IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *P.B.* v. *R.J.P.*, 2008 YKSC 9

Date: 20080118
Docket: S.C. No. 06-D3870
Registry: Whitehorse

BETWEEN:

P.B.

Petitioner

AND:

R.J.P.

Respondent

Before: Mr. Justice L.F. Gower

Appearances:

Debbie Hoffman	For the Petitioner
R.J.P.	Appearing on his own behalf
Kathleen Kinchen	Child Advocate

REASONS FOR JUDGMENT
DELIVERED FROM THE BENCH

[1] GOWER J. (Oral): This is an application for costs following a divorce trial. The application is brought by the petitioner mother under Rules 37 and 57 of the *Rules of Court*.

[2] Rule 57(9), states:

> "Subject to subrule 12, costs of and incidental to a proceeding shall follow the event unless the court otherwise orders."

The petitioner is seeking costs of that nature, which would be ordinary, taxable, party and party costs, up to the point that she served an offer to settle upon the respondent, pursuant to Rule 37(26.1).

[3] That offer to settle was served on the respondent father on October 5, 2007, and has been appended to the petitioner's affidavit filed December 7, 2007. It is the petitioner's position that my reasons for judgment (2007 YKSC 59) provided her with a result which was more favourable than the terms of the offer to settle. Thus, pursuant to Rule 37(26.1), she says that she is entitled to double costs assessed from that date, to and including the date of this hearing.

[4] Rule 37(26.1) states:

> "Despite subrules (23) to (26), if a party has made an offer to settle a claim in a family law proceeding, and the offer has not expired, been withdrawn or been accepted, and if the party making the offer obtains a judgment as favourable as, or more favourable than, the terms of the offer to settle, the party making the offer is entitled to costs assessed to the date the offer was delivered and to double costs assessed from that date." (my emphasis)

[5] In the British Columbia Court of Appeal decision *Gold* v. *Gold*, [1993] B.C.J. No. 1792 (QL), Chief Justice McEachern, speaking for the Court, said at para. 19:

> "It is my further view that the rule which should govern the award of costs in matrimonial proceedings should be the same as in other civil litigation, namely, that costs should follow the event unless the Court otherwise orders as specified in Rule 57:…"

[6] In *Newham* v. *Newham*, 1993 CanLII 1337 (B.C.C.A.), another decision of the British Columbia Court of Appeal, Mr. Justice Hinds, at paras. 29 and 30, referred to the fact that the respondent was "the substantial winner at trial" and on the basis of the *Gold* decision, he decided that she was entitled to an award of costs.

[7] In the matrimonial case of *H*. v. *H*., 2003 YKSC 51, Mr. Justice Hudson, at para.11, said that the costs should follow the event and that "the burden of proof" on the costs application in that case was borne by the unsuccessful respondent to establish a reason to rule otherwise.

[8] In *Steinhagen* v. *Steinhagen*, 2004 YKSC 55, Mr. Justice Richard said, at para. 11, that Rule 37 constitutes a "complete code" and its provisions are "mandatory." Further, he saw no reason to deny the mother the benefit of Rule 37, stating:

> "She made a reasonable offer to the father in an effort to avoid further litigation costs, an offer that he did not accept."

As will shortly become evident, I find that paragraph particularly applicable to the case at bar.

[9] In *Fulton* v. *Fulton*, 2002 BCSC 1194, Mr. Justice Hood was interpreting the use of the word "entitled" in subrules 37(24) to (26), and at para. 20 he said that:

> "…it seems to me that the word imports or bestows an absolute right to the costs in the successful offeror."

Hood J. then referred to what is now subrule (26.1), which also uses the word "entitled," and concluded, at para. 41, that it is "mandatory" that a defendant who has successfully made an offer to settle receive statutory double costs assessed from the date of the offer. Also particularly applicable to the case at bar, were Hood J.'s comments at para. 42:

> "Arguably it is considered to be even more important in family law proceedings, which Mr. Justice Warren aptly described in Crick, as "such important and potentially destructive litigation" that the parties be persuaded to make and to accept early settlement offers, and that they be penalized for not accepting a successful offer. Surely, the policy and primary object of an offer to settle in a family law proceeding is to encourage offers to be made and accepted, and to avoid the destructive impact of litigation on the family, both emotionally and financially."

[10] In *Olson* v. *Scott*, 2003 BCSC 1578, Drost J. also confirmed that the word "entitled" in subrule (26.1) means that it is mandatory, and that the Court has no

discretion but to award double costs if the terms and provisions of (26.1) have been satisfied.

