COSTS IN FAMILY LAW

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INTRODUCTION

This paper speaks to the issue of costs in family law with emphasis on how the law has developed in Nova Scotia.

The paper is divided into seven parts plus a conclusion. In the first part I will address briefly the historical evolution of costs in family law. In part II I will outline the general rule as it now stands. Parts III, IV, V and VI will highlight some exceptions to the general rule and part VII focuses on solicitor-client costs in the family law context.

I recommend to you the paper by Mark M. Orkin, Q.C., entitled "Costs in Family Law" which was a paper presented by Mr. Orkin at a National Judicial Institute Seminar on Family Law in Toronto in February 2002. I also recommend the paper "Costs in Family Law - Selected Issues" by Mark M. Orkin, Q.C. and Marie Gordon found in the Canadian Family Law Quarterly [(2003) 20 C.F.L.Q. 363]. Their papers were valuable resources of information, particularly for a historical overview of how the law on costs in the family law field has evolved in Canada. I also thank Ms. Moneesha Sinha, a third year law student at Dalhousie University for her assistance in the preparation of this paper.

Following this paper I have listed not all but the majority of reported Nova Scotia family law cases from January 1974 to November 2005 that dealt with the issue of costs. I've attempted to list the cases in the order they were decided beginning with the most recent.

PART I - HISTORICAL EVOLUTION OF COSTS IN FAMILY LAW

Although as a general rule in any legal proceeding costs are awarded to a well behaved successful party, that has not always been the case in family law. Historically, for the most part, costs in divorce proceedings were awarded in favor of the wife because usually it was the husband who owned the majority of the assets, had the greater income and overall was much better off financially. See for example *Keddy v. Keddy* (1974), 8 N.S.R. (2d) 158 (A.D.). As a result, before the ***Divorce Act***, 1968 was enacted, wives more often than not were granted costs regardless of the outcome of the proceedings. The Courts thought that it was unfair to have a woman pay for legal fees from the support payment she was receiving from her husband. Consequently, the husband would often pay costs on a solicitor-client basis to indemnify her. (See "Costs in Family Law - Selected Issues" by Orkin and Gordon)

However, after the enactment of married women's property legislation women had the right to own assets. Thereafter they too became property owners and gradually their economic dependence on their husbands began to decline. According to Orkin and Gordon (*supra*) at the same time the law with respect to costs in family law also gradually evolved such that the trend in the 1970's was toward each party bearing responsibility for their own costs. In Nova Scotia the trend was later in arriving (see *Lawrence v. Lawrence* (1981), 49 N.S.R. (2d) 100 (A.D.)) and was not consistently followed (see for example *Bennett v. Bennett* (1981), 45 N.S.R. (2d) 683 (T.D.) and the Court of Appeal's decision in *Nolet v. Nolet* (1985), 68 N.S.R. (2d) 370 (A.D.)).

The “no costs” rule promoted by *Lawrence* (*supra*) was not universally followed, I suggest, because it became apparent that it did not promote settlement and too often it was unfair to the successful party or to the party who played by the rules but yet faced considerable legal fees because of the unreasonable position taken by their spouse or their spouse’s lack of cooperation during the trial process. Factors such as the income and assets of the parties, the conduct of the parties prior to and during the course of litigation and the success of the parties were eventually noted as critical elements in the determination of costs. See for example *Bennett v. Bennett* (*supra*) and *Kaye v. Campbell* (1984), 65 N.S.R. (2d) 173 (A.D.).

Eventually the trend did change so that more often than not costs were awarded to the successful party. The reported cases in Nova Scotia in the mid-1980's and into the 1990's demonstrates some inconsistency on this issue, perhaps because of the Court’s reluctance to label either party a winner or a loser. However, it has now been accepted that in family law, like all other litigation, the successful, well-behaved party, is generally entitled to costs.

PART II - THE PRESENT RULE FOR COSTS

The rule for costs in matrimonial proceedings was stated by Hallett, J. (as he then was) in June of 1981 in *Bennett v. Bennett* (*supra*). Beginning at paragraph 9 Justice Hallett 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 (1968))."

Also, in paragraph 14 he again quoted from Orkin's Law of Costs (1968):

> "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 misconduct 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.
>
> ....
>
> 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."

Civil Procedure Rules 57.27 provides as follows:

> 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 contains no specific provision relating to costs but Rule 70.03(4) provides:

> 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 63.02(1) reads:

> 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;

(c) direct whether or not any costs are to be set off.

The Family Court of Nova Scotia, being a creature of statute, has its authority for awarding costs in the ***Family Court Act*** R.S.N.S. 1989, c 159, s.13 which provides:

> The Family Court is hereby granted the authority to award costs in any matter or proceeding in which it has jurisdiction and its authority to award costs is not limited by reason of the fact that the enactment governing the proceeding does not grant to the court authority to award costs.

The Family Court Rule on costs (Rule 17) provides that the amount of costs shall be awarded at the discretion of the court, may be collected in accordance with the procedure provided for collection of maintenance or in other such manner as the court directs and may be payable to the court, the party, his or her counsel or such other person as the court may direct.

Although the successful party is generally entitled to costs, it remains within the Court's discretion to depart from that general rule. However as stated by Hallett, J. the Court should do so only for very good reasons and as stated by Macdonald, J.A. in *Kaye v. Campbell* (*supra*), "such reason must be based on principle". Reasons for departing from the general rule may include deference to the best interests of a child (*Paquet v. Clarke* (2005), CarswellNS 20 and *Ffrench v. Ffrench* (1995), 139 N.S.R. (2d) 39 (A.D.)), impecuniosity (*Kaye v. Campbell* (*supra*)), misconduct (including miscarriage of the proceeding), oppressive and vexatious conduct, misuse of the Court's time, unnecessarily increasing costs to the opposing party, and failure to provide full disclosure as may be required by the Rules or legislation such as the *Child Support Guidelines*. Costs may also not be awarded if the case raises new issues not previously

decided by the Court or an interpretation of a law or ambiguous statute (*Bennett* (*supra*)).

The general rule for the calculation of costs is found in Rule 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. (Emphasis added)

The Tariffs that follow Rule 63 were not drafted with family law specifically in mind. Where the action before the Court does not involve a specific monetary claim, and the parties are unable to agree on the "amount involved" the Tariffs are not easily applied. This is particularly so when the proceeding before the Court involves issues such as custody and access or monetary issues like spousal and child support which are subject to variation. On numerous occasions the Court has recognized this difficulty. Williams, J. in *Grant v. Grant* (2002), 200 N.S.R. (2d) 173 (T.D.) stated at paragraph 42:

> "One is left observing what others have, that an "amount involved" analysis has limited utility in complex, multi-issue matrimonial proceedings. This is particularly so, I believe, where the litigation is as conflictual as this was." (Para. 42)

See also *Urquhart v. Urquhart* (1998), 169 N.S.R. (2d) 134 (T.D.), and *Kennedy-Dowell v. Dowell* (2002), 209 N.S.R. (2d) 392 (T.D.).

In *Urquhart* (*supra*) Goodfellow, J. resorted to a "rule of thumb" that he previously applied in *Veinot v. Veinot Estate* (1998), 167 N.S.R. (2d) 101 (T.D.). Where there was no clear "amount involved" he equated each day of trial to an amount of $15,000.00 in order to determine the

"amount involved". That formula has been followed by the Court on numerous occasions since the *Urquhart* decision in 1998.

EXCEPTIONS:

PART III - BEST INTEREST OF THE CHILDREN

One consideration in family law that may cause the Court to deviate from the general rule on costs that will rarely be found in any other legal proceeding, is concern for the best interest of the parties' children. This consideration is often closely linked to the party's ability to pay. The Court has been known to alter the costs that might otherwise be ordered because of the potential impact of the Court's decision on a parent's ability to provide for their children or to exercise access. As Gass, J. stated in Connolly v. Connolly, 2005 CarswellN.S. 320 (NSSC, F.D.) in paragraph 9:

> "Any order of costs should not have an adverse impact on the children's emotional or material well-being. Access with their father is important for their emotional well-being and the child support obligations are critical to their material well-being."

In *Connolly* (*supra*) the father lived in Newfoundland and the mother in Nova Scotia. For the father to exercise access he had to travel to Nova Scotia before returning with the children to his home province. He already owed arrears of child support. After a two day trial the wife sought $3,000.00 in costs. Justice Gass ordered the husband to pay $500.00 and gave him a year to pay. It was her way of balancing the successful wife's entitlement to costs against the children's need to spend time with their father and without impeding his ability to pay child support.

In *Paquet v. Clarke* (*supra*), a mother unsuccessfully applied under section 37 of the ***Maintenance and Custody Act*** to vary custody in order to relocate with the parties' children from Dartmouth, Nova Scotia to Sherbrooke, Quebec. The father asked for costs in the sum of $1,881.25 using the *Urquhart* (*supra*) formula. The Court ordered costs in the sum of $750.00, inclusive of disbursements and stated:

> "While on the surface it appears that the parties are in similar financial circumstances, and Mr. Clarke is paying child support, up until now Ms. Paquet has paid a disproportionate share of the children's extra-curricular activities and child-care expense. Any decision that effects her finances will also impact the children. She has incurred legal fees of her own and, based on her income I accept that costs in the amount requested by Mr. Clarke would result in a considerable burden on her budget."(para. 15)

See also Chapman v. Chapman (1996), 155 N.S.R. (2d) 19 (T.D.).

