

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

MARCELLA MAY COWGER

Petitioner

- and -

THOMAS JAMES COWGER

Respondent

MEMORANDUM OF JUDGMENT ON COSTS

[1] I have now had an opportunity to consider counsels' written submissions respecting costs and the draft Bill of Costs prepared by petitioner's counsel.

[2] This action involved claims for child custody, child and spousal support, and a division of matrimonial property. The respondent did not appear for trial so much of the evidence was uncontested. The trustee in bankruptcy for the respondent, however, appeared by counsel to contest certain aspects of the property claim. The petitioner was completely successful in the action.

[3] Petitioner's counsel submitted that the costs of the proceedings, since the assignment into bankruptcy, should be divided equally as between the respondent and the trustee personally. The basis for this submission is that the trustee, by contesting certain aspects of the property claim, prolonged or contributed to the litigation and should therefore bear some of the costs consequences personally.

[4] The trustee's counsel submitted that the trustee in bankruptcy was simply fulfilling his statutory duty to recover assets for the estate so as to protect the interests of the bankrupt's creditors. The trustee had made a *bona fide* determination that there was a genuine issue to be tried and acted responsibly in arguing the issue at trial. It was also submitted that this was not a case where the trustee acted negligently or where there was some misconduct on the part of the trustee (the traditional factors for imposing costs on a trustee personally).

[5] I agree with the submissions made on behalf of the trustee. There was a *bona fide* issue and the trustee acted reasonably in litigating the matter. These proceedings were not instituted by the trustee; he was made a party to them because of the respondent's assignment and because there were some assets which could have been part of the estate. And, while the property issue took up the bulk of the time on the trial, it made up less than half of the total effort expended on these proceedings since their inception.

[6] The trustee's counsel, however, also submitted that any award of costs was governed by the provisions of the tariff in the *Bankruptcy and Insolvency Act*. I do not agree. Section 197(1) refers to costs of any proceedings in court "under this Act". These proceedings were not commenced or prosecuted "under" the *Bankruptcy and Insolvency Act*. They were brought under the *Divorce Act* and the *Matrimonial Property Act*. Hence I do not think that s.197 or the tariff under the *Bankruptcy and Insolvency Act* have application to this issue. That statute, however, does provide guidance as to the general rule that a trustee is not personally liable for costs unless the court orders otherwise: s.197(3).

[7] For these reasons, there will be no costs payable by the trustee personally.

[8] The petitioner will have her costs against the respondent. Those costs total, inclusive of fees and disbursements, \$4,297.38 (as outlined in the draft Bill of Costs). Of that total, one-half will be applied to the corollary relief claims under the *Divorce Act* (child custody and support and spousal support). The other half will be applied to the matrimonial property claim.

[9] Dated this 28th day of May, 1998

J. Z. Vertes
J.S.C.

To: James D. Brydon
Counsel for the Petitioner

Douglas G. McNiven
Counsel for the Trustee in Bankruptcy

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MEMORANDUM OF JUDGMENT OF THE
HONOURABLE J. Z. VERTES
