

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

BARKLEY STEPHEN HERON

Petitioner

- and -

ANN MARIE HERON
also known as ANN MARIE LEPINE

Respondent

MEMORANDUM OF JUDGMENT

I) INTRODUCTION AND BACKGROUND

[1] This is a divorce action. The sole issue between the parties is division of matrimonial property.

[2] The husband filed the Divorce petition on March 3, 2011, and at the same time, filed a Notice of Motion seeking an order restraining the wife from spending or disposing of monies won at a lottery. On March 10, 2011, on consent of the parties, this Court ordered that an amount of \$3,845,748.20, half of the lottery proceeds, be paid into the trust account of a member of the Law Society of the Northwest Territories. The Order also set out time lines for completion of various steps of the litigation process.

[3] In August 2011, the parties and their counsel (Mr. Scott for the husband, Ms. McIlmoyle for the wife) engaged in settlement negotiations. Mr. Scott later prepared a document purporting to set out the agreement reached by the parties, and sent it to Ms. McIlmoyle to have it executed. An exchange of correspondence between counsel followed. Ultimately, no agreement document was signed.

[4] On September 10, 2011, Mr. Scott filed a Notice of Motion seeking summary judgment confirming the agreement which he claims was reached by the parties during the negotiations. On October 4, 2011, Ms. McIlmoyle also filed a Notice of Motion, where she sought “a Judgment that confirms accurately the Agreement made between the Parties”, and, alternatively, a direction that the matter be set for trial.

[5] These motions were before Schuler J. on October 6, 2011. She directed that they be heard at a Special Chambers hearing. She also set time lines for the various steps to be taken in preparation for that hearing. No Formal Order was ever filed, but the Court record indicates that her directions were the following: that any further affidavit materials from Ms. McIlmoyle be filed by October 14; that Mr. Scott’s Special Chambers brief be filed by October 20; that Ms. McIlmoyle’s Special Chambers brief be filed by October 28; and that Mr. Scott’s reply brief be filed by November 2. Counsel were also directed to provide their available dates by the end of the following day, so that the Court could schedule the hearing on an expedited basis. The hearing was scheduled to proceed on November 16, 2011.

[6] No evidence was filed by the October 14 deadline. Mr. Scott filed his brief on October 19. On October 27, 2011, Ms. McIlmoyle wrote to the Court, advising that due to serious health problems she was experiencing, she would not be able to proceed on the scheduled date. As a result, the Special Chambers hearing was cancelled.

[7] Since then the matter was spoken to a number of times in Family Chambers. On November 24, 2011, an agent appeared for Ms. McIlmoyle and advised the Court that arrangements were being made to get the wife new counsel. On that date Mr. Scott made application for an order allowing the release of some of the monies held in trust to satisfy a debt owed to the Canada Revenue Agency (C.R.A.) by 5069 NWT Ltd., a company which is one of the assets that this litigation relates to. Shaner J. declined to grant this relief because it had not been brought with proper notice to the other party. *Heron v. Heron* 2011 NWTSC 58. She ruled that the application could be brought back by way of Notice of Motion, on notice.

[8] On December 8 the matter was spoken to again. An agent appeared for Ms. Rattan, the wife’s new counsel. Counsel were directed to provide dates so that the hearing could be rescheduled.

B) THE PRESENT APPLICATION

[9] On December 21, Mr. Scott filed a Notice of Motion seeking relief similar to what he had sought on November 24, to address the issue of the C.R.A. debt. This is the Application that was heard on January 5, 2012.

[10] Unlike what was the case on November 24, there is now evidence showing that the C.R.A. has taken steps to enforce the debt and has obtained a Writ of Execution and Seizure against 5069 NWT Ltd. The husband deposes that if this is acted upon, it would effectively shut down the business. He seeks to have some of the monies held in trust released to satisfy the debt, or in the alternative, permission to sell another asset, also property which is part of this litigation. In his Affidavit sworn November 2, 2011, he sets out the particulars of a transaction which has been negotiated with a purchaser, which would generate funds well in excess of what is required to satisfy the debt.

[11] At the hearing of the Application, Ms. Rattan indicated at the outset that the urgency of having the debt satisfied was acknowledged, and that the wife was not opposed to the Court making an Order to allow this to happen. The aspect of the matter that counsel have been unable to resolve is what mechanism should be used to achieve this.