PART IV - CONDUCT OF THE LITIGANTS

Arguably the reason most often cited in family law for increasing or reducing what would normally be ordered by way of party and party costs, is the conduct (or perhaps more accurately the misconduct) of the parties and the manner in which the proceeding was conducted. Of the nine specific considerations listed in Rule 63.04(2) five refer in one way or another to the conduct of the parties. Rule 63.04(2) reads:

(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 over-caution, 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. [Emphasis added]

Rule 63.15 also relates to misconduct or neglect on the part of the party or his/her solicitor and reads:

63.15 (1) Where any thing is done or an omission is made, improperly or unnecessarily, by or on behalf of a party, the court may order,

(a) any costs arising from the act or omission not be allowed to the party;

(b) the party to pay the costs of any other party occasioned by the act or omission;

(c) a taxing officer to inquire into the act or omission, with power to order or disallow any costs as provided in clauses (a) and (b).

(2) Where in a proceeding, costs are incurred improperly, or without reasonable cause, or arise because of undue delay, neglect or other default, the court may, when the solicitor whom it considers to be responsible, whether personally or through a servant or agent, is before the court or has notice, make an order,

(a) disallowing the costs as between the solicitor and his client;

(b) directing the solicitor to repay to his client costs which the client has been ordered to pay to any other party;

(c) directing the solicitor personally to indemnify any other party against costs payable by the party;

(d) directing a taxing officer to inquire into the act or omission, with power to order or disallow any costs as provided in clauses (a) to (c).

Improper conduct during the course of proceedings may cause the Court to order costs in a situation where the Court might otherwise have not done so. For example, in *Godfrey-Smith v. Godfrey-Smith* (1997), 165 N.S.R. (2d) 245 (T.D.) Associate Chief Justice Macdonald (as he then was) ordered costs in the sum of $4,000.00 against the wife as a result of her failure to disclose information prior to trial which, had it been disclosed, may have resulted in a settlement. Beginning at paragraph 52 Associate Chief Justice Macdonald stated:

> "I am very hesitant to add an order for costs on top of the disposition that I have given here today because the main theme of my disposition was to enhance cooperation for the future. I do not want to prolong the acrimony. I do not want to throw a wrench into future cooperation. Furthermore I am not in my decision faulting any party more than the other for the ongoing lack of communication and lack of cooperation. As well Mrs. Godfrey-Smith was successful on some issues.
>
> However, I can not ignore the lack of disclosure on the part of Mrs. Godfrey-Smith in this matter. I can not help but conclude that had Mr. Godfrey-Smith known her position on the sabbatical (as eloquently stated in court) this matter may very well have been resolved. As well we have the problem with her late income tax returns and other discovery undertakings. My need to protect the integrity of the court system for future cases overrides my reluctance to order costs...."

A cost award may also be increased as a result of misconduct on the part of a litigant or their counsel. See for example, *Grant v. Grant* (*supra*) in which Justice Williams ordered costs

against the wife in the sum of $12,000.00 plus a further $2,250.00 for disbursements. He concluded that the conduct of the wife and her lawyer unnecessarily lengthened and inflamed the proceedings:

> "I conclude that the manner in which this proceeding was conducted by Ms. Grant and her counsel...unnecessarily complicated and lengthened the proceeding, by raising incorrect, improper, vexatious...and unnecessary allegations, assertions and accusations."(para. 38)

Improper conduct might also result in costs to a successful party being reduced. In *MacLean v. MacLean* (2001), 200 N.S.R. (2d) 34 (T.D.) Goodfellow, J. concluded that the wife was primarily successful and was entitled to costs. However, because she did not provide her updated financial information in a timely fashion he reduced her costs entitlement which he fixed at $1,200.00 to $900.00.

The Court over the years has identified various forms of misconduct most of which have been enumerated in Rule 63.04 (2). Forms of improper conduct which may result in adverse cost consequences include:

- Conduct which unnecessarily lengthens the duration of the proceeding. See *French v. French* (1997), 162 N.S.R. (2d) 104 (T.D.) in which Hood, J. concluded there was mixed success but granted Mr. French costs in the sum of $750.00 for a "wasted half day" caused by Mrs. French. Beginning at paragraph 189 she stated:

> "....the trial proceedings were lengthened by unnecessary questioning about whether the salary paid to Lorraine French by Robert French was legal income splitting permitted by the ***Income Tax Act*** or whether it was somehow improper.

> I am satisfied on the evidence and, in particular, by the testimony of Robert French, that there was no justification for an attack on Robert French's integrity, particularly an attack that focused on his professional ethics.
>
> Dealing with this issue made the trial longer by approximately a half day, in my estimation...Therefore I exercise my discretion to award costs in favor of Robert French in the amount of $750.00 for the wasted half day, since I found no merit whatsoever in the allegations of any impropriety by Robert French in the income-splitting.
>
> Otherwise, because of the mixed success, I award no costs."

See also *Grant v. Grant* (*supra*).

- The manner in which the proceeding was conducted. This could include conduct such as lack of civility, lack of cooperation throughout the proceeding and conduct not conducive to settlement. See for example *Sheppard v. Sheppard* (2005), 233 N.S.R. (2d) 379 (N.S.S.C., F.D.). Costs were denied to both parties after Legere-Sers, J. concluded that the conduct of both parties was "absolutely unacceptable". In *Chaddock v. Chaddock* (1993), 121 N.S.R. (2d) 274 (T.D.) Saunders, J. (as he then was) ordered the husband to pay costs of $1,050.00. He characterized the husband's conduct throughout the proceeding as "uncooperative or tending to be vexatious or unnecessary so as to draw the court's disapproval".

In *Day v. Day* (1994), 129 N.S.R. (2d) 186 (T.D.) Goodfellow, J. noted that the wife exhibited conduct prior to the hearing that was not conducive to settlement and that required a longer hearing than should have been the case. Although Ms. Day was granted costs, they were reduced because of her behaviour.

- Improper, vexatious, prolix or unnecessary steps. See *Grant v. Grant* (*supra*) and *French v. French* (*supra*).

- The failure to make an admission which should have been made. See for example *Guillena v. Guillena* (2003), 212 N.S.R. (2d) 101 (N.S.S.C., F.D.).

- Failure to disclose financial information. In *Mayer v. Mayer* (2001) CarswellN.S. 359 (T.D.) Associate Chief Justice Macdonald (as he then was) ordered the husband to pay costs of $5,000.00 plus disbursements and stated beginning at paragraph 41:

> "The Court certainly takes a dim view on anybody who has tried to thwart the administration of justice by hiding or failing to disclose assets, because it makes it much more difficult for our system of justice to work in those circumstances. I have found that on the two major issues, the Austrian bank account and the R.B.C. securities account, that that was exactly the case, and that Mr. Mayer was so responsible. For this reason, Ms. Mayer is entitled to an award of costs."

In *Edwards v. Edwards* (1994), 127 N.S.R. (2d) 379 (T.D.) Grant, J. ordered costs in favor of the wife. He concluded that the husband had failed to disclose in a timely fashion income relating to his new wife and expressed the view that the delay was intended to frustrate the preparation and conduct of the wife's case. See also *Godfrey-Smith v. Godfrey-Smith* (*supra*).

- Adopting an unreasonable position. After a divorce trial Tidman, J. applied Scale 4 of the Tariff in awarding the wife costs in the sum of $10,000.00 plus a further $4,000.00 with respect to an Interlocutory Application on the issue of mobility. He stated:

> "the higher degree of complexity of these proceedings was for the most part caused by the respondent by insisting on joint custody" and "[Mr. Ellis] added to the complexity by presenting an argument that can only term as preposterous in opposing the payment of any child support."

The Court of Appeal reduced the costs awarded for the Interlocutory Application from $4,000.00 to $2,500.00 based on a miscalculation of the number of days involved for the hearing but otherwise upheld the decision on costs (*Ellis v. Ellis* (1999), 175 N.S.R. (2d) 268 (C.A.)).

- Being less than forthright with the Court. In *Gardiner v. Gardiner* (2002), 209 N.S.R.

(2d) 214 (N.S.S.C., F.D.) Smith, J. (as she then was) denied an application for costs and stated beginning at paragraph 21:

> "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 therefore unnecessarily lengthening the duration of the proceedings...Our Court system relies on witnesses being forthright when giving their evidence. A witness that is less than 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 short, the Court may resort to an order for costs if the parties or their counsel do not conduct themselves in accordance with the rules of the Court and the Court's expectation for civility. Improper conduct which may unnecessarily lengthen the proceeding or increase the expense of the proceeding may attract adverse consequences. As Justice Legere-Sers stated in *Sheppard v. Sheppard* (2005), 233 N.S.R. (2d) 379 (N.S.S.C., F.D.):

> "Costs can be an effective instrument used to compensate a party in accordance with Rule 63 and prevailing case law when the conduct of one party unreasonably escalates the costs of trial and ultimately the appropriate resolution of the issues needing to be resolved." (para. 56)

PART V - RELATIVE SUCCESS OF THE PARTIES AND OFFERS TO SETTLE

Key to almost any decision on costs is the relative success of the parties. "If you are successful, you generally get costs; if you are unsuccessful, you don't." Per Goodfellow, J. in *Marshall v. Marshall* (1996), 157 N.S.R. (2d) 102 (T.D.) at paragraph 34. Success is relative. It cannot always be measured against the positions taken by the respective parties at trial. Often the degree of success must be measured against what each party was prepared to accept prior to the commencement of the trial. Civil Procedure Rules 41A and 67.06 were designed, in part, to

provide the parties with the means to put before the Court their "true" positions so that the Court can then determine who was successful and therefore who is entitled to costs.

