

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN

MEGGAN MACKENZIE-LUXON

Petitioner

- and -

RICHARD MACKENZIE-LUXON

Respondent

MEMORANDUM OF JUDGMENT

[1] The Petitioner seeks costs on a solicitor-client basis for the application she brought in response to the Respondent's failure to comply with this Court's Order of July 10, 2014. The Petitioner also seeks to have this matter placed in Case Management.

Background

[2] The Petition for Divorce was filed on October 4, 2011. The Petitioner sought a divorce and an equal division of the family property, including the matrimonial home. The Respondent filed an Answer and Counter Petition on January 26, 2012 agreeing to the divorce but seeking an unequal division of the proceeds from the sale of the matrimonial home.

[3] The parties engaged in negotiations regarding the sale of the home and agreed that the home should be sold but were unable to agree on a price. The Petitioner eventually brought an application seeking severance of the divorce from

the property issue and permitting her to sell the matrimonial home at a specified price. The Petitioner's application to sever the divorce and list the matrimonial home for sale were granted. There followed several more court appearances in relation to the sale of the home. The background is more fully described in *Mackenzie-Luxon v. Mackenzie-Luxon*, 2014 NWTSC 28 where Justice Shaner ruled on a prior application for solicitor-client costs by the Petitioner.

[4] On July 10, 2014, Justice Shaner granted a consent Order which allowed the Petitioner to be compensated for costs she had incurred in selling the matrimonial home from the proceeds of the sale of the home. In addition, the Order required the Respondent to complete the following steps by a certain date:

2. The Respondent shall file and serve on the Petitioner a Statement of Net Family Property on or before July 31<sup>st</sup>, 2014.
3. The Respondent shall respond to the Notice to Disclose served on him in December, 2013 on or before July 31, 2014.

[5] On August 15, 2014, the Petitioner filed a Notice of Motion returnable August 28, 2014 seeking that the Respondent be held in contempt of court for his failure to comply with the July 10, 2014 Order, the Respondent's pleadings be struck, solicitor/client costs, and such further and other relief as counsel might request.

[6] On August 27, 2014, the Respondent fax filed his Statement of Property. The matter was adjourned on August 28, 2014 to Family Chambers the following week. On September 3, 2014, the Respondent fax filed an Affidavit in which he responded to the Petitioner's Notice to Disclose.

[7] On September 4, 2014, the Petitioner made arguments in support of solicitor-clients costs and case management. The issue of the Respondent's failure to comply with the July 10, 2014 Order appears to have been resolved with the Respondent's fax filing of his Property Statement on August 27<sup>th</sup> and his Affidavit on September 3<sup>rd</sup>.

#### Should solicitor-client costs be granted?

[8] Generally, a successful party is entitled to costs on a party-and-party basis. Rule 648(1) of the *Rules of the Supreme Court of the Northwest Territories*

(“*Rules*”) provides that costs are determined by reference to the Tariff which is found at Schedule A of the *Rules*, unless otherwise ordered by the Court.

[9] The costs specified in the Tariff do not provide complete indemnity to a party for all of the costs incurred in pursuing an application or suit. Costs can also be awarded on a solicitor-client basis which provides full indemnification for the costs a party incurs. This is a discretionary decision of the Court which is awarded in appropriate circumstances.

[10] The approach generally followed by this Court with respect to solicitor-client costs is one that was set out by the Supreme Court of Canada in *Young v. Young* and was stated in *Personal Insurance v. Richinger*, 2012 NWTSC 19 at p. 12:

In *Katlocheechee First Nation v. H.M.T.Q.*, 2004 NWTSC 12, Vertes J., citing *Young v. Young*, [1993] 4 S.C.R. 3, said that the jurisprudence is clear that solicitor-client costs should only be awarded in rare and exceptional circumstances, generally only where there has been reprehensible, scandalous or outrageous conduct on the part of one of the parties.

