Ivens v. Ivens, 2008 NWTSC 51 Date: 2008 07 11
Docket: S-0001-DV2006-103747

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

CHRISTINA GENEVIEVE IVENS

Petitioner

-and-

SEAN DAVID IVENS

Respondent

MEMORANDUM OF JUDGMENT

[1] Three issues were argued before me in Chambers on July 3, 2008:

1. Whether the Petitioner should be granted solicitor client costs of her application for severance of the divorce from the corollary relief proceedings;

2. Whether the Petitioner should be granted costs of her application to have the proceeds of sale of the matrimonial home held in trust;

3. Whether the Court should appoint an accounting firm to provide an independent evaluation of the companies owned by the Petitioner and the Respondent.

1. Costs of the severance application

[2] The Petitioner brought an application for severance of the divorce proceedings from the corollary relief proceedings. She says that documentsfor a consentseverance order were forwarded on May 15 to the Respondent'ssolicitor, who respondedon May 21 that she had no instructions to agree to severance. The Petitioner argues that there was no valid reason for the Respondent not to agree to severance. She says she should not have had to bring a formal application and that a consent order should have been provided. She seeks solicitor client costs of the application.

[3] The Respondent says that he was prepared to consent to severance if the shared parenting agreement under discussion at the time was formalized first. He was concerned that the agreement might not materialize if the Petitioner remarried before it was done. By the time he left the country on June 9 for a trip the Petitioner was aware he was going to take, no draft order for shared parenting had been provided by the Petitioner's counsel. The severance application was served on his counsel the same day he left the country. He says that the Petitioner took advantage of his being out of the country and there is no reason why she could not have waited the further two weeks he was away until he returned and could instruct counsel.

[4] The request for severance is a routine application that should normally be made on consent. In his Answer filed in December 2006, the Respondent agreed that a divorce should be granted, so tying the divorce to the shared parenting agreement was just a tactical move. On the other hand, the Petitioner has not demonstrated that there was any urgency to sever the divorce from the corollary relief proceedings; there is no reference in her affidavit to any plans to remarry and no reason given as to why the matter could not await the Respondent's return from his trip.

[5] Solicitor client costs are generally reserved for circumstances where the Court finds it necessary to sanction "reprehensible, scandalous or outrageous" conduct on the part of a party: *Young v. Young*, [1993] 4 S.C.R. 3. In my view, while the Respondent's refusal to agree to severance until the parenting agreement or order was in place was clearly a tactical move, since severance was not urgent, the circumstances do not come within the type of conduct for which solicitor client costs are generally reserved. I therefore decline to order solicitor client costs but will grant the Petitioner costs on a party and party basis.

2. Costs of the application regarding sale proceeds

[6] The parties' matrimonial home and a condominium owned by the Respondent have been listed for sale. The Petitioner's counsel asked for an agreement from the Respondent's counsel that the proceeds of sale be held in trust until property division is resolved. At the time the Petitioner's application to the Court to have the proceeds held in trust was made, no response had been received from the Respondent's counsel. The Petitioner says she was told by the Respondent that he wanted some of the

proceeds of the sale of the matrimonial home in order to purchase other accommodation for himself. On July 3, 2008, on the basis of the Petitioner's affidavit alone and being advised that the Respondent was out of the country, I granted an order that the net proceeds of sale of both the matrimonial home and the condominium be held in the Petitioner's solicitor's trust account and that the Respondent could apply to set aside the order. He has not made such application.

[7] The Petitioner seeks party and party costs of that application, arguing that she should not have had to apply to the Court, that the Respondent should have agreed to what she sought.

[8] In his affidavit filed since the order was made, the Respondent says he advised the Petitioner by email prior to leaving Canada that he would agree that the sale proceeds be held in trust. He says he did not give instructions about that to his counsel as he did not get a response from the Petitioner to his email and did not anticipate it becoming an issue while he was gone.

[9] Although an issue was raised about the Petitioner not disclosing in her affidavit that the Respondent had agreed that the sale proceeds be held in trust, I draw no inference from that as the Respondent also did not disclose in his affidavit that he wanted money for a down payment out of the proceeds, althoughthat was concededon his behalf.