Generally, Rule 41A contemplates offers to settle, made by either party to the other, at anytime before the commencement of a trial or hearing and at least seven days before the day on which the trial or hearing is commenced. Rule 41A.09 (1) and (2) outline the consequences of failing to accept a reasonable offer to settle:

> 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 to party costs plus taxed disbursements from the date of such service**. (Emphasis added)

Rule 67 applies specifically to proceedings under the ***Matrimonial Property Act*** of Nova Scotia. Rule 67.06 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.
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> (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 come to the 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. (Emphasis added)

In addition to formal offers to settle under Rule 41A or 67.06 the Court can consider any offer to settle that is made in writing in exercising its discretion on the issue of costs. Rule 41A.11 reads as follows:

> 41A.ll. 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.

> "...The court should measure each party's bargaining position against the court's adjudication to measure the reasonableness of each position. It is also relevant to compare the court's award against each party's position at trial (which is often significantly different from their pre-trial bargaining position)." per Campbell, J. in *Kennedy-Dowell v. Dowell* (2002), 209 N.S.R. (2d) 392 (N.S.S.C., F.D.) at paragraph 12.

PART VI - ABILITY TO PAY

If a parent exhibits an inability to pay the full amount of party and party costs, the Court may order a reduced amount. See for example *Paquet v. Clarke* (*supra*).

In some cases costs may not be awarded at all because of an inability to pay. In *Kaye v. Campbell* (*supra*) costs were not awarded to the more successful party. Given the disparity of incomes between the parties, the trial judge declined to award costs. The decision was upheld on appeal.

In *Voiculescu v. Voiculescu* (2003), CarswellN.S. 564 (NSSC, F.D.) the parties were divorced after a day and a half hearing. The husband sought costs arguing that he was the successful party and that his wife had intentionally prolonged the proceedings. The Court held that the husband was the successful party and there was nothing about his conduct that would negate or reduce his entitlement to costs. The wife was elderly and suffered ill health. The trial was delayed at one point because she required medical attention and was hospitalized. She did not intentionally delay the proceedings. While the wife sought a reduction in costs because of her financial circumstances the Court concluded that the husband's circumstances were no better than the wife's. "While the court is not insensitive to Ms. Voiculescu's health issues and financial circumstances, fairness requires that Mr. Voiculescu be awarded costs." (para. 14) Applying the *Urquhart* (*supra*) formula costs in the sum of $3,375 plus disbursements of $800.00 were ordered.

In *Grant v. Grant* (*supra*) it was argued on behalf of the wife that the disparity in the incomes of the parties, their respective asset positions and the custodial arrangement should be examined when determining costs. Williams, J. stated at paragraph 45:

> "I agree that these are factors that should be part of any consideration of the issue of costs in family law litigation. I do not believe that they are more than that, however. It is not a defense. In Britt v. Britt, Ottawa 99-FL - 25457 and 96-FL-54226, March 6, 2000, MacKinnon (J.S.C.J.) observed:
>
> > "The financial ability to pay costs has long been a factor to take into account in fixing the amount of costs in a family case...It can not be a complete 'defense' to an award of costs, because if it were, this would mean that a party could litigate with financial immunity."

See also *Ellis v. Ellis* (*supra*).

PART VII - SOLICITOR-CLIENT COSTS

"The solicitor and client scale is intended to be a complete indemnification for all costs (fees and disbursements) reasonably incurred in the course of prosecuting or defending the action or proceeding." (*Apox Inc. v. Egis Pharmaceuticals* (1991), 37 C.P.R. (3d) 355 (Ont. Gen. Div.)).

Solicitor-client costs are awarded only in "rare and exceptional circumstances" to highlight the Court's disapproval of the conduct of one of the parties in the litigation. (*Wournell (P.A.) Contracting Ltd. and Wournell v. Allen* (1980), 37 N.S.R. (2d) 125 (A.D.). MacDonald, J.A., in *Wournell*, stated at paragraph 34:

> "I think there is much to be said for Mr. Chipman's argument as to the power of trial judges in this Province to award costs on the basis of a solicitor and his client. With some hesitation, however, I am of the view that such power does exist but should be exercised only in rare and exceptional cases such as enumerated in the above quotation from Orkin and never should be awarded by way of damages."

The quotation from Orkin to which MacDonald, J.A. referred was as follows:

"In *The Law of Costs* by Mark M. Orkin, the author says at pp. 53-54:

> In a dispute *inter partes* the court has a general discretionary power to award costs as between solicitor and client, although not by way of damages. The power, which was originally an equitable one, may be exercised in special cases such as suits affecting charity funds, actions brought by trustees, administration suits, cases where an arbitrator has power to dispose of the question of costs, and in certain cases of misconduct. Costs as between solicitor and client may also be allowed in contempt proceedings. In proceedings involving estates an executor is normally awarded costs out of the estate on a solicitor and client basis. However, in other cases, as against an opposite party an executor is on the same footing as any individual litigant, and is not entitled to solicitor and client costs. Costs as between solicitor and client will be ordered where they were so payable ex-contractu to a morgagee by virtue of his mortgage instrument." (para. 29)

Solicitor-client costs should not be awarded simply because the trial judge considers the action of the defendant which gave rise to the cause of action "reprehensible" (see *Lockhart v. MacDonald* (1980), 42 N.S.R. (2d) 29 (A.D.)) and thus used as a punishment, nor should they be awarded so as to ensure that the successful plaintiff receives the full benefit of the damages that may be awarded by the Court (see *Warner v. Arsenault* (1982), 53 N.S.R. (2d) 146 (A.D.)). In *Warner* (*supra*) Pace, J.A. stated at paragraphs 16 and 17:

> 16 Exemplary or punitive damages may be awarded where the defendant's conduct is such as to merit punishment. This may be exemplified by malice, fraud or cruelty as well as other abusive and insolent acts toward the victim. The purpose of the award is to vindicate the strength of the law and to demonstrate to the offender that the law will not tolerate conduct which wilfully disregards the rights of others.
>
> 17 The trial Judge found that an award of punitive damages should not be made, and with that finding I agree. The evidence does not reveal any malicious, wilful or insolent conduct by the police officer against the victim, but rather it would appear to be a case of false identification which led to these unfortunate

> results. In my opinion, the conduct of Constable Arsenault was not so reprehensible and offensive to the ordinary standards of community conduct as to call for punitive damages.

Solicitor-client costs are rarely awarded in matrimonial proceedings but it does occur. In *Aulwes v. Mai,* SFHCAA-013786 costs on a solicitor-client basis were awarded to the biological father of a child who was the subject of a Hague Convention application. The mother was deemed to be a sophisticated professional woman who deliberately attempted to keep the child away from her father. The Court determined that it was one of those "rare and exceptional circumstances" that warranted solicitor-client costs.

In *MacKay v. Boucher,* [2002] N.S.J. No. 473 (C.A.) the father was awarded solicitor-client costs to the extent of 75% of his actual legal fees, to be paid by the mother. The trial judge determined that solicitor-client costs were justified as Ms. MacKay swore a false affidavit representing the quality of legal advise that she received at the time when she entered into a lump sum support agreement. Ms. MacKay failed to provide an explanation for the statements contained in her affidavit and her false evidence caused the Respondent father to have to disprove the allegations thereby incurring additional legal expenses. The judge characterized it as a "rare and exceptional circumstance" which warranted solicitor-client costs. His decision was upheld on appeal.

In *Hargraft v. Hargraft* (1989), CaswellNS 556 (T.D.), Justice Richard declined to order solicitor-client costs and stated at paragraph 20 of his decision:

> "It is clear that in this jurisdiction solicitor-client costs are awarded only in the most unusual circumstances. I accept the submission of petitioner's counsel that the respondent was largely uncooperative throughout and his intransigence did considerably lengthen the proceedings and discourage any settlement discussions. The respondent was evasive and uncooperative in providing essential financial information and this caused greater expense than was necessary. However I can not say that the respondent's behavior throughout was so reprehensible, fraudulent or distasteful so as to warrant an award of costs on a solicitor-client basis."

Costs were awarded on a party and party basis because the conduct of the Respondent did little to minimize costs or encourage settlement.

