6101-02281

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

MARY CURRIE

Petitioner
(Respondent)

- and -

CLAYTON EARL CURRIE

Respondent
(Applicant)

Application to set aside default judgment on a matrimonial property claim. Granted on terms.

Heard at Yellowknife on December 23, 1994

Judgment filed: January 3, 1995

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE J.Z. VERTES

Counsel for the Petitioner: (Respondent) Garth L. Wallbridge

Counsel for the Respondent: (Applicant) Sydney A. Sabine

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REASONS FOR JUDGMENT

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2
dent in the original action and so, for sake of consistency, I will refer to him as "the respondent". The respondent to this application, Mary Currie, was the petitioner in the original action, so I will refer to her as "the petitioner".

)93, 3 the petitioner filed a Petition for Divorce seeking a divorce judgment and a division of matrimonial property. I pause to point out that counsel now appearing for the petitioner was not the one repre-senting her in the original proceedings.

ne is 4 entitled to join claims under the *Matrimonial Property Act*, R.S.N.W.T. 1988, c. M-6, with claims under the *Divorce Act*,

R.S.C. 1985, c.3 (2nd Supp.). Then, as now, there were no specific rules governing the procedure for the trial of such claims other than the facility to obtain directions from a judge and the general applicability of the Supreme Court Rules respecting civil proceedings.

The Petition filed in this case reads in its entirety as follows:

> The Petitioner and the Respondent acquired certain assets during the course of their marriage and it is the Petitioner's position that she contributed, either directly or indirectly, to the acquisition of such assets and is therefore entitled to a one half interest in the said property.
>
> In particular, the parties own or owned the following assets:
>
> a) Mobile home and land in Yellowknife, recently sold and the net proceeds were just under $8,000.00;
>
> b) Truck and 5th wheel travel trailer with a value of approximately $60,000.00 (equity of about $8,000.00);
>
> c) R.R.S.P.'s in the Petitioner's name with a value of $7,700.00;
>
> d) R.R.S.P.'s in the Respondent's name with a value of $10,750.00, held with North West Trust, Saskatoon Branch, 222, 2nd Avenue S., Saskatoon, Saskatchewan, S7K 1K9 (certificate #115166);
>
> The parties also have the following debts:
>
> a) Revenue Canada - Petitioner - $10,360.00
>
> b) Revenue Canada - Respondent - $10,360.00

c) Joint Visa account - $4,200.00

d) Joint Sears account - $3,000.00

e) Personal loans - 5th wheel camper - $27,000.00
- truck - $25,000.00

The Respondent has in his possession the 5th wheel camper and truck, (equity about $8,000.00) and the Petitioner has retained the net proceeds of the sale of the mobile home (approximately $8,000.00);

The Respondent has continued to make, and is likely to continue making the monthly payments on the personal loans as he retains the assets which secure the said loans.

The Respondent has made no payments on the other joint debts ($7,200.00) since the separation and is not likely to make any such payments so that these will become the Petitioner's responsibility.

The Petitioner, therefore, has retained the following matrimonial assets:

Proceeds of sale	$8,000.00
R.R.S.P.	$7,700.00

LESS:

Visa debt	$4,200.00
Sears debt	$3,000.00

The Respondent has retained the following matrimonial assets:

Equity in truck and 5th Wheel	$8,000.00
R.R.S.P.	$10,750.00
TOTAL	$18,750.00

The Petitioner therefore claims, by way of an equalization of matrimonial assets, a judgment that the Respondent holds his R.R.S.P. with North West Trust in Saskatoon plus accrued interest in trust for the Petitioner and prohibiting the Respondent from selling or otherwise dealing with the said R.R.S.P. except subject to the Petitioner's interest as aforesaid.

6 The petitioner applied for and obtained an order for substitutional service of the Petition on the respondent by service on the respondent's sister in Alberta. Service was effected on February 22, 1993. There was no response so the respondent was noted in default on May 5, 1993. Also on May 5th, as provided for by the rules, the petitioner through her counsel applied *ex parte* for a divorce judgment on affidavit evidence. The divorce judgment was issued on May 6, 1993.

7 In addition to the divorce judgment, the petitioner's counsel also sought a "corollary relief order" with respect to the matrimonial property claim. The petitioner's affidavit on the *ex parte* application contained only the following paragraph with respect to this claim:

> I seek the following corollary relief:
>
> a) Division of matrimonial property pursuant to the Matrimonial Property Act of the Northwest Territories, and in particular, judgment against the Respondent in the amount of $10,750.00 by way of equalization of matrimonial property.

