Date: 1998 02 27
Docket: 6101-02512

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

CHRISTINE MARY TANNER

Petitioner

- and -

LARRY ALAN SIMPSON

Respondent

MEMORANDUM OF JUDGMENT AS TO COSTS

[1] In my Reasons for Judgment filed May 9, 1997 after trial, I indicated that if counsel wished to make submissions on costs, they could do so in writing within 30 days of the filing of the Reasons. Counsel did file their submissions within the time specified. Unfortunately, they did not come to my attention until last week.

[2] The Petitioner seeks party and party costs to April 11, 1996 and solicitor and client costs thereafter. The Respondent, on the other hand, submits that both parties should bear their own costs.

[3] The Petitioner's request is made pursuant to Rule 201, which reads as follows:

> 201.(1)A plaintiff who makes an offer to settle at least 10 days before the commencement of the hearing is entitled to party and party costs to the day on which the offer to settle was served and solicitor and client costs from that day where
>
> (a) the offer to settle is not withdrawn, does not expire before the commencement of the hearing and is not accepted by the defendant; and
>
> (b) the plaintiff obtains a judgment on terms as favourable as or more favourable than the offer to settle.

[4] The Petitioner made a formal offer to settle on April 11, 1996, almost a year before the trial. The issue is therefore whether she has obtained a judgment on terms as favourable as or more favourable than the offer to settle.

[5] In her offer to settle, the Petitioner sought sole custody of the parties' two children. She offered that the Respondent would have custody in the event of her death, that he be notified of any relocation of the children and that he be advised of significant matters in the lives of the children.

[6] At trial, the Petitioner conceded that joint custody was appropriate and it was ordered. The dispute was over where the children would live. The Petitioner was successful in obtaining the day to day care of the children. The Respondent had argued that they should spend a year with him in Iqaluit and a year with the Petitioner in Yellowknife on an alternating basis.

[7] Counsel for the Petitioner submits that what the Petitioner offered to settle for is essentially what was ordered in that her offer of sole custody included most of the attributes of joint custody. I do not agree. Her offer did not include any right in the Respondent to share in the important decisions respecting the children; it gave him only the right to be advised about important matters. This in my view is a significant difference between sole and joint custody.

[8] The Respondent was given slightly more access (alternating four and six weeks in the summers) than was offered (six weeks for two summers and four weeks each summer thereafter).

[9] Therefore, on the issues of custody and access, success was divided.

[10] The issue of child support was complicated by the fact that the federal *Child Support Guidelines* came into effect between the conclusion of the trial and the date I rendered judgment. In the end result, the Respondent will pay approximately what the Petitioner had offered to settle for in 1996. I agree with counsel for the Respondent that the similarity between the two amounts is fortuitous; it is simply the result of applying the *Guidelines*.

[11] The final issue between the parties was matrimonial property. In her offer to settle, the Petitioner offered to pay her share of the principal owing on the parties' line of credit. The payment suggested was to be in part by way of cash and in part by transfer to the Respondent of RRSP monies in the Petitioner's name. As counsel for the

Respondent points out, the RRSP transfer would have the result to the Respondent that he would eventually pay tax on those monies.

[12] The Petitioner also offered to pay her share of interest owing on the line of credit and that there would be no further claim by either party for matrimonial property division.

[13] By the time of trial, the Petitioner had paid the principal on the line of credit. She conceded liability for payment of the interest. She advanced a claim for a share of the Respondent's pension credits and was unsuccessful in that regard. Similarly, the Respondent was unsuccessful in his claim for a share of the sale proceeds of the Petitioner's business.

[14] It was clear to me at trial that the real issues in dispute between the parties were custody, access and the living arrangements for their two children. On those issues in particular, the Plaintiff did not obtain judgment on terms as favourable as or more favourable than the offer to settle, so Rule 201 does not apply.

[15] I bear in mind that any costs order against the Respondent might have an adverse impact on his ability to pay child support.

[16] In all the circumstances, I consider that success was divided and I order that each party bear their own costs.

V.A. Schuler,
J.S.C.

Dated at Yellowknife, NT, this
27th day of February 1998

Counsel for the Petitioner: James Brydon
Counsel for the Respondent: Sheila MacPherson

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THE HONOURABLE JUSTICE V.A. SCHULER