CONCLUSION

With only a few exceptions, costs are assessed in matrimonial proceedings in much the same way as they are in any other civil case. However, unlike trials between institutional parties, the litigants generally lack extra resources and when there are children involved what they do have should, to the extent that it is possible, be kept within the family. While the Court should be mindful of the impact of its decision on children, the Court should, I suggest, be prepared to exercise its discretion in awarding or denying costs in appropriate circumstances to protect the integrity of the Court, to encourage parties to adopt reasonable positions and to discourage misuse of the Court's time and unnecessary expense.

AN ASSORTMENT OF NOVA SCOTIA CASES ON THE ISSUE OF COSTS IN FAMILY LAW PROCEEDINGS

- *Casey v. Casey* (2005), 238 N.S.R. (2d) 39 (NSSC, F.D.)

A father successfully applied to vary a child support order for his nineteen year old daughter who was attending university. The mother was ordered to contribute to the child's living and education expenses. The father was represented by counsel. The mother was unrepresented. The hearing took one-half day. Gass, J. referred to *Andrews v. Andrews* (1980), 20 R.F.L. (2d) 348 (Ont. C.A.) stated:

> "Costs are in the discretion of the court. The list of considerations in exercising one's discretion to award costs is not exhaustive, and may include issues such as the success of the parties, the conduct of the parties prior to the commencement of a litigation, the conduct of the parties during litigation, the income and assets of each party, the respective means to bear their own costs and the effect of an award on the ability of a party to meet obligations imposed by the judgment . . ."(para.7)

She concluded that the father was the successful party and noting that the mother earned $5,000.00 a year more than the father but otherwise had roughly similar financial circumstances, ordered the mother to pay $750.00 costs.

- *Connolly v. Connolly* (2005), CarswellN.S. 320 (NSSC, F.D.)

The petitioner wife sought costs after a two day divorce trial. Gass, J. found that she was "substantially successful in the result." The wife lived in Nova Scotia and the husband in Newfoundland. The wife sought costs in the sum of $3,000.00. Justice Gass held:

> "9. I am satisfied that an award of costs is appropriate in this situation in that the petitioner was substantially successful in her claims. However, I am mindful of the fact that the respondent will have significant access costs, and he already has an order to pay substantial [child support] arrears. Any order of costs should not have an adverse impact on the children's emotional or material well being. Access with their father is important for their emotional well being and the child support obligations are critical to their material well being.
>
> 10. Considering the circumstances of the matter, and balancing the fact that two full days of trial were required with the respondent's position that he represented himself because he could no longer afford to pay legal expenses, I will order costs at a substantially reduced amount. Mr. Connolly will contribute $500.00 towards Ms. Connolly's costs and he shall have one year to pay."

- *Sheppard v. Sheppard* (2005), 233 N.S.R. (2d) 379 (NSSC, F.D.)

This case involved a divorce after a twenty-nine year marriage. Costs were denied to both parties. The trial judge stated that the Court expects a high standard of civility in the practice of law and the conduct of barristers before the court and reasonable decision making in the resolution of marital disputes. Legere-Sers, J. stated:

> "Costs can be an effective instrument used to compensate a party in accordance with Rule 63 and prevailing case law when the conduct of one party unreasonably escalates the costs of trial and ultimately the appropriate resolution of the issues needing to be resolved.
>
> In this case the conduct of each of the parties was absolutely unacceptable." (paras. 56 and 57)

- *Paquet v. Clarke* (2005), CarswellN.S. 20

The mother unsuccessfully applied pursuant to section 37 of the Maintenance and Custody Act to vary the custody and access provisions of a Consent Order of the Supreme Court; specifically seeking permission to relocate with the children from Dartmouth to Sherbrooke, Quebec. The father applied for costs. The Court considered the general principle as outlined in Bennett (see below) and referred also to Kaye v. Campbell (also below) which stated that there must be good reason not to award costs to a successful party in a matrimonial cause and such reason must be based on principle. The hearing took approximately one day. The father was for the most part successful. Neither party

misconducted themselves and the case involved an issue of average complexity. The husband was entitled to costs.

> "Nevertheless before awarding costs in a matrimonial proceeding consideration should be given to the financial circumstances of the parties and any child who may be affected by the Court's order.
>
> While on the surface it appears that the parties are in similar financial circumstances, and Mr. Clarke is paying child support, up until now Ms. Paquet has paid a disproportionate share of the children's extra-curricular activities and child-care expense. Any decision that affects her finances will also impact on the children. She has incurred legal expenses of her own and, based on her income I accept that costs in the amount requested by Mr. Clarke ($1,881.25) would result in a considerable burden on her budget."
>
> Costs in the sum of $750.00 inclusive of disbursements were ordered.

- *Voiculescu v. Voiculescu* (2003) CarswellNS 564 (N.S.S.C., F.D.)

The husband had petitioned for a divorce. The wife sought an unequal division of various assets and debts in her favor as well as spousal support. After a trial which was heard over a day and

a half, it was ordered that the net equity in the former matrimonial home would be shared equally by the parties and the application for spousal support was dismissed. The husband applied for costs. The husband was self-represented. The husband was, by and large, the successful party. There were no factors that should negate his ability to recover costs or for costs to be reduced. The rule of thumb in *Urquhart* (seen below) was applied and, using Scale 3, costs of $3,375.00 were granted plus disbursements for a total of $4,175.00.

- *Joudrey v. Joudrey* (2003), 212 N.S.R. (2d) 9 (S.C.)

The wife in a divorce and a matrimonial property litigation was "successful." She received more than the husband's settlement offer made more than seven days before the trial. LeBlanc, J. held that costs were within the Court's discretion and there is no reason to depart from the general rule that the successful party was entitled to costs.

The trial judge also concluded that the "amount involved" approach to costs in family proceedings was problematic and decided against following that approach. Instead, he used the rule of thumb approach found in *Urquhart v. Urquhart* (see below) in which the "amount involved" is set at $15,000.00, multiplied by the number of days of trial. He then applied Tariff A, Scale 3. The trial lasted four days. Using this approach he granted the wife costs of $5,375.00 for the trial, $1,500.00 for interim applications and $2,391.15 in disbursements.

- *Guillena v. Guillena* (2003), 212 N.S.R. (2d) 101 (NSSC, F.D.)

This case involved a divorce after seven and a half years of marriage and two children then aged eight and six. The wife petitioned for a divorce, sought custody of the children and an equal division of matrimonial property as well as child support. The husband was working in the United States, failed to make financial disclosure, failed to appear at the trial (although he was represented by counsel at trial) and had not seen the children in one and a half years. The divorce was granted, custody was awarded to the wife. An equal division of property was ordered as was child support, including retroactive child support. The wife was awarded costs in the sum of $4,000.00.

> "Although the Respondent did not attend the trial and no evidence was offered on his behalf, he did not consent to any of the corollary relief sought by the Petitioner thus putting her to the expense of having to prove her claim. He failed to comply with the disclosure provisions of the Civil Procedure Rules and the Child Support Guidelines and he ignored the Court's directions and orders to produce his financial information. Costs is an appropriate sanction when a party to a divorce proceedings fails to comply with the disclosure provisions of the Civil Procedure Rules. The Child Support Guidelines also allow for costs amounting to a full indemnity when a party to a child support application ignores the disclosure requirements of the Guidelines. Further, when a party inexcusably ignores the Court's order to provide financial disclosure, that party should not be surprised if costs are assessed in favor of the opposing litigant." (para. 46)

- *Hill v. Hill* (2003), 213 N.S.R. (2d) 185 (C.A.)

The wife in a divorce and a matrimonial property action was awarded $8,850.00 in costs because she "has gained more than she lost by going to trial." The husband appealed arguing that there was split success. The Court of Appeal upheld the trial judge's decision stating that while the wife was not successful on all issues the trial judge was in the best position "having presiding over this protracted litigation" to make the assessment and "an award of costs is a discretionary order and subject to deference."

- *Gardiner v. Gardiner* (2002), 209 N.S.R. (2d) 214 (NSSC, F.D.)

After a divorce, which included a claim for child support, the wife sought an order for costs. After referring at length to the Civil Procedure Rules and the decision of Hallett, J. (as he then was) in *Bennett v. Bennett* (1981), 45 N.S.R. (2d) 683 (T.D.) – see below – Smith, J. (as she then was) denied the application.

> "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 lengthening the duration of the proceedings . . . 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." (paragraphs 21 and 23)

- *Aulwes v. Mai*, SFHCAA 013786

A child was ordered returned to the father under the Hague Convention after a five-day hearing. Costs were awarded on a solicitor-client basis to the child's father and on a party and party basis to the mother's second husband. Goodfellow, J. held that the Hague Convention does not limit the court's discretion with respect to costs. The mother, who was a sophisticated and well educated professional, embarked on a conscious and deliberate course of misconduct to keep the daughter away from the father. These "rare and exceptional circumstances" warranted solicitor-client costs. The second husband was awarded only party and party costs as he had knowledge of and supported the mother's activities to some extent.

- *Kennedy-Dowell v. Dowell* (2002), 209 N.S.R. (2d) 392 (NSSC, F.D.)

