

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

JANET DROVER

Petitioner

- and -

GERALD DROVER

Respondent

MEMORANDUM OF JUDGMENT

[1] This divorce action was set for trial to commence January 27, 2003. Counsel advised that all issues had been settled save for the matter of costs of the matrimonial property claim. The parties testified to provide evidence for purposes of the granting of a divorce judgment and some of that evidence was relevant to the issue of costs. In the result, I granted the divorce and the corollary relief agreed to by the parties. I also ordered that matrimonial property would be divided pursuant to the terms agreed to by the parties. The settlement agreed to between them provides that each party shall pay his or her own costs in respect of the issues of divorce and corollary relief. On the outstanding matter of costs of the matrimonial property claim, I also order that each party bear his or her own costs, for the reasons that follow.

[2] A review of the pleadings reveals that this matter has been ongoing for eight years. The petition for divorce was filed in May 1994, claiming a divorce, child custody and support, and a division of matrimonial property. It was served on the Respondent in June 1994. He filed a financial statement in February 1996. In June 1996, the Petitioner's then counsel filed a notice of ceasing to act and in February 1997, her new counsel filed an amended petition for divorce which added a claim for spousal support.

[3] In March 1997, the Petitioner filed an application for interim child support and other relief, there was an exchange of affidavits and an order for interim child support was made on April 28, 1997.

[4] In June 1997, the Petitioner filed a notice of appointment to examine the Respondent. In late July 1997, the Respondent filed his statement as to documents; the Petitioner filed hers in early August. On August 8, 1997 the Respondent filed an answer and counterpetition. The Petitioner conducted an examination for discovery of the Respondent in 1997 or 1998.

[5] In May 1998 the Petitioner's counsel filed a notice of ceasing to act. Nothing further transpired on the record until the Respondent filed an application in April 2000 for a declaration that one of the children was no longer a "child of the marriage". An order was made on May 19, 2000 suspending the Respondent's obligation to pay child support for that child pending trial.

[6] Again nothing further transpired on the record until September 2002 when the Respondent filed an application to have this matter set for trial as he had not been able to obtain a completed certificate of readiness from the Petitioner or the new counsel she retained. An order for trial issued on October 10, 2002 and the trial was subsequently set to commence as set out above. The pre-trial material filed by the parties indicates that the issues for trial would be the value of certain property items owned by the Respondent, the value and possession of the matrimonial home, occupation rent and spousal and child support.

[7] On January 10, 2003, the Respondent made a formal offer to settle all of the issues and on January 23 the Petitioner accepted that offer. The settlement thus achieved provides that the Respondent will pay child support for the remaining child of the marriage, no spousal support is payable, the matrimonial home will be sold and the proceeds of sale divided equally after deducting the costs of the sale and the Petitioner will receive the additional sum of \$12,055.00 as her share of the value of the Respondent's pension plan, insurance and tools, which is to be deducted from his share of the home sale proceeds.

[8] Since the Petitioner accepted the offer to settle before trial, rule 197(6) applies:

197(6) Where an accepted offer to settle does not provide for the disposition of costs, the plaintiff is entitled,

(a) if the offer was made by the defendant, to the plaintiff's costs assessed to the day on which the plaintiff was served with the offer; ...

[9] The Respondent, however, takes the position that the Petitioner did little or nothing to move this matter forward to trial, that he took all steps in that regard and in trying to settle the matter. He takes the position that since 1994 the only unresolved property issues were the matrimonial home and the value of his tools. He says that he should be awarded his costs to the date of acceptance of the offer.

[10] In my view the Court has a discretion as to costs. Rule 206(1) provides:

206(1) Notwithstanding the costs consequences set out in rules 192 and 201, the Court may make any order or disposition with respect to costs that it determines to be in the interests of justice in the circumstances of the case.

[11] Although there is no reference to rule 197, in my view the intent must be that the discretion apply also to the cost consequences of the latter rule as it would not make sense to single out a rule 197(6) situation for different treatment. In any event, I am of the view that the Court has an overriding discretion to order costs other than as provided in rule 197(6). The question is then, whether the Petitioner has done anything to disentitle herself from costs.

[12] As far as delay goes, I cannot say which of the parties bears the greater share of the responsibility for the length of time this matter has been ongoing. There is no explanation before me as to why the Respondent did not join issue by filing an answer and counterpetition until more than three years after the action was commenced or why he did not take steps earlier than 2002 to have the action entered for trial. If the only issues in dispute were the matrimonial home and the Respondent's tools, the valuation of those items is something the Respondent was able to obtain in order to proceed to trial in a timely fashion. Finally, from the brief evidence I heard from both parties, it seems that offers to settle were discussed from time to time, but there is no indication as to what they were or whether they were in the same terms as the one finally achieved.

[13] I am not persuaded that the Petitioner is disentitled to her costs on the basis of failure to settle or delay for the reasons set out above. As to the fact that the Respondent continued to incur costs to prepare for trial between the time of his offer and the Petitioner's acceptance of it, that in part is the result of the timing of the offer, having been made very close to the trial date.

[14] However, even if I were to find that the Petitioner should have her costs up to the date of the offer and the Respondent should have his from the date of the offer to the

date of acceptance, I think it would be virtually impossible to separate the costs of the matrimonial property issue from the costs of the issues of divorce and corollary relief. Counsel did not suggest any method by which this might be done, nor is it possible for me to determine from the evidence to what extent the property as opposed to the other issues was the subject of steps for which costs can be claimed. Apart from the application to have this matter entered for trial, both of the interim applications dealt with child support, not property, and there is no indication as to what matters were dealt with on the Respondent's examination for discovery.

[15] In all the circumstances, I am not convinced that it is possible to ascertain the costs of the property issue separate and distinct from the other issues. Even if I were inclined to order that the Petitioner receive her costs to the date of the offer and the Respondent receive his from then until the date of acceptance, I would also be inclined to order that the one be set off against the other. The problem would remain, however, how to determine what those costs are separate from the costs of the other issues.

[16] Counsel also made submissions about the result of the settlement reached, but I do not think that which party gets what under the settlement is relevant in these circumstances or justifies any departure from the approach I have taken.

[17] In the result, I have decided that the parties should each bear their own costs.

Dated this 30th day of January, 2003.

V.A. Schuler  
J.S.C.

Counsel for the Petitioner: Hugh Latimer  
Counsel for the Respondent: James Brydon

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