

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

CYNTHIA NEMEDY and LASZLO NEMEDY

Applicants

- and -

KERRY KING

Respondent

MEMORANDUM OF JUDGMENT

[1] These proceedings were commenced to deal with the custody and guardianship of M., who is 17 years old. The Applicants are M.'s aunt and uncle. They live in British Columbia. The Respondent, Kerry King, is M.'s mother. She lives in Yellowknife.

A) INTRODUCTION

[2] M.'s parents separated in 1998. They shared his custody and care for a number of years after separation but over the last few years, he lived full time with his father. In that period of time, he had limited contact with Ms. King.

[3] On June 7, 2008, M.'s father died from a massive heart attack. This happened while M. and his father were in New Brunswick on vacation. M. phoned Ms. Nemedy to tell her what was happening. M. also called Ms. King, apparently at the suggestion of Ms. Nemedy. Ms. King travelled to New Brunswick the following day. Mr. Nemedy, also travelled to New Brunswick to be with M.

[4] Soon after his father's death M. expressed the wish to go spend time in British Columbia with the Nemedys. He spent a few weeks in Yellowknife with them after returning from New Brunswick, and left for British Columbia on June 22.

[5] Early on when the topic of M. going to British Columbia was raised, the Nemedys asked Ms. King to sign a document that would transfer custody and guardianship of his person and of his estate to them while he was in their day to day care. Ms. King refused, as she expected M. would be in British Columbia for a relatively short time and she did not think that a change in guardianship was necessary.

[6] Over the course of the summer, M. decided he wanted to remain in British Columbia. The issue of his guardianship remained unresolved. Suggestions were made by both parties in late September and early October but no agreement was reached. The application was filed in this Court on October 15.

[7] Ms. King signed the custody and guardianship agreement on October 24. This made it unnecessary for the application to be argued on its merits. However, the parties were unable to reach an agreement on costs, so submissions were made on that issue on October 30.

B) POSITION OF THE PARTIES

[8] The Nemedys claim solicitor-client costs. They argue that they acted with M.'s best interests in mind, and that Ms. King's refusal to sign the guardianship agreement made an already difficult situation even more difficult for them and for M. They argue that her position was unreasonable given the circumstances, and that this is an appropriate situation for the Court to express its disapproval of her conduct through an order for solicitor-client costs. In the alternative, they argue that there should be an order for costs on an elevated scale to ensure that they receive some meaningful indemnification for the expenses that they were unnecessarily put through.

[9] Ms. King disagrees with this characterization of her actions. She argues that her response to the Nemedys' request was not unreasonable, considering the far reaching consequences of what she was being asked to do. She argues that she was concerned about M.'s well being and about whether he was making good decisions in the state of shock and grief that he was in. She argues that the parties should bear their own costs up to the point when she signed the agreement. She is claiming costs of the October 30 hearing because she says that hearing was unnecessary, and that it is the Nemedys' insistence in claiming costs that is unreasonable.

C) ANALYSIS

[10] Decisions about costs involve the exercise of considerable discretion. There are general guiding principles, but ultimately, decisions on this issue are highly dependent on the individual circumstances of each case. Because this matter arose in an emotionally charged context, with complex dynamics, the chronology of events must be reviewed in some detail before turning to the specific costs issues that arise.

1. Chronology of events

[11] Very soon after his father's death, M. expressed the wish to go spend time with the Nemedys in British Columbia. This is understandable: he and his father had spent time with the Nemedys over the previous years, and he obviously felt close to them.

[12] The document Ms. King was first asked to sign, a few days after M.'s father's passing, was a transfer custody and guardianship of M.'s person, as well as of his estate. Although that transfer was to be effective only for as long as M. remained in the day to day care of the Nemedys, the legal consequences for that period of time were nonetheless potentially significant. I do not find it surprising that Ms. King refused to sign this document when the request was first made.

[13] Ms. King deposes that she was concerned about M.'s ability to make the right choices for himself. This concern continued after he left Yellowknife with the Nemedys on June 20. Ms. King was somewhat reinforced in those concerns after having discussions with a pastor and with a school counselor about what is best for people who are grieving. It is important to note that before these events, she had never met the Nemedys. I accept that Ms. King was concerned about M.'s choices. There is little doubt that she was also disappointed and hurt that he remained distant from her during this difficult time he was going through. Her expectations about how he would act or feel towards her may have been unrealistic under all circumstances, but it does not mean that she was not sincerely hopeful and expecting that he would come back to live with her. I accept that she was truly concerned for his well being.

