

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

KATHLEEN ANNE BOKOVAY

Petitioner

- and -

COLIN DAVID BOKOVAY

Respondent

MEMORANDUM OF JUDGMENT

[1] The within divorce proceedings were commenced by the Petitioner in May 2002 at a time when she was diagnosed with terminal cancer. Sadly, the Petitioner passed away on November 24, 2002. These proceedings between the Petitioner's estate and the Respondent have, regrettably, continued to today's date. The protracted proceedings subsequent to the Petitioner's death have been mainly concerned, surprisingly, with efforts on behalf of the Petitioner's estate to have the Respondent comply with a Court Order dated November 15, 2002, and issued on the consent of the parties. The protracted nature of these proceedings since November 15, 2002, is partly attributable to the lack of communication and professional interaction between Petitioner's counsel and the Respondent's former counsel.

[2] The focus of the dispute between the parties to these proceedings has been the Petitioner's claim for an equalization of net family property pursuant to the *Family Property Act*. The final chapter of that dispute regarding family property was determined by the Court's memorandum of June 8, 2004. In the last paragraph of that memorandum the Court directed the parties to file written submissions on costs. Those submissions have now been received and the within memorandum addresses the issue of costs of these proceedings. The Respondent's new counsel suggests that the parties be given yet more time to reply to each other's submissions; however, upon my review of the written submissions which have been filed, I find that I do not require further submissions.

[3] The Petitioner's estate seeks an enhanced costs award on the basis of a) success in these proceedings, b) the conduct of the Respondent and his former counsel throughout these proceedings and c) an offer to settle made by the Petitioner early in these

proceedings. The principle submission of the Respondent, through his new counsel, is that each party should bear its own costs.

[4] In order for the costs submissions to be considered in context, I recite a chronological summary of the various steps in these proceedings.

[5] The parties were married for 18 years. There are three children of the marriage. The parties separated on January 31, 2002.

[6] The Divorce Petition was filed on May 2, 2002. In addition to a Divorce Judgment, the Petitioner sought the following relief:

- interim and permanent custody of the children,
- interim and permanent child support,
- interim and permanent spousal support,
- equalization of net family property, and,
- costs.

[7] Notwithstanding that this dispute has continued for almost two and a half years, an Answer to the Petition has never been filed by the Respondent (other curious deficiencies that appear from a review of the Court file are a) there has been no change in the identity of the Petitioner/Applicant in the style of cause even though it is the executrix of the Petitioner's estate that is the litigant now, and b) no formal notice of change of solicitors has been filed by the Respondent - but I digress).

[8] An Amended Petition was filed on October 28, 2002, in which the Petitioner added claims for:

- a trust declaration with respect to a life insurance policy; and,
- solicitor/client costs.

[9] A Notice of Motion returnable May 17, 2002, was filed by the Petitioner seeking interim custody, interim child support and interim spousal support. This motion was adjourned twice, on consent, to June 14, 2002. On June 14, 2002, the parties presented a Consent Order which the Court granted. That Order granted day to day care of the children to the Petitioner, access to the children to the Respondent, child support to the Petitioner, and other relief, including interim possession of the matrimonial home.

[10] Between June and October 2002, the parties were unable to reach agreement on matrimonial property issues. Also, because of the Petitioner's terminal illness, she sought access to the "living benefits" feature of the life insurance policy which the Respondent

owned on the life of the Petitioner; however, she and the Respondent could not reach agreement on that. Accordingly, the Petitioner filed a Notice of Motion returnable October 31, 2002, seeking:

- an Order directing sale of the matrimonial home;
- an Order respecting access to the living benefits feature of the life insurance policy, and,
- solicitor/client costs.

[11] On October 31, 2002, and again on November 8, 2002, the motion was adjourned, pending settlement discussions.

[12] On November 12, 2002, the Petitioner brought an *ex parte* application to the Court seeking an Order for the division of specific items of matrimonial property. The Court declined to hear the matter on an *ex parte* basis.

[13] The Petitioner filed a Notice of Motion returnable November 15, 2002, seeking an Order for the immediate division of matrimonial property. At this time the Petitioner's terminal illness had become more serious. This motion was not heard, as on November 15, 2002, the parties presented a Consent Order for the Court's consideration. It was accompanied by a Memorandum which stated, *inter alia*, that "this order reflects an equitable, full and final resolution of all support and or property issues between the parties".

[14] The Order, which was issued by the Court, provides:

- the Respondent is to purchase the Petitioner's one-half interest in the matrimonial home as at November 1, 2002,
- legal fees for the real estate transaction are to be shared equally,
- the combined RRSP's of the parties as at the separation date of January 31, 2002, are to be divided equally,
- the Respondent is to pay the Petitioner one-half of the value of his DND pension, forthwith,

- the Respondent is to execute the living benefits document of the life insurance policy, forthwith,
- other ancillary matters.