8 In the result, also on May 6, 1993, a "Corollary Relief Order" was signed by another judge of this court. That order provides:

> The Petitioner shall have judgment against the Respondent in the amount of $10,750.00 by way of equalization of net matrimonial property.

It is this judgment that the respondent now asks me to set aside.

9 There are a number of defects in the original proceedings that go beyond mere irregularities or technical complaints.

10 First, it will be obvious that the judgment respecting the matrimonial property claim is not, and cannot be, a "corollary relief order". Corollary relief, in the context of divorce proceedings, relates only to claims respecting support or custody orders: see *Divorce Act*, s.2(1). A matrimonial property claim is allowed to be joined with a divorce petition only as a matter of procedural convenience by the rules established by this court. A judgment obtained on such a claim is therefore a separate and distinct judgment, not a "divorce" or a "corollary relief" judgment.

11 Second, and most significantly in my opinion, there is no proper proof of the claim. The petitioner's affidavit on the *ex parte* application for the uncontested divorce merely sets out the relief claimed. It gives no evidence to support that claim. Unfortunately, this is probably due to a misconception as to the requirements in default proceedings.

12 The Supreme Court Rules draw a distinction as to the method for obtaining judgment in default of a defence:

(a) If the claim is on a debt or liquidated demand, or for the recovery of specific property, then final judgment may be signed by the clerk.

(b) In any other case, the plaintiff may apply *ex parte* for judgment or set the matter down for an assessment.

13 In the second method noted above, the plaintiff must prove its case. A final judgment granted in such instance is a judicial act, not an administrative one by the clerk, and can only be exercised on the basis of proper evidence. The failure of a defendant to defend does not prove the plaintiff's case. It may be considered generally as an admission

of liability, but it is not proof of either the cause of action or the particulars of the claim. For further discussion on the effect of default, see *Spiller et al.* v. *Brown*, [1973] 6 W.W.R. 663 (Alta. C.A.); and *Alberta Home Mtge. Corp.* v. *Fahlman et al.* (1983), 24 Alta. L.R. (2d) 172 (Q.B.).

14 In this case, once the respondent failed to reply to the petition, it may have been thought that the particulars of the property claim have been admitted. But Rule 116 of the Supreme Court Rules provides that the silence of a pleading as to any allegation in the opposite party's pleading shall not be construed as an admission of the truth of the allegation. Therefore, the failure to plead at all cannot be construed as an admission of the truth of the allegations in the petition. We do not have in this jurisdiction, as in some others, a specific rule that stipulates that a defendant who has been noted in default is deemed to admit the truth of all allegations of fact in the plaintiff's claim (see, for example, Rule 19.02 of the Ontario Rules of Civil Procedure).

15 In my view, it is the second method noted above that applies to this case. A matrimonial property claim is not a debt or liquidated demand no matter how specifically the claim is set out in the pleading. In the petition for divorce, the petitioner set out some assets and their purported values and sought an "equalization" of matrimonial assets. In her affidavit the petitioner sought a division of matrimonial property generally and, in particular, the sum of $10,750 by way of "equalization". This figure apparently relates back to the values given in the petition.

16 The *Matrimonial Property Act* provides that, in any dispute between spouses as to the possession, ownership or disposition of property, the judge may, subject to section 27(4) of the Act, make any order that he or she considers fair and equitable,

notwithstanding that the legal or equitable interest of the husband and wife in the property is in any other way defined. Section 27(4) reads:

> (4) In considering an application under this section, the judge shall take into account the respective contributions of the husband and wife whether in the form of money, services, prudent management, caring for the home and family or in any other form.

17 Any argument as to what constitutes a fair and equitable division must be supported by proper evidence and not mere assertions. Evidence as to the history of the financial inter-relationship of the parties and their respective contributions and expectations is relevant and necessary to determine what is fair and equitable. It is not good enough to simply provide a snapshot of the situation at a particular point in time. The Act is, in effect, the statutory equivalent of the constructive trust doctrine developed by the courts as the mechanism to determine matrimonial property rights.

