Lay v. *Lay*, 2003 NWTSC 23

Date: 2003 04 15
Docket: 6101-02934

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

JAMES MALCOLM CAMERON LAY

Petitioner

- and -

MAUREEN JANIS LAY

Respondent

RULING ON COSTS

[1] The Petitioner seeks his costs of this action, in which Reasons for Judgment were filed on March 21, 2003. The trial was held on February 3 and 4, 2003, in the absence of the Respondent. The issues at trial were child custody, child support and equalization of family property.

[2] The Petitioner seeks costs pursuant to Rule 201(1), which provides:

> 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 (a) the offer to settle is not withdrawn, does not expire before the commencement of the hearing and is not accepted by the defendant; and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.

[3] The Petitioner relies on an offer to settle dated November 5, 2001 and forwarded to the Respondent and her then counsel. It is clear from material the Respondent herself forwarded to the Court prior to the trial that she received the offer to settle. Rule 201(1) refers, however, to "the day on which the offer to settle was served", which means that the date of service must be admitted or formally proven by an affidavit of service. Neither has occurred in this case, and I will deal with that further on.

[4] On the material before me, the requirements of subsection (a) of Rule 201(1) are satisfied. The issues are whether, under subsection (b), the Petitioner has obtained a judgment on terms as favourable or more favourable than the offer to settle and, if he has, whether, under Rule 206(1), there is any reason why I should exercise my discretion to order costs on a basis other than would follow from Rule 201(1).

[5] The judgment rendered and the offer to settle are compared as follows:

1. the Petitioner was granted joint custody of the two children and their day to day care. This is what he had offered by way of settlement;

2. the access granted to the Respondent by the judgment is essentially the same as what the Petitioner proposed in the offer to settle. The judgment also requires that the Respondent respond within a certain time frame to access travel itineraries;

3. the judgment requires that the Respondent pay the costs of exercising access or such portion as may remain after any contribution the Petitioner makes. This is more favourable to the Petitioner than what he proposed in the offer to settle, which was that he would pay the access costs for two years and thereafter the parties would share them equally;

4. the judgment imputes income to the Respondent and requires her to pay child support, whereas the offer to settle proposed she be liable for supporting the children only when they are with her during access periods;

5. pursuant to the judgment, the property value is divided equally, with the result that the Petitioner owes the Respondent the sum of $1845.00 by way of an equalization payment. The result of the division, in the sense of who retains what property, is the same as that proposed in the offer to settle except that the latter did not provide for any equalization payment.

[6] I agree with the Petitioner's written submission filed on April 10, 2003, that the comparison of a judgment and an offer to settle should be approached by looking at the entire "package" rather than by requiring that the Petitioner achieve a result as or more

favourable on each individual issue. I also agree with the way this principle was put by J. Macdonald J., dealing with the Ontario rule from which our Rule 201(1) is derived, in *Hunger Project* v. *Council on Mind Abuse (C.O.M.A.) Inc*. (1995), 121 D.L.R. (4th) 734, 22 O.R. (3d) 29 (Ont.Ct.Gen.Div.): "... the concept of favourability requires only comparability between the offer and the judgment, not equivalence and not correspondence."

[7] Here, the only way in which the judgment results in consequences less favourable to the Petitioner than those proposed in the offer to settle is by its requirement that he make the equalization payment of $1845.00. That payment is not, however, of great significance in the context of the monetary values that were at issue. It must also be balanced against the Respondent's obligation to pay child support and access costs.

[8] I find that when considered as a whole, the judgment is on terms at least as favourable as the offer to settle.

[9] Under Rule 206(1), however, notwithstanding the costs consequences of Rule 201(1), I can make any order with respect to costs that I determine to be in the interests of justice in the circumstances of the case. So the question is whether I should decline to order costs pursuant to Rule 201(1) and instead make some other order.

[10] I find there is no basis upon which I should decline to make the order sought. The offer to settle was a reasonable one, especially when one considers that it largely reflected the actual situation of the parties from July 1998, when the interim order providing that the children reside with the Petitioner was made, to the date of trial. During that time, the Respondent did not pay child support or contribute to access travel costs and she resided in the Tuktoyaktuk property, although the Petitioner dealt with its financial and maintenance requirements.

[11] The Respondent does not appear from the record to have taken any steps to resolve this matter or move it forward to trial, although she did apply unsuccessfully to have these proceedings transferred to British Columbia in early 2002. On the eve of the trial scheduled to commence February 3, 2003, she requested, unsuccessfully, that the trial be delayed indefinitely and, after that request was refused, did not attend at the trial.

[12] I recognize that the Respondent's request that the trial be delayed was based on her lack of legal representation. However, she had had adequate time to arrange for representation since her former counsel ceased to act and she was unable to give any assurances that she would or could obtain counsel within a reasonable time or in any

event within the year. The Respondent really forced the matter to go to trial by not engaging in any settlement effort, while at the same time not putting her own position, whatever that may be, before the Court.

[13] There is very little information before me as to the Respondent's financial circumstances. Pursuant to the judgment after trial, however, she is entitled to the Tuktoyaktuk house and therefore has an asset to which recourse may be had for the payment of a costs judgment.

[14] In all the circumstances, I see no reason why the costs consequences of Rule 201(1) should not apply. Accordingly, the Petitioner will have his party and party costs to the date on which the offer to settle was served and his solicitor and client costs from that date, provided that the date of service is proven by affidavit evidence. The costs are to be taxed.

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

Dated at Yellowknife, NT,
this 15th day of April 2003

Counsel for the Petitioner: Katherine R. Peterson, Q.C.
No one appearing for the Respondent

6101-02934

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THE HONOURABLE JUSTICE V.A. SCHULER