[10] In the circumstances, the Petitionershould not have had to bring this application; it should have been dealt with on consent. I find it difficult to understand why the Respondent did not take the time and care to give instructions on this aspect of the matter to his counsel, considering that the properties are valuable assets and notwithstanding there was not likely to have been any sale while he was out of the country. The Petitioner will have costs of the sale proceeds application on a party and party basis.

3. The independent valuation

[11] The Petitioner and the Respondent are joint owners and shareholders of several companies, the main one being Medic North Emergency Services Ltd. ("Medic North"); there are also some related companies in which the Petitioner does not hold shares or any office. Of the two parties, the Respondent is the one mainly involved in corporate matters and the companies' financial arrangements.

[12] The Petitioner asks the Court to order that an independent valuation of the companies be made by Deloitte Touche. She bases her request on her concern that the companies' current accountant is a good friend of the Respondent and reports to and gets direction from the Respondent. She also says that despite numerous requests for financial documentation, it has not been forthcoming from either the Respondent or the accountant. She asks that Medic North be ordered to pay the costs of the independent valuation.

[13] The Petitioner is also concerned about tax information that indicates that the Respondent will receive a tax refund while she owes a significant amount as the result of the liquidation of some investments held by the parties. Ultimately, the Petitioner says she is of the belief that full and objective financial information and corporate valuation is not possible from the companies' current accountant or his firm.

[14] The Respondent opposes this request. He says that his lawyer has advised him that the Petitioner's counsel has been provided with the information received from the accountant to date and that a more complete package is being put together. He also says that he has previously instructed the accountant to release any information requested to the Petitioner and her counsel and that the latter have been made aware of this.

[15] The Respondent says the Petitioner's accountant should review the information prior to a decision being made about obtaining a business valuation. He questions the value of the expense of such a valuation for the company and whether it is a valid business expense for tax purposes.

[16] The Petitioner does not rely on any particular statutory authority for her request that the Court order a valuation with the expense to be borne by Medic North. No reference was made to Rule 278, which provides for a court-appointed expert where "independent technical evidence" would appear to be required [subsection (2)]. Rule 278 requires that a question or instructions be formulated for the expert and that the expert prepare a report in accordance with the directions and instructions of the Court, which is filed with the Court. Under Rule 278, the expert is really the Court's witness; subsection (10) anticipates that the parties may also call their own experts at trial. The various issues that arise under Rule 278 were not addressed on this application.

[17] If the Court is asked to appoint an expert under Rule 278 (which would have to be a specific individual), some information as to the qualifications and anticipatedfees of the individual would have to be provided as well as the individual's agreement to take on the appointment.

[18] The Petitioner may of course retain an accountant or valuator of her own choice for her own purposes. Normally a party bears the expense of retaining an expert and the expert's fees are claimed as costs from the unsuccessful party in the litigation. No authority was referred to in support of the argument that Medic North, which is not a party to the litigation, be directed to pay the cost of the expert chosen by the Petitioner.

[19] If any expert retained by the Petitioner is impeded in gainingaccess to the books or financial information of the companies, the Petitioner may seek an order to remedy that situation. At this stage, it is impossible for me to determine what has or has not been produced by way of financial information as the Petitioner's counsel says information has not been provided while the Respondent's counsel says it has. I note that examinations for discovery have yet to be held, which may also assist in the production of some or all of the information sought by the Petitioner.

[20] As it is not clear whether the Petitioner is seeking a Rule 278 Court expert and because of the lack of information addressing the requirements of that rule if she is, I am dismissing the application for appointment of Deloitte Touche at this time. This

does not preclude the filing of a further application based on Rule 278 or some other authority.

[21] Accordingly,

(i) costs of the severance application are granted to the Petitioner on a party and party basis;

(ii) costs of the application regarding the sale proceeds are granted to the Petitioner on a party and party basis;

(iii) the application for appointment of Deloitte Touche to conduct a valuation of the companies is dismissed.

V.A. Schuler
J.S.C.

Heard at Yellowknife, NT: July 3, 2008

Counsel for the Petitioner: Katherine R. Peterson, Q.C.
Counsel for the Respondent: Edward Gullberg

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