After a divorce and *Matrimonial Property Act* proceeding which also involved a claim by the husband for spousal support and a claim by the wife against the husband for child support, the wife sought costs. Campbell, J. stated:

"Costs in matrimonial proceedings, are authorized by Civil Procedure Rule 57.27 and 63.02. Despite some occasional comments in the cases to the contrary and recognizing that in family matters costs need not always follow the event, the case law seems relatively clear that the successful party in a matrimonial cause is no less entitled to costs than in any other type of proceedings . . . There is a recognized difficulty in assessing costs in family matters because of the fact that they often involve a large number of issues including those not capable of being quantified in money.

One of the purposes of awarding costs is to provide an incentive for the parties to earnestly pursue settlement. To say it another way, costs can provide a disincentive to a party who might otherwise take an unreasonable bargaining position prior to or at trial. It follows that the reasonableness of the bargaining position of the parties is a major factor in the court's exercise of discretion to award costs.

. . .the court should measure each party's bargaining position against the court's adjudication to measure the reasonableness of each position. It is also relevant to compare the court's award against each party's position at trial (which is often significantly different from their pre-trial bargaining position)." (paragraphs. 9-12)

The trial and other court appearances totaled 4.5 days. Campbell, J. recognized the difficulty in setting the "amount involved" under the *Costs and Fees Act* and instead applied the rule of thumb

coined by Goodfellow, J. In *Urquhart*. Although the wife was largely successful, the Court recognized the husband's success on the child support issue and thereby reduced the amount involved accordingly. The husband was ordered to pay the wife costs of $4,375.00 including disbursements.

- *Hanakowski v. Hanakowski* [2002] N.S.J. No. 364 (Family Division)

Following a divorce, the husband sought costs. Costs were granted to the husband in the sum of $2,500.00. He was considered to be successful, although not to the extent that he had hoped. It was necessary for him to bring his application to the Court in order to collect child support. Although the wife had made significant concessions during the course of the trial, those concessions could just have easily been made prior to the trial (for example, during two settlement conferences that had been scheduled) and had those concessions been made earlier, a trial possibly could have been avoided and, at the very least, legal expenses incurred by both parties could have been significantly reduced. The wife also failed to fully comply with directions given by the Court during pre-trial conferences and she failed to provide full financial disclosure in a timely fashion thus adding to the husband's costs.

- *Grant v. Grant* (2002), 200 N.S.R. (2d) 173 (NSSC, F.D.)

The parties separated after a marriage of approximately four years. The wife petitioned for divorce and sought a division of matrimonial property as well as child and spousal support. The Court ordered an unequal division of property in the wife's favor as well as child and spousal support and other relief. Williams, J. considered the relative success of the parties and the conduct of the wife and her lawyer which unnecessarily lengthened and inflamed the proceedings and ordered the wife to pay $12,000.00 in costs to the husband as well as $2,250.00 towards his disbursements. He said at paragraphs 38 and 39:

> I conclude that the manner in which this proceeding was conducted by Ms. Grant and her counsel . . . unnecessarily complicated and lengthened the proceeding, by raising incorrect, improper, vexatious . . . and unnecessary allegations, assertions and accusations. Too often, they were made without due or any regard to the background material and information available. Too often hyperbole was embraced. The first part of the trial was conducted in an exaggerated manner. On some critical issues . . . the assertions made by Ms. Grant (up to the time of her testimony in trial) were less than accurate.
>
> . . . I conclude that the manner in which the proceeding was conducted by Mr. Leahey and Ms. Grant unnecessarily lengthened the proceeding. It was rife with unproven allegations, some of which had no practical likelihood of being true . . . It inflamed the proceeding.

Williams, J. stated that the "amount involved" is difficult to determine in multi-issue matrimonial proceedings and said:

> "One is left observing what others have, that an 'amount involved' analysis has limited utility in complex, multi-issue matrimonial proceedings. That is particularly so, I believe, where the litigation is as conflictual as this was." (para. 42)

- *MacLean v. MacLean* (2001), 200 N.S.R. (2d) 34 (T.D.)

The husband applied to vary (terminate) his spousal support payments to his former wife. The application was dismissed. Goodfellow, J. held that the wife was primarily successful and was entitled to costs. The hearing, in chambers, took in excess of an hour. Goodfellow, J. stated beginning at paragraph 19:

> "Full disclosure in family matters is a given. Failure of a party to do so will, in most circumstances, result in adverse consequences . . .
>
> Failure to comply with this basic prerequisite, full financial disclosure almost automatically will have cost consequences because compliance of such a fundamental requirement should rarely require the Court's intervention . . .

> The Court has developed a zero tolerance policy where financial disclosure could reasonably have been complied with without Court intervention.
>
> . . .
>
> In this case, Ms. MacLean, although successful . . . did not provide her up-dated financial information in a timely fashion as should have been and therefore, her costs entitlement fixed at $1,200.00 is reduced to $900.00."

- *MacKay v. Bucher* [2001] N.S.J. No. 473 (C.A.)

The mother of an eleven-year old child applied provisionally in British Columbia to vary a consent order for a lump sum award of child support seeking ongoing periodic payments. The lump sum order was made in Nova Scotia under the *Family Maintenance Act*. The order was varied provisionally but the Nova Scotia Family Court declined to confirm the provisional order. The Nova Scotia Court remitted the matter to British Columbia for further evidence on the entitlement to special expenses. On appeal by the mother, the Court of Appeal reversed the denial of child support. The child support was varied to conform with the table amount under the Child Maintenance Guidelines. At a subsequent hearing, the father applied for costs. The Family Court Judge awarded solicitor-client costs in his favor to the extent of seventy-five percent of his actual fees. That order was made after the hearing of the appeal but before the announcement of the Court of Appeal's decision.

The Court of Appeal upheld the cost award stating that in ordering solicitor-client costs the judge found that the mother swore a false affidavit misrepresenting, among other things, the quality of the legal service which she had received at the time of entering into the lump sum agreement. She provided no explanation for the statements in her affidavit and the trial judge accepted that her false evidence on the various issues required the father to disprove the allegations. As a result, he incurred substantial additional expense. The costs award was driven by the mother's misconduct. The trial judge categorized the mother's misconduct as a "rare and exceptional circumstance" meriting the solicitor-client costs award. The Court of Appeal was not persuaded that the trial judge's decision reflected any error or that it was manifestly unjust.

- *Mayer v. Mayer* (2001) CarswellNS 359 (T.D.) - upheld on appeal (2002) CarswellNS 372

This case involved a divorce proceeding after a marriage of approximately fourteen years and two children. The children remained with the husband. The wife petitioned for divorce and Corollary relief. Many issues were agreed upon by the parties. The Court ordered an equal division of assets. The husband was ordered to pay costs to the wife in the sum of $5,000.00 plus disbursements for the trial. Associate Chief Justice MacDonald (as he then was) stated:

> "The Court certainly takes a dim view on anybody who has tried to thwart the administration of justice by hiding or failing to disclose assets, because it makes it much more difficult for our system of justice to work in those circumstances. I

have found that on the two major issues, the Austrian bank account and the RBC securities account, that that was exactly the case, and that Mr. Mayer was so responsible. For this reason, Ms. Mayer is entitled to an award for costs.

At the same time, however, it is not the duty to award punitive damages by way of costs. That would be wrong. Costs should be compensatory in nature and reflect the nature of the trial, which lasted two days. Furthermore, I accept Mr. MacLean's [counsel for the husband] submissions that the parties have made great strides, to their credit, to narrow the issues down to make this a two day trial. And finally, there has been mixed success in the issues that I have been asked to decide." (paragraphs 41 and 42)

- *Ellis v. Ellis* (1999), 175 N.S.R. (2d) 268 (C.A.)

After a six-year marriage the wife sought a divorce, custody of the children, arrears of maintenance, child support and a division of property. The husband sought joint custody, generous access and claimed undue hardship. The Trial Division granted the divorce and awarded the wife sole custody with specified access to the husband. The Court also awarded the wife spousal and child support and divided the matrimonial property. The husband, who

represented himself on appeal, appealed the trial judge's decision on most of the issues, including costs. At trial each party's legal fees approximated $40,000.00. The trial judge set the "amount involved" at $130,000.00 and awarded the wife costs, based on Scale 4 of Tariff, in the sum of $10,000.00 for the trial and $4,000.00 with respect to an interlocutory application on the issue of mobility. Tidman, J. stated:

> "the higher degree of complexity of these proceedings was for the most part caused by the respondent by insisting on joint custody" and "[Mr. Ellis] added to the complexity by presenting an argument that I can only term as preposterous in opposing the payment of any child support".

The Court of Appeal held that costs were in the discretion of the Court and it is only where the judge has erred in principle or the award of costs works a manifest injustice would the Court of Appeal interfere.

The Court of Appeal reduced the costs awarded for the interlocutory proceeding from $4,000.00 to $2,500.00 because the trial judge calculated his award based on five full days (at $750.00 per day) when the hearing took place over five partial days of hearing.

- *Stoodley v. Stoodley* (1997), 172 N.S.R. (2d) 101 (T.D.)

This was a divorce proceeding involving the issues of matrimonial property and occupation rent. The wife was more successful than the husband. Goodfellow, J. awarded costs in the sum of $1,800.00 inclusive of disbursements and stated:

> "Mr. Stoodley has conducted himself in such a manner as to unnecessarily delay and incur costs to Mrs. Stoodley, and Mrs. Stoodley is also entitled to her costs following the event."(para. 48)

- *Urquhart v. Urquhart* (1998), 169 N.S.R. (2d) 134 (T.D.)