[14] As the summer progressed, contact between M. and Ms. King was limited. Ms. King deposes that she felt she was getting mixed messages from M. about what he wanted to do when she did speak to him. Ms. Nemedy confirms that on

occasion M. gave Ms. King mixed messages. Considering what had just happened, it is not surprising that M. might have been somewhat ambivalent about what he wanted to, where he wanted to live, where he would finish his high school. It is also not surprising that he would be concerned about how his mother would react to his choices. All of this probably came across in the conversations he had with her.

[15] Eventually M. did make the decision to remain in British Columbia, despite Ms. King having invited him several times to come back to Yellowknife. On September 29, Ms. King was presented with a revised guardianship agreement. She remained unwilling to sign it because she did not think anything about M.'s emotional condition had changed, and she still wanted to be involved in his life. Through counsel she made an offer for joint guardianship, but it appears this offer was refused.

[16] On October 6, Ms. King had a telephone conversation with M. He was very upset and told her about some of the problems he was having as a result of her refusal to sign the guardianship agreement. The conversation ended when M. hung up on her.

[17] On October 14, through counsel, Ms. King sent a revised guardianship agreement to the Nemedys. The transfer of guardianship itself was in accordance with what had been requested; however, she had amended the preamble to state that M. had withdrawn from her charge, and she wanted a stipulation that the parties would bear their own legal costs. On October 15, Ms. King was advised that her proposed change to the preamble and her stipulation about costs was not acceptable to the Nemedys. That same day, they filed their formal application seeking M.'s guardianship.

[18] Ms. King signed the agreement before the return date of the application. The Nemedys were advised that she would sign the agreement the day before she was formally served with the Originating documents. It was signed the same day that she was served.

[19] It is against this factual backdrop that the issue of costs must be examined.

2. Solicitor-client costs

[20] Solicitor-client costs are generally saved for exceptional cases. This Court has expressed on a number of occasions the principles that govern the exercise of the Court's discretion when a request for solicitor client costs is made:

The general rule is that solicitor and client costs should not be awarded except in special circumstances which justify a departure from the usual award on a party and party scale. For example, it has been said that solicitor and client costs should be awarded only where there has been "reprehensible, scandalous or outrageous conduct on the part of one of the parties": *Young v. Young*, [1993] 4 S.C.R. 3. In *Stiles v. Workers' Compensation Board of British Columbia*, [1989] B.C.J. No. 1450, the British Columbia Court of Appeal said there must be "some form of reprehensible conduct, either in the circumstances giving rise to the cause of action, or in the proceedings, which makes such costs desirable as a form of chastisement".

In this Court, de Weerd J. held in *Meek v. Northwest Territories* (1992), 14 C.P.C. (3d) 360, that an award of solicitor client costs should be made "only in rare and exceptional instances to mark the court's disapproval of the conduct of a party in litigation.

Woodley v. Yellowknife Education District No.1 2000 NWTSC 7, at paras 5-6.

[21] I agree with those observations. They are consistent with similarly stringent tests adopted by this Court in *Metis National Local 66 v. North Slave Metis Alliance* [1999] N.W.T.J. No.138 and *Yellowknife (City) v. Foliot* 2002 NWTSC 1.

[22] In this case, the matter was not contested after the proceedings were commenced; the subject matter of the litigation was resolved within an hour of Ms. King being served with the originating documents. The issue is whether her refusal to sign the custody and guardianship agreement before then can be characterized as "reprehensible, scandalous or outrageous" under the circumstances. I have concluded that Ms. King's conduct does not fit this description.

[23] As I have already stated, the death of M.'s father was unexpected. Even though M. had not had much contact with Ms. King in the past few years, what happened in June changed the situation drastically for all involved. Clearly, Ms. King and her partner had certain expectations and hopes about what M. would choose to do in the face of his new reality. I do not think that Ms. King's initial refusal to sign the agreement can give rise to an order for solicitor-client costs.

[24] Ms. King's reluctance to sign the agreement at the end of September and in early October is more problematic. During the summer, she continued to believe that M. would return to Yellowknife for the start of the school year. She continued to be concerned about whether he was making the best choices for himself, and about the basis for those choices. However, as of September, it was clear that he would not return to Yellowknife. Moreover, there were no mixed messages in what M. communicated to her on October 6. Although she did indicate a willingness to sign the agreement soon after that conversation, and in that sense was not resisting the Nemedys being appointed as guardians, related issue remained contentious.