18 Further, it is worth noting that the *Matrimonial Property Act* does not speak of "equalization" of property nor does it import some presumption of equal distribution. It is the case, however, that here as in most jurisdictions such a presumption is applied, but it would be wrong to characterize a property claim as merely an exercise in achieving an equalization of assets whose values are known. For discussion on the Act, see *Slocki* v. *Slocki* (1981), 25 R.F.L. (2d) 366 (N.W.T.S.C.); *Corrigan* v. *Corrigan*, [1989] N.W.T.R. 376 (S.C.); and *Chapman* v. *Chapman*, [1993] N.W.T.R. 355 (C.A.).

19 In this case, after the default, it was incumbent on the petitioner to provide evidence on the *ex parte* application for judgment and not merely rely on the assertions in the petition. The evidence could have been in the form of affidavits or given *viva voce*

at a hearing, on notice or otherwise, as a judge may have directed. What was not open to the petitioner was to treat the application for judgment as a mere technicality akin to signing default judgment before the clerk.

20 The respondent, while not specifically relying on these procedural defects, submits that he is entitled to have the judgment set aside as of right due to the non-disclosure of material facts. One of his affidavits filed on this application contains the following assertions:

> 2. I have reviewed the Petition for Divorce filed on January 26, 1993 and the Affidavit of Mary Currie filed on January 26, 1993 in this action, and am aware that neither of these documents contain any reference to the sale of a house, in May of 1991, located at 119 Marcotte Crescent in Saskatoon, Saskatchewan (the "residence").
>
> 3. In the spring of 1991, while I was living in Yellowknife, Northwest Territories, and Mary Currie, my then wife, was living in Saskatoon, Saskatchewan, I told her that I wanted to end our relationship. During our conversation concerning the separation, which took place over the phone, I told Mary Clayton (Curry, *sic*) that she could have the residence and its contents or the proceeds of sale of same, if she would agree to make no further claim against me in relation to the marriage. She agreed that she would accept the residence and its contents, or the sale price of same, as full compensation for any amount to which she was entitled by virtue of our marriage.

21 The petitioner, needless to say, disputes these assertions. It is true that the Saskatoon residence was not mentioned by the petitioner in any previous documents on file but, according to her, she thought its disposition was irrelevant since it predated the parties' separation. The petitioner claims that the parties did not separate until March of 1992, one year later than as claimed by the respondent, and the proceeds of the sale of the Saskatoon residence went to meet various joint obligations.

22 The test for setting aside a default judgment is well-known. Supreme Court Rule 166 provides:

> 166. The court may, upon such terms as it thinks just, set aside or vary any judgment entered upon default of defence or in pursuance of an order obtained *ex parte* or may permit a defence to be filed by a party who has been noted in default.

23 The applicable principles were set out by de Weerdt J. in *Cook* v. *Howling*, [1986] N.W.T.R. 108 (S.C.), at pages 109-110:

> 1. The application should be made as soon as possible after the judgment has come to the knowledge of the defendant.
>
> 2. However, mere delay will not bar the application unless an irreparable injury will be done to the plaintiff or the delay has been wilful.
>
> 3. The application should be supported by an affidavit setting out the circumstances under which the default arose and disclosing a defence on the merits.
>
> 4. It is not sufficient to merely state that the defendant has a good defence on the merits. The affidavits must show the nature of the defence and set forth facts which will enable the court or judge to decide whether or not there was matter which would afford a defence to the action.
>
> 5. If the application is not made immediately after the defendant has become aware of the judgment, the affidavits should explain the delay in making the application. And if the delay is of long standing, the defence on the merits must be clearly established.

24 With respect to evidentiary conflicts in the affidavit material filed on this application, I am guided by the judgment of Prowse J.A. in *Wilson Arches Ltd.* v. *Sayers*, [1974] 2 W.W.R. 277 (Alta. C.A.), at page 279:

> In considering the facts set out in an affidavit relating to the proposed defence if the facts disclose a triable issue of fact or law, then, except in special circumstances, a Chambers judge will assume they are true and allow the application. Generally the truth of the facts deposed to will be dealt with on the trial and not be treated as an issue on such an application.

25 In my opinion, the affidavit evidence of the respondent reveals triable issues of fact, i.e. the distribution of proceeds from the sale of assets and whether the parties had any agreements as to same, which affect the legal issue present in every matrimonial property case, i.e. a fair and equitable distribution. It may be that upon a full trial the petitioner will end up with a judgment worth more than what she holds now, but that apparently is a risk the respondent is willing to take by moving to set aside this judgment.