The wife petitioned for divorce and a division of property. At the conclusion of the hearing the wife sought costs in the sum of $15,000.00. The husband suggested an award of $2,500.00 "would be more than adequate". Goodfellow, J. stated:

> "This like many matrimonial matters, does not easily equate with an "amount involved", which in itself, usually relates to a degree of exposure in an action."(para. 61)

And (at paragraphs 62 and 63):

> "There is an need for some degree of uniformity in the exercise of judicial discretion, with respect to entitlement and quantum of costs. Very clearly, [the wife] is entitled to her party and party costs, and as one can readily see from the representations of counsel, they are expressing their view as to what might be reasonable, without any reference to a starting point or bench mark.
>
> In all of the circumstances, I conclude that resort should be taken to Tariff "A". In the determination of costs, I have guidance from the developing rule of thumb of equating each day of trial to an amount of $15,000.00 where there is no clear "amount involved". This has the benefit of reflecting the time aspect of the trial, which in itself, normally reflects the degree of preparation and time."

He then referred to his decision in *Veinot v. Veinot Estate* (see below) and determined the amount involved to be $60,000.00 (four days of trial using Tariff "A", Scale 3) which resulted in a cost figure of $5,375.00. Justice Goodfellow then went on to state:

> "This amount, however, is not adequate or reflective of the additional work and effort required by [the wife's] counsel, due to the varying positions [the husband] maintained, such as the continuing claim for spousal support, failure to provide

any records whatsoever etc. His combative approach was at a higher level of combatitiveness than that of [the wife].” (para. 64)

Goodfellow, J. therefore resorted to Scale 5 and ordered costs of $7,525.00 exclusive of disbursements.

This appears to be the first time the “rule of thumb” referred to in the *Veinot* case was used in a divorce.

- *French v. French* (1997), 162 N.S.R. (2d) 104 (T.D.)

After twenty-five years of marriage and two children, the wife petitioned for divorce. The issues included the division of matrimonial and business assets, spousal support and child support. Hood, J. stated:

“Costs are in the discretion of the court. There was mixed success in the end result on the various issues raised. However, the trial proceedings were lengthened by unnecessary questioning about whether the salary paid to Lorraine French by Robert French was legal income splitting permitted by the Income Tax Act or whether it was somehow improper. I am satisfied on the evidence and, in particular, by the testimony of Robert French, that there was no justification for

an attack on Robert French's integrity, particularly an attack that focused on his professional ethics.

Dealing with this issue made the trial longer by approximately a half day, in my estimation . . . Therefore, I exercise my discretion to award costs in favour of Robert French in the amount of $750.00 for the wasted half day, since I found no merit whatsoever in the allegations of any impropriety by Robert French in the income-splitting.

Otherwise, because of the mixed success, I award no costs." (paragraphs 189-191)

- *Veinot v. Veinot Estate* (1998), 167 N.S.R. (2d) 101 (T.D.)

The sons of the deceased sought a constructive or resulting trust and the existence of an unregistered partnership. Goodfellow, J. stated beginning at para. 23:

"I do not consider these proceedings to be unduly complex, however, the matters were certainly of the utmost importance to the parties. In fixing "an amount involved" I take guidance from the Rules, the directions with respect to utilization of the Tariff of Costs and Fees and also from the practice I have utilized in the past of a rule of thumb so as to develop a real measure of consistency in

determining the “amount involved” where the non-monetary aspects are significant.

This rule of thumb has been used as a check in land/boundary dispute cases and in complex Chambers applications. *T.D. Bank v. Lienaux and MacNutt* (1993), S.H.93-5807, February 18, 1997, unreported:

> “In *Colins v. Speight* (1993), 123 N.S.R. (2d) 71 and also *Wyatt v. Franklin* (1993), 123 N.S.R. (2d) 347, I dealt with two and a half/ three day trials and developed a rule of thumb by way of a check for consistency and uniformity of treating each day or part of the final day of the trial as equivalent to $15,000.00.”

The *Veinot* case involved seven days of Court time and thus utilizing the rule of thumb to which he referred, Goodfellow, J. set the amount involved at $105,000 and using Tariff “A”, Schedule 3 ordered party and party costs to each of the claimants in the sum of $7,525.00 plus disbursements.

- *Thibault v. Thibault* (1997), 164 N.S.R. (2d) 137 (T.D.)

This was a divorce proceeding after a twenty-year marriage. The issues included the division of property, spousal support and child support. The wife sought costs in the sum of $2,000.00 plus disbursements. The proceeding involved several interlocutory applications in order to compel the husband to provide financial information and to preserve assets. Tidman, J. stated:

> "It seems to me that all of the issues could have been resolved without trial, had the respondent faced up to and dealt with those issues. Certainly, the resources of this family are not commensurate with the long and projected legal proceedings which the petitioner was required to endure.
>
> Under the circumstances here I will order costs against the respondent in the claimed amount of $2,000.00, plus reasonable disbursements." (paragraphs 29 and 30)

- *Godfrey-Smith v. Godfrey-Smith* (1997), 165 N.S.R. (2d) 245 (T.D.)

The husband petitioned for divorce and sought a division of matrimonial property and joint custody of the parties' two children. The wife sought sole custody, spousal support and child support. The trial judge granted the divorce, ordered joint custody and set the amount of child support to be paid by the husband. The wife's claim for spousal support was dismissed.

The husband sought a substantial order for costs due to the wife's failure to disclose information. Associate Chief Justice MacDonald (as he then was) stated:

> "I am very hesitant to add an order for costs on top of the disposition that I have given here today because the main theme of my disposition was to enhance cooperation for the future. I do not want to prolong the acrimony. I do not want to throw a wrench into future cooperation. Furthermore I am not in my decision faulting either party more than the other for the ongoing lack of communication and lack of cooperation. As well Mrs. Godfrey-Smith was successful on some issues.
>
> However, I cannot ignore the lack of disclosure on the part of Mrs. Godfrey-Smith in this matter. I cannot help but conclude that had Mr. Godfrey-Smith known her position on the sabbatical (as eloquently stated in court) this matter may very well have been resolved. As well we have the problem with her late income tax returns and other discovery undertakings. **My need to protect the integrity of the court system for future cases overrides my reluctance to order costs.** (Emphasis added) Our system is designed to promote settlement and timely disclosure serves a very important purpose. This case is a classic example, I believe, of where disclosure may very well have gone a long way to promote settlement . . . I feel that I am left with no other alternative but to order costs in favour of Mr. Godfrey-Smith. I repeat that my order for costs is not designed to punish. It is designed to protect the integrity of our litigation system and to

encourage settlements in future cases. As well, it is designed to indemnify Mr. Godfrey-Smith fractionally for his solicitor-client account. I order costs in the amount of $4,000.00 (inclusive of disbursements which I estimate to be $600)". (paragraphs 52-54)

- *Marshall v. Marshall* (1996), 157 N.S.R. (2d) 102 (T.D.)

After granting a divorce the Court addressed the issues of custody, access, child support and the arrears of child support. With respect to costs, Goodfellow, J. stated:

"Anyone, when they have a claim, is entitled to their day in Court, but the consequences have to be addressed. If you are successful, you generally get costs; if you are unsuccessful, you don't." (para. 34)

Justice Goodfellow felt that some of the issues were unnecessarily before the Court and he ordered the husband to pay to the wife party and party costs in the sum of $1,200.00 including disbursements.

- *Chapman v. Chapman* (1996), 155 N.S.R. (2d) 19 (T.D.)

This was a divorce proceeding. The issues included the enforceability of an agreement between the parties. The wife was successful. The wife sought costs in accordance with the

Tariff. She sought $3,375.00. Goodfellow, J. stated that he agreed that costs should generally be awarded in family matters but stated:

> "....I would award the costs sought; however, given the added dimension of the children and the need for the father to have some resources for his own association with the children and that this matter has been disposed of in less than two hours, I am going to provide some relief to Mrs. Chapman and I tax and allow costs and disbursements at $1,100 payable within six months from this date."(para. 21)

- *Ffrench v. Ffrench* (1994), 135 N.S.R. (2d) 321 (T.D.)

The wife petitioned for divorce and sought custody and support for the two children and lump sum spousal support. She was awarded sole custody, lump sum spousal support and monthly child support. The trial lasted four days and the conclusion "was very close to the position Mrs. Ffrench took with respect to settlement and unfortunately Mr. Ffrench did not, until during the course of the trial, agree to a lump sum maintenance payment to cover funds garnisheed incorrectly from Mrs. Ffrench, and he had at no time offered child support greater than $300.00 per month.

In addition Mr. Ffrench took a rigid position with respect to custody of the children, and the positions he took not only resulted in additional unnecessary expense to the custodial parent of the children by requiring a day that ought not to have been necessary, but also by exercising

his right to act as his own counsel, he ended up protracting the trial by at least a day and a half from what would have been anticipated had he been represented by counsel."

