Lamb v. *Walcer,* 2008 NWTSC 83

Date: 2008 10 22
Docket: S-0001-FM-2006000123

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

AND 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:

NANCY LAMB

Applicant

- and -

DAVID WALCER

Respondent

MEMORANDUM OF JUDGMENT REGARDING COSTS

[1] This Memorandum addresses the issue of costs in these proceedings which came on before me on the Applicant's Motion which was served on the Respondent who did not appear.

[2] The issues at trial were custody and access relating to two children of the relationship, arrears of child support, retroactive child support and special expenses, and division of matrimonial property.

[3] After a 1 ½ day trial, I issued a Judgment on September 29, 2008, (*Lamb* v. *Walcer,* 2008 NWTSC 72) ordering, among other things, the following:

> 1. That the Applicant have sole custody of the children with reasonable access to the Respondent and certain specific access to be exercised on at least 48 hours notice;

2. That the Respondent pay the Applicant a matrimonial property equalization payment of $15,011.00.

3. That Respondent pay arrears of child support and retroactive child support and special expenses although these are of marginal relevance to this application.

[4] Included in my calculations of the equalization payment was a credit of $22,000.00 to the Respondent for his equity in the matrimonial property being a vacant lot, at the time of commencement of the relationship. It is noted that, at trial, the Applicant made no claim against the Respondent on any retirement savings plan or his pension.

[5] The Applicant made an Offer of Settlement in writing on February 22, 2008 which offer was never withdrawn. The Respondent did not respond to this offer and it was therefore necessary for the Applicant to take the matter to trial. The Applicant says that she obtained a judgment at trial considerably more favourable than the terms of her offer to the Respondent.

[6] The Applicant seeks costs on a solicitor and client basis pursuant to Rule 201 of the *Rules of Court* from the date the Offer was made until September 29, 2008 being the date of judgment. Rule 201 is set out 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 favourable as or more favourable than the offer to settle.

[7] Although this rule would "entitle" a party in appropriate circumstances to solicitor and client costs, the Court nevertheless has discretion when dealing with costs in an action: Rule 643.

[8] In considering this issue, it is necessary to compare the terms of the Offer of Settlement with the relief granted to the Applicant in my Memorandum of Judgment.

Custody

[9] In the Settlement Offer, the Applicant proposed she have sole custody and day to day care of the children with the Respondent to "exercise liberal and generous access as may be agreed upon between the parties from time to time, taking the child's [sic] wishes into consideration."

[10] At trial I awarded the Applicant sole custody and day to day care and control of the children as well as reasonable access to the children as may be agreed upon and certain specific access to be exercised on 48 hours notice.

[11] After separating, the parties had joint custody of the children and shared day to day care and control of them until February of 2007 when the Applicant assumed care and control. This de facto situation was formalized in court orders dated August 24, 2007 and September 20, 2007. However, up to the date of trial, the issue of joint custody in the legal sense had been left in limbo. Although the relief granted to the Applicant at trial was more defined with respect to specific access, I am not prepared to conclude for the purpose of this motion that the Applicant's position was more favourable after trial than terms offered to the Respondent. However, it was clearly not less favourable either.

Division of Matrimonial Property

[12] Although the Applicant was required to satisfy the Court that her proposal for custody of and access to the children of the relationship was appropriate and in their best interests, this issue was not difficult to resolve based on the evidence before the Court and did not take a significant amount of court time. The main area of contention at trial was the distribution of matrimonial property. I say this while noting that the Respondent, who was self-represented, was present at the opening of trial but left after a few minutes and did not return and participate thereafter. Regardless, the Court was under a duty to scrutinize the Applicant's claim for an equalization payment and to have her prove her entitlement on a balance of probabilities.

[13] In February of 2008, the sum of $265,000.71 was being held in trust from the sale of the matrimonial home. Prior to the commencement of the relationship in October of 1985, the Respondent had purchased a Lot in Yellowknife on which would be built the family home. The purchase price was $24,500.00 and the Respondent took out a loan that was repayable over a 3 year period. The Respondent had been ordered to provide details of this transaction but did not do so. The Applicant's evidence was that within 2 months of the parties starting to live together, the Respondent made one final payment on the loan although she thought there was a year left on it and perhaps as much as $8,500.00 owing when the last payment was made. She asked that this amount be included as matrimonial property. I found that, on a balance of probabilities, the Respondent had paid $22,000.00 on the loan prior to commencement of the relationship and that only $2,500.00 would be considered as matrimonial property. In the settlement offer, the Applicant proposed giving the Respondent credit for $20,000.00 for his equity in this property. Accordingly, the result at trial in this one respect was more favourable to the Respondent.