[11] In *Lang* v. *Lang*, 2005 BCSC 1468, at para. 16, Gill J. referred to the British Columbia Court of Appeal decision in *Graham* v. *Graham*, 2005 BCCA 278, a matrimonial case decided by Saunders J.A., who said at paras. 11 and 12 of that decision:

> "Rule 37(26.1) is part of the overall rule that is intended to encourage and facilitate settlement of disputes."

Saunders J.A. then quoted Lowry J.A. in *Cridge* v. *Harper Grey Easton*, 2005 BCCA 33, who said:

> "Rule 37 is, as stated in *Brown* v. *Lowe*, a complete code. It is important that the Rule be uniformly applied to give effect to its purpose. Litigants must be able to make offers of settlement under the Rule with confidence that the Rule will be applied when costs are awarded."

[12] Finally, in *Ree* v. *Ree*, [1999] B.C.J. No. 2628, Coultas J. said at paragraph 14:

> "An order for costs to be paid by the defendant will create hardship for him. Were I not to make that order, it would create hardship for the plaintiff.

I find that paragraph to be particularly instructive as well, with respect to the case at bar.

[13] I have no difficulty in concluding that the result of my reasons for judgment provided the petitioner with a result which was more favourable in most respects, if not all, than that set out in the offer to settle. To be clear on that point, in the offer to settle the petitioner offered shared joint custody of the four children of the marriage; the petitioner was awarded sole custody. In the offer to settle the petitioner was prepared to accept $900 a month in child support; I awarded her substantially more than that. In the

offer to settle the petitioner was prepared to waive approximately $13,000 in arrears of child support; I awarded the petitioner those arrears. The offer to settle would have allowed the respondent to retain his entire NorthwesTel pension; my reasons ordered that the pensions of both parties be split and divided at source. The offer to settle would have allowed the respondent to retain about $17,000 in a total of three Royal Bank accounts; my reasons for judgment ordered that the funds in those accounts be divided equally. Finally, the offer to settle would have allowed the respondent to retain his Avion air miles points, and my reasons for judgment ordered that those points be divided as matrimonial property.

[14] The respondent says that the petitioner is being “greedy” in seeking costs. He says that he will not be able to afford the costs. He says that he is still confused about the legalities of the situation because he does not have a lawyer.

[15] THE RESPONDENT: Excuse me, Your Honour, that was only in reference to --

[16] THE COURT: No, I am not finished yet. Please. I am not prepared to let you speak at the moment.

[17] He complains of having financial problems, he says that he is at risk of being terminated from his employment, and finally, he says that if I “side with Ms. Hoffman” on this costs issue, then he will not be able to continue financially in his present circumstances.

[18] All of those submissions seem to miss the point that the respondent has been given more than sufficient opportunity to retain a lawyer, to seek legal advice, and to accept the terms of the written offer to settle. I have dealt with a lot of those points, particularly with the issue of counsel in my reasons for judgment, so I will not repeat those comments here.

[19] Further, the respondent's suggestion that I have an option about whether to "side" with the petitioner's counsel on this, again, is completely misguided. Firstly, the general rule is that costs follow the event, and a Court will only depart from that rule if there are good reasons for doing so. Generally speaking, those reasons would have to be exceptional. In this case, there are no reasons to depart from the general rule. Therefore, costs should follow the event up to and including the written offer to settle, made on October 5, 2007. Secondly, once that offer to settle was made, the petitioner thereby became "entitled" to double costs from that date to this. The courts have repeatedly stated that the application of Rule 37(26.1) is mandatory and that I have no discretion but to apply it. So it is not a question of siding with the petitioner, it is a question of applying the law, and if that creates a financial hardship for the respondent, then it is one which I am abundantly satisfied is of his own making. Also, if I were not to make the order sought, it would certainly create hardship for the petitioner.

[20] So I am prepared to order that the petitioner receive her costs, and I -- do I need to specify the scale and --

[21] MS. HOFFMAN: I had set out in my notice of motion that it would be a scale, tariff scale 3 up to October 5th, but with the coming in of the new tariff, it would

actually be costs on scale B up to October 5th, and then double costs thereafter on scale B.

[22] THE COURT: All right. So ordered.

[23] Finally, I will order, and this is pursuant to the notice of motion filed December 11, 2007, any expenses under s. 7 of the *Child Support Guidelines*, over and above the benefits packages of the respective parties for the children, shall be equally divided between them.

[24] I will waive the requirement for the respondent to approve the form and content of this order, but I will direct that the order come to me for review before it is issued.

[25] Have I omitted anything?

[26] MS. HOFFMAN: No, My Lord.

[27] THE COURT: All right. Thank you.

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GOWER J.