

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

In the matter of the *Children's Law Act*
of the Northwest Territories

And in the matter of the *Family Law Act*
of the Northwest Territories

BETWEEN:

HARRIET KOYINA

Applicant

- and -

GEORGE ALLAN KOYINA

Respondent

MEMORANDUM OF JUDGMENT

1) INTRODUCTION

[1] The Applicant, Harriet Koyina, seeks costs in proceedings she took against the Respondent, George Koyina. In those proceedings, she sought the unequal division of the family assets and spousal support. The trial proceeded on June 13 and 14, 2007. My Reasons for Judgment, reported at 2007 NWTSC 52, were filed on July 25, 2007.

[2] Ms. Koyina's position is set out in her written submissions, and were supplemented with oral representations made at the costs hearing on August 17, 2007. She seeks an order granting her party and party costs from the commencement of the application until March 6, 2007, and solicitor-client costs from March 6, 2007 until the date that a costs judgment is entered. Mr. Koyina, who represents himself on this matter, presented oral submissions at the costs hearing. His position is that he should not have to pay for Ms. Koyina's lawyer, especially considering that he did not have

enough money to hire a lawyer for himself. He argues that he has a family to support and that the orders arising from these proceedings have placed him in a very precarious financial position. He says he cannot afford to pay what he has been ordered to pay, let alone anything more.

2) PARTY AND PARTY COSTS

[3] Party and party costs are calculated on the basis of a Tariff set out in the *Rules of the Supreme Court of the Northwest Territories*. They are meant to serve as partial compensation for the successful party's litigation and legal costs. The usual rule is that the successful litigant is entitled to his or her costs on the litigation. The Court retains the discretion to deprive the successful litigant of those costs if there is a good reason to do so. *McGrath v. Holmes* [1996] N.W.T.J. No.37.

[4] While this rule generally applies in matrimonial cases, a number of other considerations may impact on how the court will exercise its discretion on costs in those types of proceedings. The means of a party to pay costs and the impact of other orders made as a result of the proceedings are among those considerations. *Fair v. Jones* [1999] N.W.T.J. No.44, at para.15.

[5] Ms. Koyina was mostly successful in obtaining the reliefs that she sought at this trial. She obtained an order for unequal division of the matrimonial property as well as an order for spousal support. Mr. Koyina's only submission in response to her request for costs is that he does not have the means to pay them.

[6] I do realize that Mr. Koyina is supporting his spouse and a young child. I also realize that the spousal support orders arising from these proceedings have had, and will continue to have, a direct and significant impact on his means. However, the evidence adduced at trial showed that Mr. Koyina has a well paying job. Although the obligation he has to support Ms. Koyina will require some adjustments to his budget and lifestyle for a period of time, I am not satisfied that there are any compelling reasons to depart from the usual rule that a successful litigant is entitled to his or her costs on a party and party basis.

3) SOLICITOR-CLIENT COSTS

[7] Ms. Koyina's claim for solicitor-client costs is based on a settlement offer that was served on Mr. Koyina in March of 2007, a few months before the trial date. She invokes Rule 201 of the *Rules of Court* in support of her claim that she is entitled to solicitor-client costs from the date that offer was served.

[8] Rule 201 says that where a party serves a settlement offer to another party and ultimately obtains, after trial, a judgment on terms as favourable as or more favourable than the offer, that party is entitled to solicitor-client costs from the date the offer was served.

[9] Lysette Deyelle's Affidavit sworn June 13, 2007 establishes that a settlement offer was mailed by registered mail to Mr. Koyina on February 28, 2007. It appears from Exhibit "C" to that Affidavit that it was not Mr. Koyina who signed for the envelope at the post office. However, Mr. Koyina acknowledged in his submissions that he remembered having received that settlement offer. I am satisfied, therefore, that Ms. Koyina has established that the settlement offer was served.

[10] As I already mentioned, Rule 201 is engaged when a litigant obtains a judgment on terms "as favourable as or more favourable than" than the terms of a settlement offer. It is intended to be an incentive to the settlement of litigation by setting out a predictable outcome where a party rejects a settlement offer that ought to have been accepted. For that incentive to be effective, the Rule must be applied unless there is a good reason not to do so. The overriding discretion of a trial judge on the issue of costs, however, remains. *Fair v. Jones, supra*, at para.10. *Scott v. Sibbeston* 1999 NWTSC 21, at para. 6. *Bokoway v. Bokoway* [2004] N.W.T.J. No.46, at para.29.

