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6101-02410

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

MAUREEN ELIZABETH McCAGG

Petitioner

- and -

WILLIAM RONALD McCAGG

Respondent

Ruling on costs.
Judgment on costs filed: February 11, 1997.

MEMORANDUM OF JUDGMENT OF THE HONOURABLE JUSTICE V.A. SCHULER

Counsel for the Petitioner: Sheila M. MacPherson

Counsel for the Respondent: James D. Brydon

Counsel have filed written submissions on the issue of costs in this matter.

This was a divorce action in which the Petitioner sought a resolution of matrimonial property issues and spousal maintenance. A trial was held on February 8 and 9, 1996 and judgment issued on March 19, 1996.

Eleven items of matrimonial property were dealt with, three by agreement between the parties as submitted to me at trial (these latter were the Respondent's pension plan, the Nevada lot and the Fort Simpson vacant lot). The dispute over the remaining items was as to value or date of division. Neither party took the position that an unequal division of matrimonial property was warranted in this case.

The main areas of dispute at trial were the date of division of the Respondent's CIBC Dividend Reinvestment Plan shares, his RBC Dominion Securities Registered Retirement Savings Plan, the former matrimonial home and the MURB's owned by the parties. The Petitioner was successful in the position she took with respect to those items.

The Petitioner sought spousal support for an indeterminate time in the amount of $2,000.00 per month. The Respondent took the position that the Petitioner was not entitled to any spousal support, but that if it was awarded, it should be time-

limited. In the end result, the Petitioner was awarded spousal support of $2,000.00 per month for a period of four years.

On the issue of costs, counsel for the Respondent referred to an offer of settlement he had made at first verbally and later in writing. There was no reference to any costs effect in the offer and it was not accompanied by a payment into court.

The 1979 Rules of Court in effect at the time the offer was made, and at the time of trial, did not regulate verbal or written offers of settlement. They dealt only with payment of monies into court (Rules 173 to 190).

The fact that the offer was not made with notice to the Petitioner that it was intended to have a costs effect means that it should have no costs effect and I see no reason in this case to hold otherwise; see *Inkit Ltd. v Polar Parkas Ltd.*, December 18, 1995, S.C.N.W.T. CV 02525 (unreported, Veit J).

It is submitted on behalf of the Respondent that the Petitioner and the Respondent should each bear their own costs and that this case comes within an "exception" created for matrimonial litigation by the British Columbia Court of Appeal in *Gold v. Gold*, September 1, 1993, B.C.C.A. (unreported). In that case, the Court held as follows:

> It is my further view that the rule which should govern the award of costs in matrimonial proceedings should be the same as in other civil litigation, namely, that costs should follow the event unless the Court otherwise orders as specified in Rule 57: *Meneghetti v Meneghetti* (1979), 17 B.C.L.R. 200 (B.C.S.C.) at p. 201.
>
> The question, then, is: when should the Court order otherwise? With respect, when the court should order otherwise is a matter of discretion, to be exercised judicially by the trial judge, as directed by the Rules of Court. To lay down any strict guidelines or even to attempt to give exhaustive examples is not, I think, helpful because the facts and issues in each family law case vary so greatly. Factors such as hardship, earning capacity, the purpose of the particular award, the conduct of the parties in the litigation, and the importance of not upsetting the balance achieved by the award itself are all matters which a trial judge, quite properly, may be asked to take into account. Assessing the importance of such factors within the context of a particular case, however, is a matter best left for determination by the trial judge.

I do not read *Gold v Gold* as creating any exception. In my view, it simply sets out the principle that costs should follow the event in matrimonial litigation unless the court orders otherwise and it further suggests some factors that a trial judge might take into account in ordering otherwise.

The 1979 Northwest Territories Rules of Court provided that costs are in the discretion of the Court: Rule 541.

