Date: 2007 01 29
Docket: S-0001 DV 6101-03589

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

THOMAS CHRISTIAN GROSS

Petitioner

- and -

ALBINA GROSS

Respondent

MEMORANDUM ON COSTS APPLICATION

[1] This Memorandum addresses the issue of costs of these proceedings. I heard argument on this issue on January 24, 2007.

A) Background

[2] The issues at this trial were division of family property and spousal support.

[3] On the division of property issue, the Petitioner acknowledged that there should be an equal division of family property pursuant to the *Family Law Act*, RSNWT 1999, c.18, and that an equalization payment was due to the Respondent. The issue was quantum. There was a disagreement between the Petitioner and the Respondent as to the approach that should be taken to calculate the equalization payment.

[4] The Petitioner argued that in calculating the equalization payment, the values that should be used, for all assets and liabilities, were the values as of the separation date, June 19, 2000.

[5] The Respondent's position was that the matrimonial home was impressedwith a constructive trust in her favour, and that she was entitled to benefit from the increase in value of the home between the time of separation and the time of trial. The Respondent also argued that, because the Petitioner had sold certain assets after separation and reinvested the proceeds, she was entitled to benefit from some of the profits the Petitioner realized as a result. The Respondent raised other issues having to do with the handling of assets and liabilities by the Petitioner between the time of separation and the time of trial.

[6] The parties also disagreed about the value that should be attributed to other assets.

[7] On the issue of spousal support, the Petitioner's position was that if the Respondent was entitled to a support order, that order should be time-limited, given the relatively short duration of the marriage. The Petitionersuggested that the *Spousal Support Advisory Guidelines* were a useful tool to assess the quantum and duration of any support ordered. The Petitioner said that if one applied the *Guidelines* to the circumstances of this case, the quantum of support would be in a range between $430.00 and $573.00 monthly, and the duration would be between 3 and 6 years.

[8] The Respondent's position was that an order for spousal support should be made, that it should not be time limited, and that the quantum should be in the range of $2,500.00 per month to bring the Respondent to a standard of living comparable to what she had during the marriage.

[9] In my Reasons for Judgment, reported at 2006 NWTSC 66, I found that the approach advocated by the Respondent on the division of family property was inconsistent with the *Family Law Act, supra.* I rejected the constructive trust argument with respect to the matrimonial home. I declined to follow the approach the Respondent was advocating with respect to the tracing of funds arising from the sale of other assets. I calculated the equalization payment on the basis of findings I made about the asset and liability positions of the parties as of the valuation date. I made a number of findings that were favourable to the Respondent when deciding what value should be attributed to certain specific assets. For example, with respect to jewelry in possession of the Respondent, I accepted her evidence and concluded that its value was much less

than what the Petitioner had estimated. The same was true for a number of items where the value was in dispute.

[10] On the spousal support issue, I found that the Respondent was entitled to an order for spousal support that was not time limited, in an amount of $900.00 per month. I also found that the Respondent was entitled to a lump sum payment of $9,900.00, for retroactive support going back to December 14th, 2005, the date her application for interim support was dismissed.

B) Principles Applicable to the Determination of Costs

[11] As a general principle, in litigation, costs follow the event, although the Court has considerable discretion in this area. That discretion takes on even more importance in matrimonial litigation, given that this type of litigation usually involves a large number of issues that are often intertwined, and may involve matters that are not of a monetary nature. *Fair* v. *Jones*, [1999] N.W.T.J.No.44, at para.15.

[12] The determination of the issue of costs in this case requires consideration of the general costs provisions in the *Rules of Court of the Northwest Territories*, R-10-96, as amended ("*The Rules of Court*") as well as the relevant provisions of the *Northwest Territories Divorce Rules* R-094-9, as amended ("*The Divorce Rules*") *Fair* v. *Jones, supra*, at para.13.

[13] Both the *Rules of Court* and the *Divorce Rules* include provisions that deal with the costs consequences that may flow from an offer to settle. These are relevant because in this case, the Petitioner relies on offers to settle that were made on July 31st, 2006 and August 31st, 2006.

[14] Rule 201 of the *Rules of Court* reads, in part, as follows:

> 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 favorable as or more favorable than the offer to settle.

[15] Rule 206(1) preserves the Court's overriding discretion on this issue:

> 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.
>
> (...)

[16] Rule 18 of the *Divorce Rules* deals with settlement offers. Costs consequences of offers are set out at Subrule 18(6):

> 18.(...)
>
> (6) In exercising its discretion as to costs (...) 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.