[11] The Petitioner argues that she should receive solicitor-client costs because of the Respondent’s delay in complying with the consent Order of July 10, 2014. The parties agreed to an Order with deadlines for the Respondent to file a Statement of Net Family Property and to respond to the Notice to Disclose. The Petitioner complains that the Respondent did not comply with those agreed upon deadlines and it was only the day before the returnable date for the Notice of Motion that the Respondent filed anything in compliance with the Order. The Petitioner says that this is an ongoing pattern in this matter where the Respondent does not respond until the Petitioner brings an application at which point, the Respondent files a last minute response.

[12] The Respondent claims he is impecunious and that he cannot afford to pay costs, solicitor-client or otherwise, and cannot do so forthwith.

[13] The Respondent did not comply with the consent Order until the Petitioner filed her Notice of Motion. He has not provided an explanation for why he did not file his Property Statement until August 27, 2014, the day before the returnable date for the Notice of Motion. The Respondent’s Affidavit in response to the Petitioner’s Notice to Disclose was filed September 3, 2014 and does not include

an explanation for why he did not meet the July 31, 2014 deadline to respond to the Notice to Disclose. It is not clear why the Respondent did not comply with the agreed upon deadlines and it has put the Petitioner in the position of having to file a Notice of Motion to gain the Respondent's compliance with the Order.

[14] While the Respondent has been dilatory in complying with his agreed upon obligations, I am not convinced that is the rare and exceptional case where there has been reprehensible, scandalous or outrageous conduct. Therefore, I decline to order solicitor-client costs. In the circumstances, it is appropriate that the Petitioner have her party-and-party costs of the motion and appearances of August 28, 2014 and September 4, 2014 and that they should be payable forthwith.

Should there be case management?

[15] The Petitioner is also seeking that this matter be entered into case management under Part 19 of the *Rules*. The Petitioner wishes to have case management because the matter has been outstanding for some time now, there are not a lot of assets remaining and the parties cannot afford to continue litigation. The Petitioner's counsel is also intending to wind up her family law practice by the end of December and wishes to have this matter resolved by then. According to the Petitioner, the only outstanding issue is the division of the proceeds of sale of the matrimonial home which amount to approximately \$17,000.00.

[16] The Respondent claims that he cannot afford the cost for he and his counsel to travel to Yellowknife; the Respondent lives in Duncan, British Columbia and his counsel is located in Saskatoon, Saskatchewan. In addition, the Petitioner does not live in the Northwest Territories. The Respondent is not opposed to case management but is not certain how it would work given the location of the parties and one counsel and the limited financial resources available to the parties. According to the Respondent, there is also the issue of the division of the Petitioner's pension.

[17] It is not entirely clear what counsel is seeking for case management or what case management would accomplish in this case. Given the concerns of the Respondent referred to above and that the parties do not agree about what the outstanding issues are, it seems that a settlement conference would not be practical. With the Petitioner's counsel intending to cease her practice in December, it is also

unlikely that much could be accomplished in case management between now and then.

[18] Given the time constraints and the other circumstances referred to above, the Court can expedite a hearing in this matter. If counsel wish to have an expedited hearing, they should provide their availability to the Court **by October 3, 2014** for a 1 day hearing between now and December 19, 2014. In order to ensure that the Court can schedule a hearing, counsel should ensure that sufficient availability is provided to the Court. Once the matter has been scheduled, counsel can arrange a pre-hearing conference with the assigned judge to discuss outstanding issues and the conduct of the hearing.

[19] In conclusion, for these reasons, the Petitioner is granted her party-and-party costs of the motion and appearances of August 28, 2014 and September 4, 2014 which are payable forthwith. In addition, the parties may have an expedited hearing and, if they wish to do so, are to provide their availability to the Court **by October 3, 2014** for a 1 day hearing to be held by December 19, 2014.

S.H. Smallwood  
J.S.C.

Dated this 24<sup>th</sup> day of  
September, 2014.

Solicitor for the Petitioner: Elaine Keenan-Bengts  
Solicitor for the Respondent: D. Jane Olson

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HONOURABLE JUSTICE S.H. SMALLWOOD

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