Date: 1999 07 20
Docket: 6101-03054

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

BRADFORD JOHN PELLERIN

Petitioner

-and-

KRYSTAL LYN PELLERIN

Respondent

MEMORANDUM OF JUDGMENT

[1] This is an application by the Petitioner for costs of these proceedings.

[2] The Petitioner and the Respondent are the parents of two young boys. Between the time of their separation and January of 1999, they had shared the day to day custody and care of the children in Yellowknife. In January, the Respondent's employer offered her a better position in Hay River. This gave rise to a dispute as to which party would maintain the care of the children.

[3] Counsel were able to have the matter set for a *viva voce* hearing only a few days before the position in Hay River was to commence. At the hearing, the Respondent testified that she would not move to Hay River without the children.

[4] I ruled that the children would stay in Yellowknife on an interim basis. As set out in my written decision filed January 27, 1999, I did not feel that it would be in the best interests of the children to move to Hay River at that time. I also found that "both parents are mature, thoughtful individuals who have an amicable, cooperative relationship which centers on doing what they think is best for their children". I made no order as to costs.

[5] A few weeks after my ruling, the Respondent, who had moved to Hay River after all, approached the Petitioner about agreeing to a psychological assessment of the

children and the parties. The Petitioner did not agree and the Respondent brought an application before Justice Vertes of this Court in March.

[6] The evidence before Vertes J. was that since the hearing for the interim order, the Respondent had learned that if she stayed in Yellowknife she would likely be unemployed in a few months since her position there was to be eliminated. There had been reference to this as a future possibility at the hearing before me. The Respondent had therefore decided to take the position in Hay River. The parties had agreed that until the trial, the children would stay with the Petitioner in Yellowknife with extended visits to the Respondent in Hay River.

[7] Vertes J. ordered the assessment. He decided that since the *status quo* of shared parenting had changed with the Respondent's move to Hay River, that was a significant change in the children's environment which should be examined along with the parenting abilities of each party in a sole parenting role and how the children function in each party's home. He ruled that examination of these points, which would be relevant at trial, would benefit from an expert assessment.

[8] Vertes J. ordered that the parties split the cost of the assessment, subject to the ultimate determination of the trial judge. He also ordered that costs of the application for the assessment be in the discretion of the trial judge.

[9] The assessment was completed in May and it recommended that the children remain in the care of the Petitioner.

[10] Since then, the parties have come to a resolution of this matter and a trial will not be necessary. They have agreed that the children will remain in Yellowknife with the Petitioner and will have extensive visits with the Respondent.

[11] The Respondent has indicated in her affidavit filed on this application that she will return to Yellowknife after two years if her employer will give her a position of equal or greater responsibility to what she now has in Hay River.

[12] The hearing before me on interim care of the children and the application for the assessment were, prior to this application for costs, the only court applications of any significance in this matter.

[13] The Petitioner seeks costs of all proceedings to date including payment by the Respondent of his share of the assessment fees and expenses.

[14] I turn now to the issue generally of costs in matrimonial or custody matters. This action was commenced by way of a petition for divorce and so the Court may make such orders as it sees fit for the payment of the costs of either party: Rule 33, *Northwest Territories Divorce Rules*.

[15] Counsel for the Petitioner relied on *Gold v. Gold,* [1993] B.C.J. No. 1792 (B.C.C.A.) for the principle that the rule that should govern the award of costs in matrimonial proceedings should be the same as in other civil litigation, in other words costs should follow the event unless the Court orders otherwise. However, *Gold v. Gold* was a matrimonial property case, as was *Meneghetti v. Meneghetti* (1979), 17 B.C.L.R. 200 (B.C.S.C.), the case quoted with approval in *Gold v. Gold.* The considerations which apply to costs in a case involving property will usually be quite different from those in a case involving the best interests of children. In any event, the "rule" referred to would allow the Court to order otherwise, which is not all that much different from saying that the Court has a discretion, just as it does under Rule 33.

[16] I find more helpful the words of the Alberta Court of Appeal in *Henry v. Pham* (1987), 10 R.F.L. (3d) 418:

> There is no general rule respecting costs in custody questions. We think it significant that [the parties against whom costs were ordered at trial] were maintaining a consent order, and, on the judgment, were genuinely seeking a judicial determination of what was in the best interest of the child. That determination clearly was not an easy one. It required a very careful assessment of the evidence and a nice balancing of the competing interests. No party can be said to have improperly or unnecessarily invoked the court. Nor was there a question of success, having regard to the real issue - the child's welfare. It was a case that had to be heard.

[17] In the result, the Court of Appeal ordered that each side bear their own costs of the trial.

[18] I have decided that there will be no order as to costs of the interim custody hearing. It was a one day hearing, precipitated by the Respondent being offered a position in Hay River. She had a very short time period within which to decide whether she would accept the position. According to the evidence at the hearing, declining the

position would have left her with the prospect of only part-time work at a lesser salary in Yellowknife.