With respect to costs, Goodfellow, J. stated:

> "Costs as between party and party are not imposed as a punishment on the person who must pay them. Party and party costs are given in the discretion of the court as a partial indemnity to the person entitled to them.
>
> ....
>
> [I]n the exercise of discretion the court awarding costs in situations such as this must acknowledge the public's interest in the administration of justice, and that a party who utilizes the limited judicial resources available and also increases unnecessarily the expenses of the other party, costs should be awarded partly in the hope that a message of deterrence is conveyed." (paragraphs 7 and 9)

In this case (which preceded *Urquhart*) Goodfellow, J. referred to Tariff "A", fixed the "amount involved" at $60,000.00 and, using Scale 5 ordered costs in the sum of $7,525.00 in favor of the wife. He concluded that Mr. Ffrench had unreasonably increased the expense and costs to Mrs. Ffrench by refusing reasonable proposals by Mrs. Ffrench and adopting unreasonable positions of his own.

On Appeal (reported at (1995), 139 N.S.R. (2d) 39) the Court of Appeal reduced the husband's child support and therefore concluded that the husband's position on that issue at least was not as unreasonable as it may have been thought by the trial judge. The Court stated:

> "The higher scale should not be used to penalize a person who acts on his own behalf, or to discourage people from seeking a trial on custody and support issues." (para. 23)

Costs were reduced to $5,375.00 (using the third scale and the same amount involved).

- *Day v. Day* (1994), 129 N.S.R. (2d) 186 (T.D.)

The wife applied for a divorce after eighteen years of marriage. She also sought a division of matrimonial assets and spousal support. Her Petition was granted. The hearing took one day with additional time needed on a second day for arguments. The wife sought total costs of $4,250.00 plus disbursements of $814.51. Goodfellow, J. likened the trial to a heavily contested one day Chambers matter. He noted that the wife exhibited conduct prior to the hearing that was not conducive to settlement and required that the hearing take more time than should have been the case. Nevertheless Goodfellow, J. found that Ms. Day was entitled to have some relief by way of costs and ordered $1,700.00 plus disbursements in the sum of $750.01 plus GST on those disbursements.

- *Edwards v. Edwards* (1994), 127 N.S.R. (2d) 379 (T.D.)

The mother applied to vary the child support provisions of the Corollary Relief Judgment. The father counter-applied to vary the child support downward and then added four other applications relating to access to the children, the surname of the children, school and medical information relating to the children and money held in trust for the children. The wife's application was granted, the husband's applications were dismissed. The wife sought costs. Grant, J. stated:

> "This application got out of hand, in my opinion, primarily because of the conduct of the father."

He also concluded that the husband failed to disclose in a timely fashion income relating to his new wife and opined that the delay was to frustrate the preparation and conduct of the wife's case. "[Costs] are to be a "substantial contribution" to a party's reasonable expense." In spite of the husband's conduct, Justice Grant did not believe solicitor and client costs were warranted. He fixed the "amount involved" at $130,000.00 by multiplying the increase in the monthly child support by twelve to arrive at a figure of $13,000.00 per year and then extrapolating that figure over ten more years when the youngest of the two children would be fifteen. He then reduced that amount because of the possibility for future variations to $100,000.00 and applied Scale 5. In addition he ordered disbursements reimbursed to the wife in the sum of $1,192.00. That decision was upheld on appeal ((1995), 133 N.S.R. (2d) 8).

- *Chaddock v. Chaddock* (1993), 121 N.S.R. (2d) 274 (T.D.)

The wife petitioned for divorce. The main issue was child support. The Petition was granted as well as child support and the wife sought costs. While the husband was successful in resisting some of the wife's claims, the wife was largely successful. Saunders, J. (as he then was) stated:

> "As a rule costs follow the result. A successful litigant in Nova Scotia is generally awarded costs provided that party's conduct is free from reproach. *Bennett v. Bennett* (1981), 45 N.S.R. (2d) 683; 86 A.P.R. 683. While it is recognized that in matrimonial causes it may sometimes be inappropriate to make an order that costs should follow the event, there must be a good reason not to award costs to a successful litigant in a matrimonial cause. Such reason must be based on principle. *Kaye v. Campbell* (1984), 65 N.S.R. (2d) 173 ..."(para.5)

He concluded that there was no reason to deny the wife's claim for costs. He fixed the "amount involved" under Tariff "A" at $3,000.00 and ordered the husband to pay costs of $1,050.00. He characterized the husband's conduct throughout the proceeding as "uncooperative or tending to be vexatious or unnecessary so as to draw the court's disapproval" which resulted in a greater imposition of costs than would otherwise be the case.

> "I have no doubt that the respondent's refusal to cooperate and provide [information requested by the wife and demanded by the court] was done to thwart his wife's efforts to place relevant information before the court. As a result the petitioner was put to great expense in her efforts to obtain disclosure of matters which would not have been controversial and ought to have been provided voluntarily. The respondent's behavior will result in costs against him on Scale 5." (para. 17)

- *Legere v. Legere* (1993), 118 N.S.R. (2d) 446 (T.D.)

The parties divorced after thirty years of marriage and four children. The primary issue was spousal support which the wife was granted. No costs were ordered.

- *Draper v. Draper* (1993), 115 N.S.R. (2d) 193 (T.D.)

The wife petitioned for divorce, sought custody of the parties' daughter and applied for maintenance and a division matrimonial assets. The divorce was granted, the wife was given custody and the matrimonial home was divided unequally in favor of the wife. The wife also received spousal and child support. The wife sought costs in the sum of $5,625.00 and the husband proposed costs in the sum of $2,000.00. The trial judge recognized the difficulty in dealing with costs in matrimonial matters because they often involve both monetary and non-monetary issues. Although Civil Procedure Rule 41A did not at that time apply to matrimonial proceedings the Court did consider the settlement offers exchanged by the parties pursuant to

Rule 67.06. The amount awarded the wife by the Court both under the ***Divorce Act*** and the ***Matrimonial Property Act*** exceeded her proposal. Costs of $3,500.00 plus disbursements were ordered in favor of the wife.

- *Bechard v. Bechard* (1992), 113 N.S.R. (2d) 230 (T.D.)

The husband and wife petitioned the Court for a divorce, a division of matrimonial assets and a determination of the husband's entitlement to spousal support and to a share of the wife's business. The divorce was granted and the matrimonial assets divided. The Court awarded the husband $2,000.00 for input into his wife's business and denied him spousal support. The trial judge concluded that:

"By far the majority of the success is in favor of the [wife]."

After referring to *Lawrence* and *Bennett* (both referred to below) and stating that the issues were not complex, the trial judge exercised her discretion and awarded the wife the sum of $4,500.00 in costs.

- *Stillman v. Stillman* (1991), 103 N.S.R. (2d) 271 (T.D.)

The wife petitioned for divorce, sought custody of the parties' three children, spousal and child support and exclusive possession of the matrimonial home and an equal division of

matrimonial property. The husband sought the enforcement of a Separation Agreement. The trial division set aside the parties' Separation Agreement based on unconscionability and harshness and awarded the wife custody, spousal and child support and an equal division of matrimonial property. With respect to costs, Saunders, J. (as he then was) stated:

> "Both the petitioner and the respondent seek their costs. I see no reason to exercise my discretion in any way other than that suggested by Mr. Justice Hart in *Lawrence v. Lawrence*...." (referred to below) (para. 230)
>
> No costs were awarded to either party.

- *MacNaughton v. MacNaughton* (1991), 103 N.S.R. (2d) 356 (A.D.)

The wife petitioned for divorce and sought spousal and child support. The parties agreed on custody, access and an equal division of matrimonial property. The trial division divided the matrimonial property, awarded the wife lump sum spousal support and periodic child support. The trial judge awarded the wife $1,000.00 costs. The Court of Appeal stated:

> "Although there have been some exceptions, the general rule has been that in matters of this kind the parties bear their own costs. We find no special circumstances or reasons in this case to depart from the rule usually followed. Accordingly we order that each party will bear his and her costs at both trial and on appeal." (para. 8)

- *Hargraft v. Hargraft* (1989) CarswellNS 566 (T.D.)

After fifteen years of marriage, the wife petitioned for a divorce. Custody was agreed upon. The issues primarily involved spousal and child support and the division of property. At the conclusion of the hearing, the wife sought costs on a solicitor-client basis. Richard, J. stated:

> "It is clear that in this jurisdiction solicitor-client costs are awarded only in the most unusual circumstances. I accept the submission of petitioner's counsel that the respondent was largely uncooperative throughout and his intransigence did considerably lengthen the proceedings and discourage any settlement discussions. The respondent was evasive and uncooperative in providing essential financial information and this caused greater expense than was necessary. However, I cannot say that the respondent's behavior throughout was so reprehensible, fraudulent or distasteful so as to warrant an award of costs on a solicitor-client basis."

Richard, J. referred to the decision in *Lawrence* and stated that it was his general practice in matrimonial matters to order that the parties bear their own costs because it encouraged more meaningful efforts to settle matters short of trial. However, whereas the Respondent by his actions (or inaction) did very little to "minimize costs" or "encourage settlement of the issues" Justice Richard departed from his normal practice and awarded costs to the Petitioner on a party and party basis.