[15] The final two paragraphs of the November 15, 2002, Order read as follows:

12. And it is further ordered that both parties shall execute all documentation necessary to give effect to this Order of the Court, forthwith.

13. And it is further ordered that this Consent Order reflects an equitable, full and final resolution of all property and or support issues between the parties.

[16] As stated earlier, the Petitioner died on November 24, 2002.

[17] Between November 2002 and June 2003, the Respondent's counsel received from DND a letter which indicated the amount that would be paid to the Petitioner upon an equal division of the Respondent's pension entitlement. The amount was stated to be an "approximate" amount. The executrix of the Petitioner's estate indicated that she did not wish to accept an approximate amount but required a precise figure, in the interests of the estate and its beneficiaries (the children of the marriage).

[18] The division of the DND pension which was ordered by the Court Order of November 15, 2002, required further Court appearances. The Petitioner's estate filed a Notice of Motion returnable June 6, 2003, seeking a further Order to compel the Respondent to comply with the provisions of the November 15, 2002 Order regarding the DND pension. Following Court appearances on June 6, 2003, and June 20, 2003, the Court ordered the Respondent to forthwith make written application to DND for division of his pension entitlement. The Court also ordered the Respondent to pay costs of \$750.00 to the Petitioner's estate with respect to the June 2003 application.

[19] The Respondent's former counsel, without the knowledge or consent of Petitioner's counsel, prepared and submitted to the Clerk a draft Order with respect to the Court's decision of June 20, 2003, and this Order was issued by the Clerk. Regrettably, the wording was incomplete and inaccurate, and was not rectified by Respondent's former counsel until March 16, 2004, and only then by Order of the Court.

[20] On February 3, 2004, Petitioner's counsel wrote to Respondent's then counsel advising that an error had been made in transferring RRSP monies from the Petitioner's account to the Respondent's account in equalizing the RRSP assets pursuant to the

November 15, 2002 Court Order. There was an overpayment to the Respondent of \$37,313.85, and the Petitioner's estate demanded a transfer back immediately of these funds. The Respondent refused. This led to yet further Court appearances, culminating in the Court's decision in favour of the Petitioner's estate, set forth in its Memorandum of Judgment of June 8, 2004. The Petitioner's estate filed Notices of Motion returnable March 5, 2004 and April 2, 2004 on this issue, and there were Court appearances on March 5, 2004, March 12, 2004, April 2, 2004, April 23, 2004, and April 30, 2004. As indicated in the Court's decision of June 8, 2004, the Respondent's position on this particular matter was not reasonable, as he was essentially attempting to revisit a matter which had been resolved by the Consent Order of November 15, 2002. The Respondent's submissions at the April 30, 2004 Court hearing disclosed a) his intransigence on a pre-separation issue, and b) that his motivation for refusing to transfer back the RRSP overpayment was to obtain leverage on the pre-separation issue.

[21] The foregoing chronology discloses an unnecessarily protracted lawsuit, notwithstanding that the issues are mainly straightforward (e.g., the equalization of matrimonial property following dissolution of a long-term marriage) and notwithstanding the presentation of two consent orders in June 2002 and November 2002.

[22] These proceedings were commenced by the Petition for Divorce. The relief sought by the Petitioner in that initial document included an equalization of net family property, and it is this item that consumed much of the time and resources expended on this lawsuit. As a litigant the Petitioner achieved success on this item and in this lawsuit, and accordingly costs should follow the event. Indeed, the Petitioner achieved success in the lawsuit as early as the Court's Order of November 15, 2002. With respect, that Order should have ended the litigation (except for a determination of costs). The two items which prolonged the litigation were disputes in compliance with that November 15, 2002 Order. The one dispute (DND pension) was resolved by subsequent Court Order in the Petitioner's favour, with costs payable by the Respondent. The other dispute (transfer back of RRSP overpayment) was also resolved by subsequent Court Order in the Petitioner's favour.

[23] Accordingly, in the normal course of events I would order the Respondent to pay the Petitioner's party/party costs of these proceedings throughout (i.e., except for those June 2003 steps for which costs have already been ordered and except for the unsuccessful *ex parte* application of November 12, 2002).

[24] However, counsel have now drawn to my attention an Offer to Settle made by the Petitioner on October 21, 2002. In that document the Petitioner offered to settle the

division of matrimonial property on a basis described in the offer. On the three main items, the offer is virtually identical to what is achieved by the Petitioner in the November 15, 2002 Order, i.e., a) the Respondent to purchase the Petitioner's interest in the matrimonial home, b) the DND pension to be divided equally, and c) the RRSP's to be divided equally.

[25] In my view this offer was reasonable, and should have been accepted by the Respondent. Its reasonableness is confirmed by the fact that the Respondent, through his counsel, subsequently agreed to its terms being incorporated into a Court Order (though, still later, he seemed to retreat from that position with respect to the RRSP's). The *Rules of Court* provide that the Court can take into account a reasonable offer that is made by one of the litigants who subsequently achieves success in the Court process on terms that are as favourable as those contained in the offer which was not accepted.