[17] Rule 201 of the *Rules of Court* is engaged where the offer made was as favorable or more favorable than the judgment obtained. Subrule 18(6) of the *Divorce Rules* says that the terms of the offer are a relevant factor,but lists other considerations, including the success of the parties and their conduct of the matter. As a result, the question of whether the offers made in this case should have costs consequences must be decided bearing in mind the terms of the offers, the positions advanced by the parties at trial, and the trial results. As stated by Vertes J. in *Fair* v. *Jones*, *supra*, at para.19, the issue can be framed as "whether it was reasonable to go to trial with the offers that were on the table".

C) Application of Principles to the Facts of this Case

[18] The Petitioner relies on offers made on July 31st, 2006, and August 31st, 2006. Both offers were made and served within 10 days of the commencement of the hearing.

[19] The most significant terms of the July offer were that the Petitionerwould make an equalization payment of $40,000.00; the time share in Kelowna would be sold and the proceeds would be divided equally between the parties, after

reimbursement to the Petitioner of condo and maintenance fees paid since separation; the Petitioner's work related pension would be divided equally; the Petitioner would pay the Respondent spousal support of $650.00 every month, and this obligation would be subject to a review by the Court in three years.

[20] The August offer was very similar to the July one, except it also included a provision that the Petitioner would pay the Respondent pre-judgment interest, from the date of separation, on the equalization payment amount.

[21] The Petitioner takes the position that the July 31st offer, globally, was at least as favorable, and probably more favorable to the Respondent than the results she obtained at trial. Therefore, he claims he is entitled to party and party costs to the day the offer was served, and to solicitor and client costs from that date.

[22] Although the amount of spousal support ordered was higher than what was offered, the Petitioner argues the difference is minimal and is offset by the treatment of spousal support for income tax purposes, as well as by the fact that any additional income the Respondent receives results in a corresponding reduction in the amount of her social assistance entitlement. The Petitioner argues that in any event it would take a long time before the monthly difference of $250.00 would add up to what the Respondent would have received as pre-judgment interest, had she accepted the August offer.

[23] In summary, the Petitioner's position is that this is a matter that should have settled, and that the only reason it did not was that the Respondent had unrealistic expectations and did not want to deal with this matter or be divorced from him.

[24] The Respondent disputes that the offers were as favourable or more favourable than the results she obtained at trial. She takes the position that as she was successful in obtaining an equalization payment and an order for spousal support, she is entitled to party and party costs in accordance with the general principle that costs follow the event. But the crux of her position is that the issue of costs should not be decided only on the basis of the parties' relative success in the case. She argues that a number of other factors must be taken into account and should lead this Court to the conclusion that it would be fair to grant her costs.

[25] The Respondent points to the fact that the Petitioner, who was in possession of most of the assets, never made any voluntary payment to her during the many years between separation and trial. The Respondent also points to the fact that the Petitioner opposed her application for interim spousal support in December of 2005. She further argues that the Petitioner did not comply with his obligations as a sponsor for her and her mother in the context of their immigration to Canada. The Respondent says that these factors, combinedwith the overall circumstances of the case, should lead this Court to exercise its discretion and grant her party and party costs.

[26] This was a case where there was divided success. Neither party emerged substantially successful in comparison to the other. On the divisionof property, the approach advocated by the Respondent, if accepted, would have led to a much higher equalization payment being ordered. In that respect, she was unsuccessful. By contrast, on the spousal support issue, although she did not obtain an order in the amount that she was seeking,she obtaineda larger amount than what the Petitioner was saying she should be awarded. More importantly, she succeeded in obtaining an order without a time limit, which is significantly more advantageous to her than a time limited order.

[27] The fact that there was divided success is only one of the factors that I am to take into account. I now turn to some of the other matters that were referred to by counsel in their submissions.

[28] With respect to the settlement offers, I am not persuaded that the terms of the July or August offers were more favourable or as favourable as what was ultimately ordered. The equalization payment offered was higher than the amount ordered in the judgment. However, the offer did not include any provision for retroactive spousal support, which was somethingthe Respondent was granted in the judgment.

[29] The amount of support ordered was larger than what was offered. I reject the notion that fiscal considerations dilute in any way the difference between what was offered and what was ordered. The fiscal consequencesare very limitedfor the Respondent, because she has a very low income and likely would pay very little taxes, if any.

[30] As for the argument based on the impact of the spousal support on the Respondent's entitlement to social assistance, my understanding is that the Respondent's monthly social assistance entitlement was $393.92 (Exhibit #2, Tab 10). If her income increased, the social assistance would be reduced by a corresponding amount. This, simply put, means that the first $393.92 of spousal support the Respondent received would not increase her income, because she would lose an equivalent amount in social assistance. However, as the amount of spousal support in the offers and the amount ordered in the judgmentare well above $393.92, the difference between the two does result in a corresponding increase of the Respondent's monthly income, and is more advantageousto that extent.

