Date: 20030828
Docket No.: S.C. 00-D3290
Registry: Whitehorse

IN THE SUPREME COURT OF THE YUKON TERRITORY

BETWEEN:

R.D.H.

Petitioner

AND:

V.M.H.

Respondent

Shayne Fairman — For the Petitioner

David Christie — For the Respondent

MEMORANDUM OF JUDGMENT
DELIVERED FROM THE BENCH

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[1] HUDSON J. (Oral): This is an application by the petitioner for an order that the court order costs be payable to him, that is to the petitioner, by the respondent.

[2] Now there was a trial, which lasted six days, five for a hearing and one for submissions. The issues included divorce, custody and access of the one child, C., born in 1996, the property division, spousal support, and child support.

[3] Reasons for Judgment were filed on January 15, 2003, the last paragraph which reads:

> Counsel have asked me to reserve my decision on costs and I do so.

This then is a continuation of the submissions at trial.

[4] The petitioner's argument commences with a consideration of a case, *Gold v. Gold,* [1993] B.C.J. No. 1792. It is a family case, although not dealing with custody, the matter of costs in family matters is reviewed. Petitioner's counsel starts out with a reference to Rule 57(9) of the Supreme Court Rules reading on costs:

> costs of and incidental to a proceeding shall follow the event unless the court otherwise orders.

Later on, at paragraph 19, with respect to this, after dealing with the case of *Ripley v. Ripley* (1991), 30 R.F.L. (3d) 41, Chief Justice McEachern, says:

> 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….

Then he goes on to say at paragraph 20:

> The question, then, is: when should the Court order otherwise? With respect, when the court should order otherwise is a matter of discretion, to be exercised judicially by the trial judge, as directed by the Rules of Court. To lay down any strict guidelines or even to attempt to give exhaustive examples is not, I think, helpful because the facts and issues in each family law case vary so greatly. Factors such as hardship, earning capacity, the purpose of the particular award, the conduct of the parties in the litigation, and the importance of not upsetting the balance achieved by the award itself are all matters which a trial judge, quite properly, may be asked to take into account. Assessing the importance of such factors within the context of a particular case, however, is a matter best left for determination by the trial judge.

And then, finally, in paragraph 22, he says:

> Mrs. Gold has been substantially successful --

That is the first time that phrase is used in the judgment.

> -- has been substantially successful on the main issue, and the items on which Mr. Gold has been successful, although not insignificant, are not sufficient to warrant departing from the usual rule.

And with that, he awarded costs to Mrs. Gold, on issues of support and property.

[5] In the case at bar, the judgment of the Court provided that, firstly, there was a decree granted, of divorce, prior to trial. The trial judge ordered that there be an order of sole custody of the child to the petitioner, supervised access to the respondent subject to modification in the future. No child support order to be paid by the respondent to the petitioner. Spousal support in a modest amount was ordered to cease after the passage of one year. Property division was ordered, not markedly different from the position taken by either party, in order that the sums owing to the respondent by the petitioner be secured against the family home which was in joint tenancy, I believe. Is that right Mr. Fairman?

[6] MR. FAIRMAN: Yes, that is correct.

[7] THE COURT: Yes. By far the main issues were custody and access. In the Reasons for Judgment, at paragraph 5, this is said:

> The principal and most time-consuming issue at the hearing was the issue of custody of the child, C., born November 14, 1996.

And at paragraph 78, after the heading "Access":

> Most of the evidence was dedicated to this issue.

[8] On these issues, the petitioner's position, was upheld at trial. On these issues, the respondent, in addition to other matters that were alleged, alleged child abuse and that the petitioner's home in which the child was resident provided for a horrible existence. “Horror” and “terror” were stated in the respondent's evidence repeatedly. The petitioner denied these assertions vehemently. To support his position, supporting evidence was called, and others, such as school records, were presented to refute these assertions.

[9] It is my finding that, pursuant to *Gold, supra*, and the case of *Newham v. Newham,* [1993] B.C.J. No. 2036, that the petitioner, with regard to the judgment in this matter, achieved substantial success on an issue by issue basis or on a global basis, whichever it employed.