[14] However, the Applicant went on to propose a division of the funds held in trust with the Respondent receiving $134,369.86 and she receiving $130,630.85. That is, for all intents and purposes, in her Offer of Settlement, the Applicant was proposing to forego her entitlement to an equalization payment. At trial, as noted above, I ordered she receive $15,011.00 as an equalization payment. Clearly, the result at trial was vastly more favourable to the Applicant than the proposal in this regard as contained in her Settlement Offer.

[15] While there are other elements that could be compared, such as child support and special expenses as well as minor items regarding pensions and RRSPs, it is not necessary for me to examine these. They are, at worst, neutral in terms of the Offer and ultimate result.

[16] The Applicant asks that I also consider Rule 128 set out as follows:

> 128. Where the Court is of the opinion that any allegation of fact that was denied or not admitted ought to have been admitted, the Court may make an order with respect to any extra costs occasioned because they were denied or not admitted.

[17] By Orders of this Court on August 24, 2007 and again on September 20, 2007, the Respondent was specifically ordered to provide the Applicant with the following financial information:

> a. his income information required to establish his present obligation to pay child support under the *Northwest Territories Child Support Guidelines* including his 2006 tax return, notice of assessment and his three most recent pay stubs;
>
> b. the value of certain matrimonial property as at the date of separation including:
>
> i) the Respondent's pension; and
> ii) the Respondent's registered retirement savings plan accounts; and
>
> c. proof of his equity in the property at 37 Johnson Crescent as at the date the parties began living together with such disclosure to include documentation on the purchase price of the property and any mortgage outstanding on the date the parties began living together.

[18] The Respondent provided none of this information thus placing the Applicant under a considerable burden to obtain information and documentation as well as independent professional advice related to pension valuation which should have been available to her or would otherwise have been unnecessary. Accordingly, the Applicant was required to expend significant funds in bringing this matter to trial where she obtained a result more favourable than the proposal in her Offer of Settlement.

[19] The Applicant's solicitor and client costs from February 28, 2008 to September 29, 2008 were $8,869.41 inclusive of disbursements and taxes. One disbursement in the sum of $793.00 was paid to an actuary for pension valuation. Fees and disbursements totalled $7,821.80 for work done prior to February 28, 2008. There have been and will be additional fees for work done after September 29, 2008.

[20] In my view, Rule 201 is intended to have a party to an action assess or reassess, as the case may be, his or her position with a view to compromise and settlement. At the end of the day, a better result from a financial and emotional standpoint is more often achieved where parties are able to reach a settlement and

avoid a trial. In this case, I find that the Offer of Settlement made by the Applicant was reasonable and fair. The result she achieved at trial was more favourable to her than her proposed offer would have been. Therefore, I find that she is entitled to solicitor and client costs for the period between the date the Offer to Settle was made and the date of Judgment. For the periods prior to and after these dates, the Applicant shall have her party and party costs.

Conclusion

[21] In the result, I make the following Order:

> 1. The Applicant is awarded solicitor and client costs from the period her Offer to Settle was made up to the date of judgment (September 29, 2008) in the lump sum amount of $8869.41.
>
> 2. The Applicant is awarded party and party costs for the periods prior and subsequent to the interval set out in subparagraph 1 which I fix at the sum of $2,750.00
>
> 3. The law firm of Denroche and Associates is hereby directed to disburse from trust to the Applicant's solicitor, Margo Nightingale, the sum of $11,619.41 in satisfaction of this Order.
>
> 4. The balance of funds held in trust are to be disbursed to the Respondent, David Walcer, less any reasonable legal fees and disbursements.
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> 5. The Applicant shall take out the formal order and serve a copy on Denroche and Associates along with a copy of this Memorandum of Judgment and may serve copies of both documents on the Respondent in the same manner as is set out in the Memorandum of Judgment of September 29, 2008 and specifically in paragraph [27] 9(f).

D.M. Cooper
J.S.C.

Dated this 23rd day of October, 2008.

Counsel for the Applicant: Margo Nightingale
The Respondent was self represented but did not appear.

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