[31] Finally, we do not know, at this point, for how many years the Respondent will receive spousal support in the amount ordered in the judgment. It is not possible to determine with certainty whether in the end, this is a more favourable overall outcome than what she would have received by acceptingthe Plaintiff's offer to settle.

[32] Although I do not find that Rule 201 of the *Rules of Court* is engaged in the circumstances of this case, I do find that the July and August offers were reasonable offers, and I have taken that into account.

[33] With respect to the Petitioner's failure to make any voluntary payments to the Respondent between the time of separation and the trial, I accept this is a factor, but find that the Petitioner's conduct must be examined in the broader context of the case. There is no suggestion or evidence that the Respondent made any meaningful efforts towards settling the case. The Petitioner could have chosen to make voluntary payments to her but in the absence of any prospect of settlement, the fact that he did not is not determinative when one examines the overall circumstances disclosed by the evidence.

[34] I have also taken into account that for a period of several months after separation, up to some time in 2002, the Respondent remained in the matrimonial home and the Petitioner continued to maintain the property, while he rented accommodations for himself and his daughter in Yellowknife.

[35] I have also considered the fact that the Petitioner opposed the Respondent's application for interim spousal support. I have reviewed the certified copy of the transcript of the hearing before Justice Richard on December 14th, 2005. Two applications were before the Court that day. The first was to have an individual appointed as the Respondent's guardian *ad litem* for this matter. A large part of the exchange between the Court and counsel had to do with that application.

[36] The second application was the application for interim spousal support. In dealing with this application Justice Richard said the following:

> "(...) I am not satisfied that this is necessarily a case for an interim spousal support order in any event on the material before the Court at present. The affidavits before the Court are conflicting or incomplete on the contributions made by the respective parties during the six years of cohabitation and on the support by the husband of the wife in the years immediately following the separation in the year 2000. In these circumstances, at least with the scanty material before the Court, the issue of spousal support is best left to a determination by the trial judge after the presentation of more complete evidence and full argument based on the more complete evidence."

Transcript of Proceedings of December 14th, 2005, p.111 line 43 to p.112 line 10.

[37] The insufficiency of the materials filed was raised as a preliminary matter. The application was dismissed on that basis, without counsel having made any submissions on the merits. Although it is clear the Petitioner was opposing the application, it is also clear that the reason it was dismissed was because the Court found that it was not supported by sufficient material. This is important context against which to assess the position the Petitioner took at the time.

[38] I also find that the fact that the Petitioner sponsored the Respondent and her mother when they immigrated to Canada is not relevant to the determination of costs in these proceedings. That issue is in my view complete distinct from the matters that were at issue in this trial, namely, obligations the Petitioner had to the Respondent arising from their marriage.

[39] A factor which I find to be of great significance in the assessment of the overall circumstances of this case is that between the time the parties separatedand the time of trial, the Respondent became afflicted with a serious mental illness. It was some time before she received treatment. She was in and out of hospital, and on some occasions involuntarily committed pursuant to mental health legislation. There were periods of time where she could not instruct counsel.

[40] The Respondent, of course, is not responsible for her illness. She was still under the care of her psychiatrist, Dr. Chin, at the time of the trial, and based on his evidence she still suffered from some of the symptoms associated with her disease. These circumstances, cannot be ignored in assessing whether the trial could have been avoided, and in the examination of the positions taken by the parties.

[41] On the whole, although I agree with the Petitioner'scounsel that this is probably a case, in ordinary circumstances, that would have had a very good chance of settling without trial, and that it may be that in some respect the Respondenthad unreasonable expectations, I am not prepared, given her personalcircumstances at the time, to find that this is an appropriate case for awarding costs against her.

[42] I am also not convinced that the Respondent has made the case for entitlement to costs. The Petitioner did make some efforts to attempt to settle this case, and made offers that were, examined globally, comparable to what the Respondent obtained in the judgment.

[43] In my view, considering the full context of this case, it is one where each party should bear its own costs.

[44] I have considered the Petitioner's request to be awarded costs of the January 24th, 2007 hearing. The Petitioner conveyed to the Respondent before that hearing that he was content to have each party bear its own costs. The position he took at the costs hearing was in response to the Respondent's insistence to claim costs.

[45] Given the divided success, the issues arising from the settlement offers, and the various factors raised during counsel's submissions, I find that both parties had

legitimate points to make on the costs issue and after careful consideration, I have concluded that there should not be an order as to costs for the January 24th hearing either.

[46] For these reasons, there will not be an order as to costs on this case.

L.A. Charbonneau
J.S.C.

Dated at Yellowknife, NT, this
29th day of January 2007

Counsel for the Petitioner: Sheila M. MacPherson
Counsel for the Respondent: Robert A. Kasting

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MEMORANDUM ON COSTS APPLICATION OF
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