[26] Rule 18 of the *Divorce Rules* states:

18.(1) At any time before the commencement of a trial or hearing, a party may serve a written offer to settle a claim for support of a spouse, support for the children of the marriage or division of property.

(2) An offer may be accepted at any time before the Court makes an order disposing of the claim in respect of which the offer is made by serving a written notice of acceptance on the party who made the offer.

(3) An offer may be revoked at any time before it is accepted by serving a written revocation on the party to whom the offer was made.

(4) Where an offer is accepted, the Court may incorporate any of the items of the offer into an order.

(5) Where an offer is not accepted, no communication respecting the offer shall be made to the Court until the Court makes an order disposing of the claim in respect of which the offer has been made.

(6) In exercising its discretion as to costs under rule 33, the Court may take into account the terms of the offer, the date on which the offer was served, the date of acceptance if it was accepted, the success of the parties and the conduct of the parties during the litigation.

[27] Part 13 of the *Rules of Court* dealing generally with civil proceedings also provides an incentive for litigants to accept a timely, reasonable offer. In particular, Rule 201(1) 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.

[28] The Petitioner's October 21, 2002 offer is stated as being made "pursuant to Rules 193-201" of the *Rules of Court*.

[29] Notwithstanding these provisions for costs consequences of not accepting reasonable offers to settle litigation, in the final analysis costs are in the Court's discretion.

[30] In all of the circumstances of the present case, I find there is merit in the Petitioner's request for an enhanced costs award. The Petitioner and her estate have achieved substantial success in this lawsuit. The Respondent should have accepted the Petitioner's reasonable offer of October 21, 2002, and avoided the unnecessary expense of further litigation beyond that point. Even after the Court Order of November 15, 2002, it was necessary for the Petitioner's estate to take further Court proceedings to compel compliance by the Respondent with that Court Order (the Respondent had to know that he was at risk of an award of solicitor/client costs against him at that point). On the two disputed issues which ensued, both were determined against the Respondent. Accordingly, in my view the Petitioner ought to have her usual party/party costs up to October 21, 2002, and costs on an enhanced basis thereafter (i.e., except for the June 2003 Court proceedings for which the Court has already made its determination on costs).

[31] I am reluctant to make such an award on the basis of solicitor/client costs, in view of the protracted nature of this lawsuit after October 21, 2002, and the animosity and lack of communication between counsel. Taxation of a proper solicitor/client bill of costs in this instance would be difficult, time-consuming and no doubt contested. I prefer instead to consider a multiple (double or triple) of party/party costs after October 21, 2002, and then award a lump sum on that basis.

[32] I have reviewed the two proposed party and party bills of costs included in the Petitioner's written brief. With respect, I do not adopt either, as I find them to be incomplete in part, and over-inclusive in part.

[33] In arriving at a lump sum or round figure for party and party costs for each of the two phases of these proceedings (i.e., up to October 21, 2002, and subsequent to October 21, 2002), I have carefully reviewed the Court file and had regard to Column 5 of Schedule A of the *Rules of Court*.

[34] In my view \$1,400, exclusive of disbursements, is a reasonable figure for the Petitioner's party and party costs to October 21, 2002. This includes preparation of pleadings and amended pleadings, preparation for and obtaining interim relief in May and June of 2002, various adjournments, and correspondence.

[35] In my view \$2,300.00, exclusive of disbursements, is a reasonable figure for the Petitioner's party and party costs subsequent to October 21, 2002. This includes preparation for and obtaining interlocutory relief in October and November of 2002 and in March and April of 2004, the various adjournments in connection therewith, preparation and filing of costs submissions, correspondence, and entry of various orders, including that flowing from this memorandum. In the circumstances of this case, including the Offer to Settle of October 21, 2002, I would double the Petitioner's party and party costs under Column 5 for the period subsequent to October 21, 2002, for a figure of \$4,600.00.

[36] In the result I award to the Petitioner lump sum costs of \$7,000.00, inclusive of disbursements, determined as follows:

\$1,400.00 - party/party costs (lump sum) to October 21, 2002  
\$4,600.00 - double party/party costs (lump sum) subsequent to October 21, 2002  
\$1,000.00 - reasonable disbursements (lump sum)  
\$7,000.00

[37] To reiterate, I have not included in this figure any costs for the unsuccessful *ex parte* application of November 12, 2002, nor for the June 2003 proceedings for which costs have already been awarded.



J.E. Richard,  
J.S.C.

Dated at Yellowknife, NT, this  
10<sup>th</sup> day of August 2004

Counsel for Estate fo the Petitioner: Jill A. Murray  
Counsel for the Respondent: Adrian C. Wright

S-001-DV-6101-03400

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