Peters' income under section 19(1) that she was intentionally under employed. Proof of her illness and lack of her ability to work rests with Ms. Peters. I find she had ample opportunity to provide medical evidence. Her lack of explanation resulted in the imputation of her income for:

(a) 2011 to $38,276.00;

(b) 2012 to $39,347.00;

(c) 2013, Ms. Peters' income is imputed to $40,448.00.

Ms. Forgeron advised the court that Ms. Peters would receive a 2.8% increment each year. If Ms. Forgeron's evidence is correct; and Ms. Peters plans to make $38,000; she would be required to work 40 weeks a year, and not 52. According to Ms. Forgeron, work is available to Ms. Peters.

CHILD SUPPORT

[30] Ms. Peters requests more child support to cover the extra time she had the children. I have allowed her an eight week period where she had the children with her where that interruption of visitation with Mr. Pelley may have had some validity. A set-off between the contributions Mr. Pelley made to the home, and the difference between maintenance from each parent results in Mr. Pelley owing $27,363 up to the end of April 2014. He paid $27,079. His balance is $284. His ongoing child support as set off against Ms. Peters' imputed income amounts to $565 a month child support payments. A more in depth analysis of child support as set out in **Woodford v. MacDonald**, 2014 NSCA 31, was not possible given the evidence provided.

[31] While this breakdown is set out in more detail in the oral decision, I felt it was necessary to go over the details the decision summary as well as a review of the voids in evidence. It is clear that substantial portions of the court time used to deal with this matter is due to Ms. Peters' conduct. Mr. Pelley, to a lesser degree,

was inordinately interested in securing information in relation to the use of a small insurance cheque when he knew or ought to have known there was ongoing work being done on the house with the proceeds from that cheque.

[32] Approximately one half of a court day was necessary to establish the ancillary issues. The remaining two days, plus two hours, was due solely to Ms. Peters' conduct and evidence. Ms. Peters disputed all issues. She was untruthful to the court on the issues of her work and the plans for the development of her home. She withheld the children from Mr. Pelley without reason. She alleged serious problems with him as a parent; these were never proven. She inexplicably phoned his new employer to advise that he was leaving work early. She had three extensive leaves from her employment without explanation. She failed to provide medical information, although she was well aware that her employment record was in issue.

COSTS

[33] Costs are covered by Rule 77 of the *Civil Procedure Rules*, and Costs and fees are fixed pursuant to the *Cost & Fees Act.*

[34] 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.

[35] Rule 77.03 provides direction as to the nature of the decision 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.
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> **(2)** A judge may order a party to pay solicitor and client costs to another party in exceptional circumstances recognized by law.
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> **(3)** Costs of a proceeding follow the result, unless a judge orders or a Rule provides otherwise.
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> **(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:
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> > **(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.

[36] 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.

[37] Rule 77.07(2) further directs content 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:
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> **(a)** the amount claimed in relation to the amount recovered;
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> **(b)** a written offer of settlement, whether made formally under Rule 10 - Settlement or otherwise, that is not accepted;
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> **(c)** an offer of contribution;
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> **(d)** a payment into court;
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> **(e)** conduct of a party affecting the speed or expense of the proceeding;
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> **(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.

[38] The principles to apply to a cost case is set out by MacDonald, J. in **Lubin v. Lubin**, [2012] NSSC 93:

> **3** Several principles emerge from the Rules and the case law:
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> 1. Costs are in the discretion of the Court.
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> 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.

11. In determining what are "reasonable expenses", the fees billed to a successful party may be considered but this is only one factor among many to be reviewed.

12. When offers to settle have been exchanged, consider the provisions of the civil procedure rules in relation to offers and also examine the reasonableness of the offer compared to the parties position at trial and the ultimate decision of the court.

[39] Justice O'Neil, in confirming the principles set out by Justice MacDonald expressed his opinion on the difficulty of establishing fixed standards for costs in family matters. In **Robar v. Arseneau**, 2010 NSJ 593 at para. 17, Associated Chief Justice O'Neil discussed the difficulty in establishing costs in family matters based on a strict format. Justice O'Neil summarized the case law at paragraph 17 as follows:

> 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.
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> 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 Rule 63.04(1) and (2).
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> 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.

> 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.
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> 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.

[40] The **Lubin** case, much like the Pelley-Peters case, required numerous pre-trials, three and a half days of hearing, plus time for the oral decision. I estimate that two days are attributable to finding out what Ms. Peters made, or didn't make, and why or why not, as well as, providing the court with necessary detail surrounding her manner of exercising access for a credibility examination. In short, I found Mr. Pelley to be forthcoming and reasonable in all matters excepting his intense focus on the $17,000 insurance money. In all other matters he has been

open and forthright with the court and was willing to surrender access on the two occasions when it might have been reasonable and in the children's best interest.

[41] Ms. Peters disputed all issues relating to access denial and her failure to work after separation. She was unsuccessful in both matters (except the two (2) visitation denials already referred to). She was untruthful to the court in relation to her work, her leaves, her refusals to follow shared parenting. Ms. Peters contradicted herself during testimony relating to her information sources of Mr. Pelley's misconduct. She failed to supply information supporting her illness from the work force for 17 months when she knew this was a major issue. Ms. Peters displayed the type of conduct Judge Dwyer referred to when he condemned parties who drag out proceedings because it costs them nothing.

[42] Ms. Peters is able to work, and is able to earn in excess of $40,000. She's not incurred any legal fees. It is certainly possible that her unreasonable attitude on relevant matters may not have existed if she was required to pay for counsel. I order costs against her in the amount of $20,000, which she shall pay within a 12 month period. I acknowledge this will cause her some hardship, but she is, according to Ms. Forgeron, capable of earning $45,000 a year, plus a yearly increment, plus overtime. As well, she will receive just under $30,000 when the equalization takes place. The order for costs is solely attributable to Ms. Peters'

conduct throughout the hearing. All financial aspects to be concluded no later than August 30, 2014.

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MacLellan, J.