[10] I find that this follows the case of *Fotheringham v. Fotheringham,* [2001] B.C.J. No. 2083, and reading from paragraph 45 and 46, which spells out the enlargement of the guidelines in *Gold, supra*, for determining whether or not costs should be ordered in such case. I have attempted to follow those guidelines in making the aforesaid determination. The question, therefore, which is raised is whether any of the concerns brought forward by the evidence can be employed to find a reason "to order otherwise" pursuant to Rule 57(9) which says:

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

[11] It is my finding, and I agree with the petitioner's counsel, that the establishment of a reason to rule otherwise than that the costs should follow the event, that the burden of proof is borne by the respondent.

[12] With respect to "event", I find that following *Fotheringham, supra*, and the other cases cited, that this refers to the trial as whole.

[13] In the case of *Newham, supra*, following *Gold, supra*, it is established that the ruling is applicable, that is to say, that the ruling in *Gold, supra*, is applicable to custody matters.

[14] It is forcibly argued by the respondent that the rule as to costs, which should be applied in this case, is, and reading from his outline, in paragraph 5:

> In family cases, Courts have also held that there is no general rule as to costs because it is not a matter of "winning versus losing" so much as it is an exercise to determine the child's best interests. Therefore, a party should not be penalized in costs for a bona fide attempt to assert the child's best interests. There is case law stating that no costs should be ordered when each party comes to court in good faith with a genuine view as to what is in the child's best interest.
>
> Given the often complex nature of the issues in family law matters, the court should while still applying the underlying premise in *Gold* and *Solonick* that costs in family law matters follow the cause in the normal course, exercise its discretion in a manner that recognizes the importance of the underlying need to diligently pursue what is in the best interest's of the child.

[15] I have, in coming to the conclusion that I have reached here, borne that in mind.

[16] Also, I would, in terms of what facts are to be considered in this case, give some weight to the case of *Mack v. Taks,* [2003] B.C.J. No. 1709, with respect to hardship. Although I do find it to be a factor, I do not find it, as stated in the judgment of McEwan J., quoting from Madam Justice Prowse:

> ...financial hardship in itself is not a sound basis for departing from the usual rule with respect to costs.

That it is not, in this case, a sound basis. I find that it is a factor to be considered, and I do not go so far as to say that it cannot be a sound basis. I have, therefore, given some consideration to it, not as a basis, but only as a factor.

[17] In this case, the matter of hardship is somewhat unclear. The evidence, when last heard, with respect to the petitioner, did not indicate that he was in any way of any wealth and is perhaps said to be living day to day with the financing of his business through his credit cards.

[18] Although, with respect to the respondent, she is finding it difficult. It was noted in the judgment that she has skills which are marketable, and given time it is expected that they will be useful and result in recompense to her. It is only marginally interesting with respect to the matter of hardship.

[19] Perhaps relevant was the evidence that the respondent was able to defray some $40,000 pre-trial expenses, some of which, whether to be costs awarded to the respondent, might be costs, but much of which might be described as unnecessary. The point here is that she was able to defray those costs by one means or another. That is relevant, I think, to determination of whether or not I am looking at hardship.

[20] I have heard submissions that costs should not be awarded in this case as it would upset the balance established in the Reasons for Judgment. However, it is clear that those reasons were made with the understanding that an application for costs might be made. It is argued by the petitioner that an order for costs will be set off, if made, against sums that are due to the respondent by the petitioner. I believe that to be relevant to whether there is a balance to be upset.

[21] I cannot find on the evidence that there is clearly a balance that requires to be maintained as against a just award of costs. In this issue, I refer to the case of *Sahrmann v. Otto,* [1994] B.C.J. No. 2585. Generally and further, I refer to the case of *Ritchie v. Solonick,* [1999] Y.J. No. 105, a case in this court, a judgment of Mr. Justice Vertes, which has been referred to by both parties. The trial judge there had before him a circumstance, not altogether unlike this, in which there are some useful similarities in which, after considering *Gold, supra*, and other cases, he says:

> In my opinion, custody and support cases should be subject to the normal cost principles applicable to all litigation, subject of course to the overriding discretion of the court.

He had previously said this:

> The discretion must be exercised, however, on a principled basis. One of those principles is that costs generally follow the event. This is embodied in Rule 57(9). There is an expectation that the successful litigant will recover costs from the unsuccessful one. Generally speaking this principle also applies to "family" litigation...