[19] The parties had shared the care of the children to that point and both were concerned for the children's best interests. Both parties had a valid case to put before the Court. It cannot be said that the Respondent improperly or unnecessarily invoked the Court.

[20] In my view, the fact that the Respondent changed her position after the hearing should not affect costs. At the hearing she said she would not leave Yellowknife without the children. After the ruling, she decided she would. That does not mean she improperly or unnecessarily sought a decision from the Court. She was in a difficult position with difficult decisions to make. The hearing would still have been necessary had she decided before then that she would move to Hay River in any event of the Court's decision.

[21] As to the costs of the application for the assessment and the assessment itself, the Petitioner argues that he should be awarded costs for three reasons: first, because the assessment may not have been necessary had the Respondent said initially that she would be relocating to Hay River for only two years; second, because the terms of the settlement as between the parties have not changed to any significant degree since the Minutes of Settlement he first proposed after the hearing before me in January of 1999; and third, because prior to this application for costs, he had offered to accept in settlement of the costs issue payment by the Respondent of half his share of the assessment expenses plus court costs.

[22] In my decision on the interim hearing, I had observed that if the parties were to proceed to trial for a permanent order, evidence other than what was called on the interim application, such as home study reports or assessments of the children, might be involved. Obviously Vertes J. felt that there was good reason to order the assessment; I have already referred to his reasons for doing so.

[23] It is clear to me from the reasons given by Vertes J. when he made the assessment order that the matter was expected at that time to go to trial. It seems that with the benefit of the assessment results, which were received in May, the Respondent has decided not to pursue the matter to trial but instead to look at alternatives to her position in Hay River. There is no evidence that before the assessment was received,

the Respondent had decided to limit her time in Hay River to two years. Nor does any such decision on her part necessarily mean that the assessment would not have been needed or that there would not have been a trial on the issue of where the children would live for the two years.

[24] As to the Minutes of Settlement, while it is true that what was proposed did not change in that all three drafts presented by the Petitioner to the Respondent in February, May and June provided for the parties to have joint custody with day to day care and control with the Petitioner, the Respondent did not sign the first two drafts. The Petitioner says that the Respondent had told him that she agreed with what was in those drafts. But the information before Vertes J. when he made the assessment order in March was that the parties had agreed that the children would remain with the Petitioner only until the trial and the issue at trial would be where the children would stay on a permanent basis. I can only conclude that there was no agreement in February that the children would stay in the Petitioner's care on a permanent basis. By the time the May version of the Minutes of Settlement was sent to the Respondent, the assessment had been received. After that, the negotiations seem to have focused on the amount of time the children would spend time with the Respondent. I cannot see that anything out of the ordinary took place that would have any bearing on the issue of costs.

[25] All of this simply leads me to the conclusion that the assessment was of assistance in resolving this matter without a trial. I agree with the submission of the Respondent's counsel that the Respondent was entitled to consider the assessment on the issue of permanent custody. He also stated that it had avoided a trial.

[26] There are references in the Respondent's affidavit to an occupational therapy report done in February, 1999 on one of the children and which was considered by the psychologist in preparing her assessment. The occupational therapy report apparently provided some information about the parenting abilities of the parties. The Respondent says she was not aware of the report until she received the expert's assessment.

[27] Counsel for the Petitioner argued that the Respondent should have been aware of the occupational therapy report because the child had been in therapy for some years. She suggested that recourse to the report could have avoided the necessity of the assessment. In my view, however, the Respondent should not be faulted for being unaware of the report's existence, especially when the Petitioner was apparently also

unaware of it or, if he was aware, did not bring it to her (or the Court's) attention when the application was made for the assessment order. In any event, I doubt that one would expect the same kind of assessment from an occupational therapy report that one would from a psychological assessment.

[28] The offer by the Petitioner to settle for half his share of the assessment expenses is relevant only if I determine that the Respondent should pay the Petitioner's costs. I have determined that she should not. It appears to me that the assessment has assisted in settling this difficult matter without a trial. That being the case, the offer is irrelevant.

[29] The assessment was costly but it has avoided the expense of a trial, which in all likelihood would have been more costly, not only financially but in terms of the time and emotional commitment and stress on the parties (and the children) that usually result from custody trials.

[30] In the result, I dismiss the application for costs. The parties will each be responsible for their own costs of this proceeding and all applications throughout, including this one, and for their own portion of the fees and expenses of the psychologist as ordered by Vertes J. in his reasons filed April 1, 1999.

V.A. Schuler
J.S.C.

Heard at Yellowknife, Northwest Territories
the 16th Day of July, 1999.

Counsel for the Petitioner: Elizabeth Hellinga
Counsel for the Respondent: Mark Seebaran

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