26 What is the respondent's excuse for not defending in the first place? He says he could not afford to hire a lawyer. He was advised by his sister of the proceedings when she was served substitutionally. In June of 1993 he was served with a garnishee summons so he became aware of the judgment at that time. Still he did nothing because, he says, he was unable to afford a lawyer. So what finally prompted this application? On November 30, 1994, the sheriff, pursuant to a writ of execution filed by the petitioner, seized the respondent's van and various equipment and tools used by the respondent in his trade. This application was filed ten days later. Apparently he can now afford a lawyer.

27 Litigants, and their advisors, should not be under the impression that any delay will be excused automatically. A defendant or respondent who deliberately disregards legal proceedings does so at their own risk since they may not be entitled to have a judgment set aside: *Winwest Drywall & Building Supply Ltd.* v. *Bruneau* (1986), 34 A.R.

358 (Q.B.). The overriding factor, however, is whether the petitioner will suffer an irreparable injury or prejudice. None has been shown in this case.

28 Having regard to the serious procedural defects in how the judgment was obtained, and the issues that must be examined on this type of claim, I am satisfied that the delay, while somewhat wilful, is not so serious as to disentitle the respondent from a trial of this claim. There is, however, a price to this relief. That comes in the form of terms that I may consider necessary and just in the circumstances of this case.

29 The court enjoys a wide discretion in setting terms. These may, and usually do, include directions as to a speedy trial, the imposition of costs, and allowing a writ of execution to remain in force notwithstanding the setting aside of the judgment upon which it is based. Reference may be made to *Canadian Imperial Bank of Commerce* v. *Sheahan* (1979), 22 O.R. (2d) 686 (Div.Ct.); *Costa* v. *Sanavik Co-Operative Association Limited* (1980), 15 C.P.C. 27 (N.W.T.S.C.); and, *Chitel* v. *Rothbart* (1989), 29 C.P.C. (2d) 136 (Ont.C.A.), leave to appeal to S.C.C. refused (1989), 98 N.R. 132.

30 This is an appropriate case to impose these types of terms. The petitioner should at least have the security of knowing that some assets will be available for satisfaction of any judgment at the end of the litigation. There should also be an incentive to keep the litigation moving. Finally, with respect to cost penalties, even though there were substantive defects in the way the judgment was obtained, there is no evidence of a deliberate attempt to mislead the court or subvert its procedures. As I noted before, there was a misconception as to the proper procedure. The root of the problem lies in the respondent's deliberate disregard of the legal process both before and after the

judgment was entered. Costs were run up needlessly and I do not see why he should not be responsible for them.

31 Therefore, I grant the application and set aside the judgment dated May 6, 1993 (entitled "Corollary Relief Order"). I do so, however, on the following conditions:

1. The respondent shall pay the petitioner's thrown away costs, those being all costs subsequent to the service of the petition including costs incurred in obtaining judgment and the writ of execution and any costs relating to the sheriff's seizure, plus costs of this application, all in any event of the cause, to be taxed on the basis of Column One of the tariff of costs. Were it not for the defective manner in which the judgment was obtained, I would have awarded costs on a higher scale. The costs are to be paid within 10 days of taxation. Instead of taxation, the parties may of course agree on the quantum or apply to me to fix the amount of costs in a lump sum.

2. The writ of execution taken out by the petitioner shall remain in force, but further enforcement proceedings are stayed in the meantime.

3. The vehicle, equipment and tools seized by the sheriff on November 30, 1994, shall remain under seizure but shall be forthwith released to the respondent on a bailee's undertaking.

4. The respondent shall, within 10 days of this order, file and serve a Statement of Defence to the matrimonial property claim set forth in the Petition for Divorce.

The petitioner shall have 10 days from the date of service within which to file and serve a Reply, if any, thereto.

5. The parties shall be at liberty to conduct such pre-trial procedures, including examinations for discovery and production of documents, as they deem necessary and appropriate.

6. Should the respondent fail to meet the conditions stipulated in this order, the petitioner may apply to me to set aside the stay of enforcement of the writ of execution and to authorize the repossession of the van in question.

32 If further directions are required, counsel may make arrangements to see me in chambers.

John Z. Vertes
J.S.C.

Yellowknife, Northwest Territories
January 3, 1995

Counsel for the Petitioner: Garth L. Wallbridge
(Respondent)

Counsel for the Respondent: Sydney A. Sabine
(Applicant)

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