- *McGrath v. McGrath* (1988), 86 N.S.R. (2d) 35 (T.D.)

The parties divorced after nineteen years of marriage. The husband was granted custody of a sixteen year old son. The wife was granted custody of an eighteen year old daughter and an eleven year old son. The husband earned more than twice that of the wife and was awarded child support. The wife sought costs arguing that she had acted in good faith, and was reasonable in her offers of settlement. Counsel for the wife referred to *Bennett* (see below) and *Kaye v. Campbell* of the Court of Appeal (also below) which decided that there must be a reason to deny costs to a successful party.

The trial judge concluded that with respect to the issues that were litigated, success was divided and therefore no costs were ordered.

- *Nolet v. Nolet* (1985), 68 N.S.R. (2d) 370 (A.D.)

The wife petitioned for divorce and applied for a division of matrimonial property. The trial division granted the divorce, confirmed a prior agreement between the parties regarding custody but refused the wife's application for spousal support. Child support was ordered. The Court also granted the wife exclusive possession of the matrimonial home and ordered the husband to convey his interests in the home to the wife in return for a mortgage payable in the future. The wife appealed the Court's decision with respect to spousal and child support, the interest rate applied to the mortgage and the trial division's refusal to award her costs (without reasons given). On that issue the Court of Appeal stated:

> "The general rule that costs will normally follow the event is not, strictly speaking, applicable in divorce proceedings." (para. 13)

The Court referred to the Court of Appeal decision in *Lawrence* (referred to below). Macdonald, J.A. stated that he:

> "...would not have faulted the learned trial judge had he awarded Mrs. Nolet full costs on the trial. In the exercise of his discretion, however, he declined to do so. I am not persuaded that he exercised his discretion on a wrong principle or in a non-judicial manner and I would therefore not interfere with his order as to costs."(para. 15)

- *Wilson v. Wilson* (1985), 68 N.S.R. (2d) 399 (T.D.)

The parties divorced after twenty years of marriage. The trial division ordered the matrimonial assets be divided and granted the wife spousal support. Both parties then applied for party and party costs. The Court considered among other things the case of *Lawrence* (referred to below) and the offers exchanged between the parties and ordered the husband to pay to the wife $12,485.55 for disbursements as well as one half of her party and party costs including costs of the application for costs.

- *Kaye v. Campbell* (1985), 65 N.S.R. (2d) 173 (A.D.)

The wife obtained a divorce and was awarded spousal support. The trial judge declined to order costs. The wife appealed. Her appeal was dismissed. The trial judge had declined to award costs on the ground that the wife had a superior income to that of the husband and that the husband had to pay child support. The Court referred to *Bennett* (see below) in which it was held that there must be good reason not to award costs to a successful party in a matrimonial cause. Macdonald, J.A. stated:

> "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 our opinion, this decision can be interpreted as denying costs on the ground of the respondent's impecuniosity. The trial Judge made his decision after seeing and hearing both parties and other witnesses and we are not convinced that he erred in the exercise of his discretion." (paragraphs 10 and 11)

- *Lawrence v. Lawrence* (1981), 47 N.S.R. (2d) 100 (A.D.)

A wife brought a petition for divorce and an application under the Matrimonial Property Act for a division of property. The trial division made a division of property and awarded the

wife both lump sum and periodic support. At trial the wife was awarded costs. The husband appealed. Hart, J.A. stated beginning at paragraph 50:

> "...Costs, of course, are in the discretion of the trial judge and in this case he has exercised that discretion by allowing costs to the wife to be taxed. I see no ground for interfering with this exercise of discretion.
>
> I would point out, however, that the intent of the Matrimonial Property Act is to create an equal division of the matrimonial assets of the parties at the time of dissolution of the marriage. Every attempt should be made to minimize costs in proceedings of this sort and to encourage settlement of the issues between the parties. **It may be that the time has come to treat the costs of a proceeding such as this as one of the liabilities of matrimonial property and to arrange any division of matrimonial assets so as to allow each party to pay equally towards the total amount of the costs**." [Emphasis added]

- *Bennett v. Bennett* (1981), 45 N.S.R. (2d) 683 (T.D.)

A Family Court judge refused to award costs to a wife who was successful in an application to vary a *Decree Nisi* because her former husband traveled some distance to attend the hearing. She filed a Notice of Objection requesting that costs be taxed.

After referring to Civil Procedure Rule 57.27 Hallett, J. (as he then was) stated beginning at paragraph 8,:

> "The learned Family Court judge found that the respondent had 'undergone considerable expenses to attend the hearing.' He stated that he could find no rationale for awarding costs...
>
> 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*).
>
> ...[T]he practice in the Supreme Court on applications to vary maintenance made pursuant to s. 11(2) of the Divorce Act is generally to award costs to the successful applicant."

After reviewing the law on costs in litigation proceedings generally and family law specifically, Justice Hallett concluded that there was no justifiable reason to deprive Ms. Bennett of her costs.

- *Swift v. Swift* (1981), 46 N.S.R. (2d) 562 (N.S.F.C.)

The husband applied to vary the access and maintenance provisions of a Decree Necee. The wife counter-applied seeking an increase in periodic maintenance and an order specifying access. The Family Court recommended a variation of the access provisions but no change in the maintenance provisions of the order. With respect to costs, Daley, F.C.J. stated:

> "The Family Court Rules permits costs to be awarded at the discretion of the Family Court judge. The ability to and the awarding of costs is a relatively recent and seldom exercised procedure in the Family Court. The policy of the courts, in general, in matrimonial matters of this kind has been to award costs against the male spouse or not to award any costs, and does not necessarily follow what seems to be the general policy in other civil matters, i.e., that costs are awarded to the successful party. The rationale for not holding female spouses accountable is from what I have been able to determine, a carry over from former times when the female spouse was unable to pay costs based on their legal position vis-a-vis ownership of property. Times, of course, have changed. It would seem to me that to award costs and to do it with fairness, is to have information on which to base an award. That may not be possible but I do believe that some criteria or standard should be put forward for the court to consider. None were put forth although a specific amount was requested. I do not know if the amount is appropriate. I therefore award no costs."(para.16)

- *Travis v. Travis* (1975) 10 N.S.R. (2d) 181 (A.D.)

The husband petitioned for divorce and the wife counter-petitioned. The trial judge dismissed the husband's petition and granted the wife's counter-petition and awarded her maintenance. The trial judge did not award costs to either party.

The trial judge based his decision to deny costs on *Chapman v. Chapman*, [1972] 3 All E.R.1089. In that case the wife alleged that the parties had lived separate and apart for at least five years prior to her petition and asked for costs. The petition was undefended. On Appeal Lord Denning said in the course of his judgment that:

> "If a wife seeks a divorce on the five year grounds she should pay her own costs of it, just as the husband has to do."

Cooper, J.A. stated:

> "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." (emphasis added) Here, leaving the counter-petition aside for the moment, the appellant was fully justified in resisting the attempt by the petitioner to escape payment of maintenance. I think also that she was justified in the course she took of issuing a counter-petition on the ground of three years separation rather than five. She succeeded on the counter-petition for a decree of

divorce and in her claim for maintenance. I cannot find any special considerations which would disentitle her, as the successful party, to her costs.

...

I therefore respectfully conclude that the trial judge was in error in not awarding costs to the appellant which I think she should have on the party and party scale. I come to this conclusion on the particular facts of this case and express no opinion as to the disposition of costs in a situation where no question as to maintenance or otherwise arises justifying appearing at the trial and where the petition is grounded upon s. 4(1)(e)(i) or s. 4(1)(e)(ii) of the Divorce Act.

...

I would allow the appeal with costs." (paragraphs 6,12 and 13)

- *Keddy v. Keddy* (1974) 8 N.S.R. (2d) 158 (A.D.)

The husband petitioned for divorce on the grounds of adultery. The trial judge granted the husband's petition and ordered him to pay spousal support to the wife. The husband was granted custody of the children. The wife appealed. The Appeal Division increased the maintenance payable to the wife. With respect to costs, MacDonald, J.A. stated:

> "I am aware of and accept the principle that wives are no longer to be considered prima facie as being entitled to recover their costs from their husbands in matrimonial actions.
>
> ...
>
> The general rule of practice that appears to have developed is that where a wife is a defendant in a divorce action, although unsuccessful, she is entitled to costs if her defence has been fairly and reasonably conducted.
>
> ...
>
> From a common sense point of view it appears to me that a court in exercising its discretion as to costs should consider all the circumstances in general and in particular the financial position of the parties. A wife with no liquid assets should normally be entitled to costs from an affluent husband, unless there are

> extenuating circumstances to the contrary. There is surely an equitable aspect in the exercise of a discretion on costs and I think the matter was well stated by Widgery, L.J., in *Gooday v. Gooday*, [1968] 3 A.E.R. 611, at 616 when he said "... indeed, in the exercise of his discretion as to costs *he must do what is right and just in the case before him*." (Italics added) (paragraphs 39 to 41)
>
> ...

The husband who was a medical doctor and earned $76,000.00 in 1972, was ordered to pay to his wife, a receptionist at a hospital earning $3,900.00 per year, costs arising out of the trial and the appeal on a party and party basis.