He goes on to describe what he sees as the modest financial circumstances of the defendant. While those modest circumstances prevented him from finding and for making an order for double costs, they do not prevent him from making an order for costs against the respondent, notwithstanding that that person has large support payments to make and is subject to foreclosure proceedings. It is not a happy statement, but, considering the balance of his judgment, it is to show that such an order is not inappropriate in matters such as this.

[22] The respondent makes three main submissions. Firstly, it is argued that there was no substantial success on the part of the petitioner. I partially dealt with that. Secondly, respondent says that to order costs would upset the balance achieved at trial. I dealt with that in part. Thirdly, the petitioner should not be allowed to refer to

some of the correspondence with relation to the settlement offers made and not accepted. With respect to point number three, I agree. I give no consideration to the alleged offer of settlement as it does not appear to have been made evidence at the trial or a subsequent proper application. In any event, its terms are unknown to the court.

[23] In support of number one, the respondent cites the case of *Chassie v. Venczel,* [2002] B.C.J. No. 246. This case can be distinguished on its facts. It also cited the case of *C.J.L.W. v. A.M.D*., [2002] Y.J. No. 102. This case describes what is a very close matter and in considering the closeness of the decision on the issues, the judge decided that there should be no order for costs. Each party should bear their own costs.

[24] The case of *Emerson v. Emerson,* [1995] O.J. No. 3172, is a case of interest with respect to costs. It does not cite *Gold, supra*. Since, *Gold, supra*, contains a substantial alteration to costs in matrimonial matters, I do not rely on the *Emerson, supra*, case.

[25] Again, with respect to *Fotheringham, supra*, which I have previously cited, I refer to paragraph 3 of the judgment, which, in fact, repeats the matters which I referred to in *Gold, supra.* With respect to the references in *Fotheringham*, *supra*, I generally agree and I have attempted to follow those guidelines.

[26] The case of *Kelly v. Lyle,* [2003] Y.J. No. 46, is to be distinguished on its facts. There, the decision was that the success at trial was equal.

[27] With respect to *M.F.A. v. R.D.A.*, [2002] B.C.J. No. 1681, there were insufficient facts given in that case to enable me to know whether it is a case that could be followed. I do not think the law is misstated, but it is the law that I have already referred to.

[28] In support of issue and argument number 2, that there should be an order for costs in order to have the balance established by the reasons for judgment maintained, they recited the cases of *Gold, supra,* and *Mack, supra*. I would simply distinguish the case at bar on its facts. I do not find that an award of costs, as I have earlier said, upset any balance as to constitute a reason not to order costs pursuant to Rule 57(9).

[29] Again, generally, a significant case after *Gold, supra*, was *Alexander v. Alexander,* [2003] B.C.J. No. 1014. I find that the basis of that decision is found in paragraph 8, where the trial judge said:

> The Reasons illustrate, however, that it was a difficult decision to make and that the circumstances narrowly favoured continuing the children's primary residence with the mother.

This case at bar does not involve of anything equivalent to a "narrowly favouring" in that the decision of custody and access was readily made on the evidence before me.

[30] I cannot state that custody or access in this decision were narrowly favoured to either party. Likewise in *Kelly v. Lyle, supra*, it was, as I say, to found equal success and therefore no balance was upset.

[31] Finally, and for the reasons that I have stated, I find that the petitioner was

substantially successful in this trial, this trial being an event pursuant to Rule 57(9).

[32] I find that there is no reason for the court to otherwise order the payment of costs pursuant to Rule 57(9) except to follow the event in the cases sent to follow the laws spelled out in the cases of *Gold v. Gold, supra, Newham v. Newham, supra* , and the further reasons that I have stated above.

[33] The court therefore orders the petitioner have his costs to be paid by the respondent and, upon the assessment, to be set off against the sums owing by the respondent to the petitioner on Scale 3.

[34] Also, costs are awarded with respect to the application filed October 12, 2000, and July 10, 2001. My finding is that the rule cited by the petitioner governs and there is nothing in the application before me today to state otherwise. For greater certainty, the costs I have here ordered includes today's proceedings.

[35] MR. FAIRMAN: My Lord, just for clarity, the -- I believe Your Lordship may have misspoken in the concluding remarks when you said that they would be set off against sums owed by the respondent to the petitioner. It would be set off by sums owed petitioner.

[36] THE COURT: I think I misplaced the words "to" and "from". All right, I agree. Thank you.

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HUDSON J.