Evans v. *Martin*, 2008 NWTSC 33

Date: 2008 05 14
Docket: S-0001-CV-2004000228

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

MARLENE EVANS and EARL EVANS

Applicants

- and -

DEREK PAUL MARTIN

Respondent

MEMORANDUM OF JUDGMENT

[1] On March 31, 2008, in Reasons for Judgment reported at 2008 NWTSC 22, I issued my decision dealing with issues of custody, access and child support. This Memorandum deals with the question of costs, which is the only matter that remains outstanding.

[2] The Applicants seek party and party costs. They rely on the principle that the successful party is generally entitled to party and party costs. They also rely on various aspects of how this case unfolded in support of their argument that costs should be ordered in their favor.

[3] The Respondent argues the parties should bear their own costs. He says that success was divided at trial and that there are no other reasons to order costs against him.

1. IMPACT OF OFFERS TO SETTLE

[4] Offers to settle were made prior to trial. The Plaintiffs say those offers do not have any costs consequences. The Respondent argues that the offer he made could engage Rule 201 of the *Rules of Court.* Even if he is right, this is somewhat of a moot point since he is not actually claiming costs. Nevertheless, since the parties have addressed this issue in some detail in their written submissions, I will deal with it before I turn to the other issues raised.

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

[6] The parties disagree about how this Rule applies in situations where the case involves multiple issues, as was the case here. The Plaintiffs appear to suggest that to engage Rule 201, the offer must be as favorable or more favorable than the trial result on each and every issue. The Respondent argues that the offer must be looked at as a whole to determine how it compares, overall, with the results achieved at trial.

[7] There are cases from this jurisdiction that support the notion that where multiple issues are involved, offers to settle and trial results should be examined as a whole for the purposes of determining whether Rule 201 is engaged. *Fair* v. *Jones* [1999] N.W.T.J. No.44; *Lay* v. *Lay* [2003] N.W.T.J. No.21. I tend to agree with that approach. In this case, however, it does not matter. Whether the offers are examined issue by issue or globally, the result is the same: Rule 201 is not engaged.

[8] There is no suggestion that the offer made by the Applicants engages Rule 201. The only question is whether the offer made by the Respondent does.

[9] On the issue of custody, the Respondent's offer was that the "permanent care and control" of the child would be with the Applicants. At trial the Applicants were granted sole custody. Sole custody is a concept that carries legal consequences. Not all of those consequences are encompassed in the concept of "care and control". That difference cannot be overlooked, even if there may have been good reasons why "softer" language was used in the offer.

[10] On the issue of access, the Respondent's offer contemplated a much faster and much more significant expansion of the access than what was ordered in the judgment: overnight access on alternating week-ends would have begun within four months;four months later, the access would have been further expanded to include two weeks during the summer school break; four months after that it would have expandedfurther to include access during the Christmas break and the Spring break on alternatingyears. By contrast, the access ordered in the judgment does not provide for any overnight access until July 2009; that access is also quite limited in time (one week-end per month), and place (it will have to be exercised within the community of Fort Smith). Hence, the access ordered was not as favourable or more favourable than what was set out in the Respondent's offer.

[11] On the issue of child support, the Respondent's offer was more favourable than what was ordered in the judgment.

[12] Of the three issues in this case, the only part of the Respondent's offer that was more favourable or as favourable as the judgmentobtained was his offer on the issue of child support. This issue was less significant and much less contested than the others.

[13] The costs consequences of Rule 201 are significant. For that reason, the Rule should be strictly construed. *Lloyd* v. *Lloyd* (2002), 112 A.C.W.S. (3d) 1026; *Koyina* v. *Koyina* 2007 NWTSC 70. I conclude that the Respondent's offer does not engage Rule 201.

2. WHETHER THE APPLICANTS ARE ENTITLED TO COSTS ON THE BASIS THAT THEY WERE THE SUCCESSFUL PARTY

[14] As already mentioned, the Applicants' claim for party and party costs is primarily based on their contention that they were the successful party in this case because they were successful on the issue of custody. They say this was the most significant issue, and that access and child support were corollary.