The basic principles are that a successful litigant has by law no right to costs, but rather a reasonable expectation of receiving them, subject to the Court's discretion (which is in turn subject to any statutory provisions and the Rules of Court). That discretion must be exercised judicially and should take into account the degree of success achieved by a party. The Court has, however, a discretion to deprive a successful party of costs, where appropriate grounds exist for so doing: Orkin, The Law of Costs, 2nd ed., Canada Law Book Inc., 1995.

Certainly there have been cases in the Northwest Territories where costs have been awarded in a matrimonial property and spousal support dispute. See, for example, *Viswalingam v Viswalingam*, [1996] N.W.T.R. 342 (S.C.) and *McGrath v Holmes*, June 12, 1996, S.C.N.W.T. CV 04084 and 6101-02266 (unreported, Richard J.).

In this case, as the Petitioner was substantially successful at trial, she should have her costs unless there are valid grounds to deny her same. In my view, there are no grounds related to the conduct of the action which would justify denying her costs.

Counsel for the Respondent submits that a costs award will be a hardship for the Respondent, as he is already paying spousal support out of his income. Any hardship for the Respondent is, however, a time-limited one. And, it must also be borne in mind that it was found at trial that the Petitioner had been economically disadvantaged by, first, the role that she assumed in the marriage and, second, as a result of the breakdown of the marriage. The Respondent, on the other hand, was found to have been economically advantaged by the marriage and the priority placed within it on his career and his standard of living was found not to have suffered after the separation, when he had been able to increase his assets, albeit to a modest extent.

In *Gold v Gold*, the Court suggested that a factor that might be considered is whether an award of costs would upset the balance or equality achieved by a matrimonial property award. I have considered whether that is applicable in this case. But I must also bear in mind that the economic assets gained by the Petitioner in the matrimonial property award were taken into account in determining that time-limited support would fairly compensate her as the economically disadvantaged spouse.

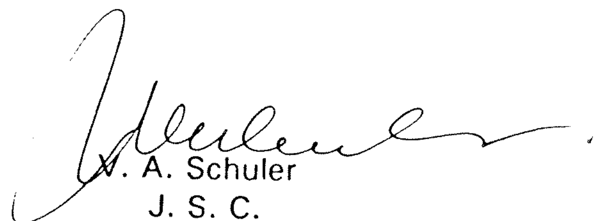
To a degree, therefore, the Petitioner is being asked or expected to rely on those assets. To expect that she will also pay her costs out of those assets (or the time-limited support) would, in all liklihood result in hardship to her to a greater extent than to the Respondent if he is made responsible for the costs. On the evidence at trial, and even with the decrease in employment benefits he expected, the Respondent is in a better position to bear the costs burden. To order that he pay the Petitioner's costs would not, in my view, upset the balance sought to be acheived by the matrimonial property award in this case.

Counsel for the Respondent also argued that because the Respondent did not dispute the Petitioner's entitlement to an equal share in the assets, only the amount she was awarded in excess of what the Respondent argued she should get should be taken into account for purposes of determining what column of the tariff should apply. I might agree with that had the undisputed amounts been paid to the Petitioner, or paid into Court, before the trial. Except in the case of a GIC, they were

not. In any event, in this case it makes little difference because the "excess" figure of $14,859.48 relied upon by the Respondent for the application of column three of the 1979 tariff is not all that much less than the $15,000.00 that would move the costs into column four as proposed by the Petitioner. This does not, of course, take into account whether a multiple should be used, as has frequently been the practice because of the inadequacy of the tariff in the 1979 Rules.

There being no evidence that the costs proposed by counsel for the Petitioner would exceed the amount actually billed by counsel, the fact that the Petitioner may be legally aided is, in my view, irrelevant.

The Petitioner will have her costs. Having reviewed the draft bills of costs submitted, having considered the Respondent's counsel's objections to some of the items, and being of the view that it would not be desirable for the parties to engage in further dispute over a taxation, I set the costs, inclusive of disbursements and inclusive of this application, at $7,000.00.



V. A. Schuler
J. S. C.

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