[12] The first possibility is for the Court to order the release of some of the funds held in trust for the purposes of satisfying the debt. The second possibility is for the Court to give the husband permission to proceed with the transaction set out in his Affidavit and pay the debt from the sales proceeds. The evidence shows that everything is in place for that sale to proceed. The wife is not opposed to that transaction taking place. Under the circumstances, I see no reason not to proceed in that fashion.

[13] At the hearing of the Application, Mr. Scott argued that because of the delays in the matter, the husband should have access to some of the sales proceeds to enable him to continue carrying out business activities in the community. That request is significantly broader than what is set out in the Notice of Motion. The Notice and the evidence filed in support of it relate to the immediate need to deal with the C.R.A. debt. The husband needing to have access to funds for other purposes is an

entirely different issue, and not one that is properly raised within the scope of this Application.

C) RESCHEDULING THE SPECIAL CHAMBERS HEARING

[14] The next matter that must be addressed is the setting of a new date for the Special Chambers hearing that had been set to proceed last November. Mr. Scott seeks, as he has before, the earliest possible date to have the matter dealt with. Ms. Rattan indicated in her submissions that based on her review of the matter, cross-examination on some of the Affidavits should take place before the hearing can proceed. Mr. Scott is opposed to this.

[15] The right of a party to cross-examine a person on an Affidavit made in a court proceedings is set out at Rule 381 of the *Rules of Court*. A party does not need the leave of the Court to conduct such cross-examination. However, it is a right that must be exercised with diligence:

381. (...)

(5) The right to cross-examine shall be exercised with reasonable diligence, and the Court may refuse an adjournment on any application or proceeding for the purpose of cross-examination where the party seeking the adjournment has failed to act with reasonable diligence.

[16] Here, Ms. Rattan's request cannot be characterized as an adjournment request, as there is not yet a new Special Chambers hearing date set. However, if cross-examination were to take place, it would inevitably result in further delays. The cross-examination would have to take place at a date where counsel are available; it would take some time before transcripts could be prepared; Mr. Scott would have to be given the opportunity to provide an updated brief dealing with any new issues arising from the cross-examination.

[17] When this matter was spoken to on October 6 2011 and time lines were set in preparation for the hearing, there was never any indication that cross-examination on the Affidavits was required. The wife was provided an opportunity to adduce further evidence and did not do so. But for counsel's illness, the matter the hearing would have proceeded on the basis of the evidentiary record as it existed at that

point. The Affidavits filed since then do not have anything to do with the agreement allegedly reached back in August.

[18] The cancellation of the November 24 hearing date was the result of events that were beyond anyone's control. However, especially since the Court had agreed to set the hearing on an expedited basis, the delays arising from these unfortunate circumstances must be mitigated as much as possible.

[19] In all the circumstances, in my view, the new hearing date ought not to be pushed back to allow for cross-examination on Affidavits, because that is not an avenue that was pursued, or ever raised, in earlier stages of these proceedings.

[20] Counsel have provided their availabilities for the first three months of 2012. The only dates on which they were both available in January are dates where the Court is not. The next date where they are both available is February 3, 2012. I direct that the hearing take place on that date. New time lines for the filing of the wife's brief, and the husband's reply brief will be set.

D) CONCLUSION

[21] For those Reasons, the following Order will issue:

1. The husband has leave to proceed with the transaction referred to at Paragraph 11 of his Affidavit sworn November 2, 2011;
2. The proceeds from that transaction shall be added to the monies already held in trust pursuant to the Order of this Court dated March 10, 2011;
3. The debt owed by 5069 NWT Ltd. to the Canada Revenue Agency shall be paid out of the monies held in trust;
4. The Notices of Motion which had previously been scheduled to be heard in Special Chambers on November 16, 2011, will proceed on February 3, 2012 at 10:00AM;
5. The wife's Special Chambers brief shall be filed with the Court and served on the husband's counsel no later than 4:00PM on January 25, 2012;

6. If the husband's counsel wishes to file a reply brief, he shall do so and serve it on the wife's counsel no later than January 30, 2012.

[22] Counsel are directed to prepare a Formal Order to this effect.

[23] Counsel are also directed to prepare an Order reflecting the outcome of the Court appearance of October 6, 2011.

L.A. Charbonneau
J.S.C.

Dated at Yellowknife, NT, this
6th day of January, 2012

Counsel for the Petitioner:
Counsel for Respondent:

James R. Scott
Baljindar Rattan

S-1-DV-2011-104099

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