[15] Determining which party was successful at trial can at times be very simple,and at other times more problematic. When multiple issues are raised, identifyingthe most significant issue or issues goes a long way in making the assessment of which party, if any, was predominantly successful.

[16] There is no question that custody was a significant issue in this case. However, I do not think that the related issue of access can be characterized as having been a corollary or secondary one. This litigation was as much about access as it was about custody. This was evident at trial, where the Applicants vigorouslyopposed any Court ordered expansion of the access regime. They wanted any change to that regime to be subject to their consent. Clearly, and not surprisingly under the circumstances, they viewed access as a very important issue.

[17] The Applicants were successful on the issue of custody, but they were not successful in preventing a change to the access regime. In particular, they were not successful in their complete resistance to overnight access.

[18] On the other hand, the expansion of the access regime that was ordered in the judgment was much more conservative than what the Respondent was seeking. In that sense, the Applicants achieved partial success.

[19] On the issue of child support, the Applicants also achieved partial success. They obtained an order for ongoing and retroactive child support, but the retroactive support was not ordered going as far back as what they were seeking. In any event, even unmitigated success on that issue would not amount to overall success in this litigation, given the relative importance of the child support issue in the overallcontext of the case.

[20] I find, therefore, that success was divided in this case.

3. WHETHER COSTS SHOULD NONETHELESSBE ORDEREDIN FAVOUR OF THE APPLICANTS

[21] Costs are, ultimately, a discretionary matter. The Applicants have advanced a number of reasons why, quite apart from the outcome of the case, they should be granted party and party costs. Their arguments relate to the manner in which this matter was conducted by the Respondent, the unreasonableness of his position on custody, and the procedural steps that they were forced to take to bring this matter to trial. They also ask me to take into account the fact that the Respondentbenefited from legal aid assistance for this case.

[22] Dealing first with what I would describe as the procedural issues, the first adjournment of the trial, in November 2005, was consented to and appears to have been due to a change of counsel. There is nothing to suggest that it was an attempt to delay things or was the result of anyone's bad faith. I also note that part of the Consent Order that issued at that time was that the Applicants would get their costs for the appearance associated with that adjournment. The second adjournment, in February 2006, was also by consent, and appears to have taken place in the context of an attempt to settle the case.

[23] The Application to have the Certificate of Readiness entered was ultimately consented to in August 2007. In the normal course of things, a litigant should not have to file an Application to be able to have a Certificate of Readiness filed. However, the Applicants have already been awarded costs of that particular Application. As for the Application to have Undertakings fulfilled, it was ultimately consented to in February 2007. Whatever issues led to that Application, this is not something that, on its own, would be sufficient to persuade me that a costs order is appropriate for the case as a whole.

[24] The Respondent's claim for joint custody was not supported by particularly compelling evidence. At the same time, the issues of custody and access were so closely intertwined in this case that I do not find that the Respondent's position on custody should be looked in isolation from the dispute over access. Given how far apart the parties were globally, I do not find the Respondent's position on custody justifies a costs order being made against him.

[25] Finally, the fact that the Respondent received assistance from legal aid for this case is not relevant to costs. Rule 646 makes this clear:

> 646. Where a party has been granted assistance under the *Legal Services Act* or any other legal aid plan, the Court shall not take into consideration the fact the party is receiving legal aid when considering an award of costs for or against that party.

4) CONCLUSION

[26] There is no doubt that unique dynamics come into play in family law cases, particularly in cases where the issues include custody and access. These are often very difficult cases for the parties, because they engage issues that are of vital importanceto them, and that are often intertwined with significantly emotional matters. That was very much true in this case, and is also something I have taken into account in examining the costs issue.

[27] On the whole, I am satisfied that this is a case where there should not be a costs order, and I decline to make one.

L.A. Charbonneau
J.S.C.

Dated at Yellowknife, NT, this
14th day of May 2008

Counsel for the Applicants: Katherine R. Peterson, Q.C.
Counsel for the Respondent: Karina Winton

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