[11] In order to decide whether Rule 201 is engaged in the circumstances of this case, I must compare the terms of the Judgment to those of the settlement offer served on Mr. Koyina.

[12] A copy of the offer is attached as Exhibit "A" to Ms. Deyelle's Affidavit. It is dated February 26, 2006 and reads as follows:

This Offer to Settle is made pursuant to Rule 193 of the Rules of Court of the Northwest Territories. The Offer to Settle remains open until the day of the commencement of the formal trial in the within matter. The terms of the Offer to Settle are as follows:

1. That the Respondent, George Allan Koyina, shall pay to the Applicant, Harriet Koyina, spousal support in the amount of \$1,000.00 per month for a period of 48 months, commencing May 1, 2006;
2. That the spousal support indicated in Paragraph 1 shall be due and payable on the 1st day of each month;

3. That each party shall retain all of the property currently in their possession and shall not have any further claim for property division from one another;

4. In the event that the Respondent does not accept the within offer as settlement of the action, the Applicant intends to rely on cost consequences set out pursuant to Rules 193 and 201 of the Rules of Court.

[13] On division of property, the Judgment corresponds to the offer. On the issue of spousal support, the monthly amount that Mr. Koyina was ordered to pay is \$800.00, whereas the offer contemplated monthly payments of \$1,000.00. Ms. Koyina argues that even though the amount of support ordered is lower than what was in her offer, the net result is the same because the offer was for support to be paid for a shorter period of time than what was ordered in the Judgment. She point out that had the offer been accepted, Mr. Koyina would have had to pay her a total of \$48,000.00 in spousal support (\$1000.00 per month over 48 months), and that under the terms of the Judgment, she will receive the same amount, albeit over a longer period of time (\$800.00 per month over 60 months). On that basis, she argues that the Judgment is on terms as favourable to her as the settlement offer, and that Rule 201 is engaged.

[14] One of the difficulties in approaching the issue this way is that a Judgment granting spousal support is not cast in stone. It can be the subject of a variation application if circumstances change. This makes it difficult to quantify with certainty the total monetary value of a time-limited order. In addition, in my view, it is far from clear that receiving smaller monthly amounts for a longer period of time truly constitutes a term as favourable as receiving larger monthly amounts during a shorter period of time. The latter is arguably more advantageous, as the recipient gets his or her money within a shorter time frame.

[15] It is for the party seeking to invoke the rule to establish the foundation for its application. *Starkman v. Starkman* (1990) 75 O.R. (2d) 19. In addition, given the significant consequences that arise when Rule 201 is engaged, what constitutes terms “as favourable as the offer” should be strictly construed. *Lloyd v. Lloyd* (2002), 114 A.C.W.S. (3d) 1026. I am not persuaded, in the circumstances of this case, that the terms of the offer were as favourable as the terms of the Judgment on the issue of spousal support.

[16] A further problem arises in the circumstances of this case. The settlement offer is silent as to the impact, if any, that the Interim Order made by this Court in April 2006 is to have if the offer is accepted. By the time the offer was served, Mr. Koyina had been the subject of this Interim Order for almost a year. Nothing in the offer explained how the monies paid pursuant to the Interim Order would affect Mr. Koyina's obligations if he accepted the offer. Ms. Koyina may have intended that monies paid pursuant to the Interim Order would set off some what would be owed if the offer was accepted, and may have assumed that Mr. Koyina's interpretation would be the same. But the fact remains that the question was not addressed.

[17] An offer to settle has to be fixed, certain and understandable. *Fair v. Jones, supra* at para. 7. If it lacks clarity or is open to different interpretations, that goes to the detriment of the party who seeks to rely on it.

[18] In the circumstances of this case, I am not persuaded that Rule 201 is engaged. I am not convinced that the Judgment was as favourable as the terms of the offer made because the monthly amount of support ordered was less than what was in the offer. In addition, I find that the offer was not sufficiently clear because it did not address the question of how monies paid pursuant to the Interim Order would impact on what Mr. Koyina would owe if he accepted the offer.

[19] For these reasons, I decline to grant Ms. Koyina solicitor-client costs. She will have her party and party costs from the commencement of her application until today's date. Those costs are to be taxed in the usual course.

L.A. Charbonneau
J.S.C.

Dated at Yellowknife, NT, this
4th day of September 2007

Counsel for the Applicant: Terri Nguyen
Respondent appeared on his own behalf

S-0001-CV-2005000043

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