[25] The evidence shows that the communication between all involved was limited and somewhat strained. That is hardly surprising, given the difficult and emotional circumstances that had arisen. At some point in the unfolding of these events, Ms. King's inability or refusal to accept where M. may have at played a part in her refusing to sign the agreement. Still, I her conduct is a far cry from having been "reprehensible, scandalous or outrageous".

[26] For those reasons I find that this is not a situation where solicitor-client costs should be ordered, and I decline to do so.

3. Other costs order

[27] Subject to the overriding discretion of the Court, the usual rule is that the successful party is entitled to his or her costs, on a party and party basis.

[28] The subject matter of the application was disposed of by consent, before the hearing date. Based on my review of the materials, I think that there is little doubt that the Nemedys would have been successful had the application been contested. Evidently, Ms. King came to that realization as well.

[29] The issue then becomes whether notwithstanding this result, the circumstances of the case are such that the Court should depart from the usual rule and decline to order costs in favor of the successful party.

[30] I recognize that the circumstances that led to this application were unfortunate and difficult for all involved, for a number of reasons. As I have already alluded to, Ms. King's refusal to sign the agreement in June cannot be held

against her. At that point, everyone was reacting to a recent, unexpected, shocking event, and operating under very trying circumstances.

[31] However, by the end of September the situation had evolved considerably. Of course, the people involved were still dealing with issues of grief and uncertainties arising from the situation. This is not the type of event that M. or his father's family could be expected to get over within a few months. Similarly, no one would expect Ms. King to be fully at peace with her son's decision to move away and to distance himself more and more from her.

[32] That being said, time had passed, M. had made a choice to remain in British Columbia, and it was clear that he would not go back to Yellowknife to live with Ms. King. It is easy to understand why this it was difficult for Ms. King to come to terms with that reality. But at that point, the Nemedys request for a transfer of guardianship was entirely reasonable, and in M.'s best interests. Ms. King continued to resist that request. She attempted to negotiate different arrangements: she proposed joint guardianship, and then she proposed terms that were different than what the Nemedys were seeking, and were not acceptable to them. Ms. King was entitled to explore those options. But when conflict exists and the potential for litigation is looming, asserting and maintaining a legal position comes with a certain risk.

[33] It would be different had the Nemedys commenced proceedings immediately, or very quickly, after Ms. King first refused to sign the agreement in June. But this litigation was not commenced precipitously. Originating document were filed only several months later, after a further request had been refused, and at a time where M.'s intentions had become quite clear.

[34] Under the circumstances, I do not find that this is a case where it is appropriate to depart from the usual rule. The Nemedys, as successful parties, are entitled to an order for costs.

[35] Ms. King has argued that the October 30 hearing was unnecessary because she signed the agreement on October 24, and that she is the one who should get costs of the hearing. That argument ignores the fact that although the substance of the application was disposed of before the hearing date, the issue of costs remained contentious. Costs are a part of litigation. As with any other issue, if parties are unable to reach agreement on it, they are entitled to make submissions and have a Court decide on it.

[36] The Nemedys have argued that if party and party costs are ordered, they should be ordered on an elevated scale so that they provide a meaningful indemnification for the substantial legal costs that they incurred on this matter. However, party and party costs are intended to provide partial indemnification of the expenses incurred by the party they are awarded to. They are never sufficient to provide full indemnification.

[37] To bring this matter to a close, I conclude that this it is appropriate for me to make a lump sum order for costs. I have taken into account the Column 2 Tariff in the *Rules of Court*, which ordinarily applies to litigation bearing on non monetary matters; that the Tariff has not been reviewed for some time; that the matter did not go to a hearing on the merits; that the Nemedys only have partial success on the question of costs; and the overall circumstances and context where this litigation arose. Although I have concluded that a costs order is appropriate, under the circumstances, I am also of the view that some restraint is warranted.

[38] For all those reasons, I find that the Nemedys are entitled to a lump sum of \$600.00, inclusive of disbursements.

L.A. Charbonneau
J.S.C.

Dated at Yellowknife, NT, this
19th day of November 2008

Counsel for the Applicants: Katherine Peterson, Q.C.

Counsel for the Respondent: Margo Nightingale

S-0001-FM-2008000117

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