Citation: *Murphy v. Murphy,* 2002 YKSC 49

Date: 20020910
Docket: S.C. No. 96-D2845
Registry: Whitehorse

IN THE SUPREME COURT OF THE YUKON TERRITORY

BETWEEN:

SUSAN MARIE MURPHY

PETITIONER

AND:

KEVIN JOSEPH MURPHY

RESPONDENT

RULING OF MR. JUSTICE HUDSON

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[1] This is an application by the petitioner to settle the matter of costs arising from the applications leading to a decision of this court on February 5, 2002.

[2] These proceedings involved the plan of the petitioner and her common-law husband to move with the children to Fort McMurray, Alberta, because of an attractive employment opportunity there.

[3] The parties were divorced on January 16, 1998. The respondent had been ordered to pay $1,000.00 per month for the support of the three children who were in the custody of the petitioner.

[4] Specifically, the applications before the court were:

a) An application by the respondent to be relieved of the obligation to pay support for two months in the summer when the children were visiting with him. Further, that he be forgiven the non-payment of $1,000.00 for the month of July 2001.

b) An application by the petitioner to vary the corollary relief order granted on January 16, 1998, to alter the access terms and to alter the order for payment of child support.

[5] In effect, while there were applications with relation to child support, the overriding topic and concern of both parties was the projected move by the petitioner to Fort McMurray, Alberta, the desire of the respondent that the move not take place, and the resultant consideration of what decision to be made was in the best interests of the children. The court's decision was rendered February 5, 2002 and it favoured the petitioner's position, which allowed the move for the reasons stated therein.

[6] The hearing of the applications, complete with *viva voce* testimony, were remarkably free of the vindictive and acrimonious presentations that one sometimes sees in these matters. As indicated in my reasons, this was not a decision as to who was the better parent. Rather, it was what immediate future course of action was in the best interests of the children – to remain in Whitehorse with uncertain economic terms or for the petitioner to move with the children to Fort McMurray, which had a guarantee of prosperity. Economics were not the only basis for the decision. All of the points in favour or against the move and the effect on the children were considered.

[7] The circumstance that takes this matter out of the ordinary is that on December 17, 2001 an offer to settle was made pursuant to Rule 37(22) and (37). This offer to settle is set out as follows:

> 1. The Petitioner and the Respondent shall have joint custody of the Children.
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> 2. The Children shall have their primary residence with the Petitioner.
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> 3. The Respondent shall have reasonable and generous access to the Children as follows:
>
> a) Every spring school vacation
>
> b) 6 weeks during the summer school vacations
>
> c) Every other Christmas school vacation, commencing in 2002
>
> d) Reasonable telephone, email and mail contact;
>
> e) Such other times as may be mutually agreed between the parties, especially on occasions when the Respondent visits family in Alberta.
>
> 2.(*sic*) The Petitioner shall be responsible for arranging and paying for the Children's transportation from Fort McMurray to Whitehorse for the spring school vacation.
>
> 3. The Petitioner and the Respondent shall share the cost of the Children's transportation from Fort McMurray to Whitehorse for the Children's summer and Christmas visits with the Respondent.
>
> 4. The Respondent shall continue to pay child support of $1,000 per month.
>
> 5. The Respondent shall not be responsible for the payment of child support during the 6 weeks in the summer that the Children are visiting with him (ie. no child support is payable for one month, only $500 is payable for one month).

> 6. The arrears of child support in the amount of $1,000 owing from the Respondent's non-payment of child support for the month of July 2001 shall be forgiven.

[8] Rule 37(25) of the Rules of Court states:

> *Consequences of failure to accept plaintiff's offer for non-monetary relief*
>
> (25) If the plaintiff has made an offer to settle a claim for non-monetary relief, and it has not expired or been withdrawn or been accepted, and if the plaintiff obtains a judgment as favourable as, or more favourable than, the terms of the offer to settle, the plaintiff is entitled to costs assessed to the date the offer was delivered and to double costs assessed from that date.

[9] The petitioner has provided a table of comparisons in which she argues, graphically, for the conclusion that the terms of the Rule have been complied with. This table is as follows:

COMPARISON OF RESULTS – MURPHY v. MURPHY

Monetary claim	Offer to Settle	Order made
Respondent sought relief from paying child support when children with him in summer +$1000 to Respondent	Petitioner offered this relief for 6 week period of summer access +$1,500 to Respondent	No relief for Respondent while children with him for summer – he pays $1,235 during 4 weeks of summer access - $1,235 payable by Respondent
Respondent didn't pay $1,000 for child support in July 2001 + $1,000 to Respondent	Petitioner offered to forgive this amount + $1,000 to Respondent	No forgiveness of this amount of unpaid child support - $1,000 payable by Respondent

Respondent wanted child support calculated on basis of his income of $63,498 -$1,132 payable by Resp	Petitioner offered to allow Respondent to continue paying child support of $1,000 per month - $1,000 payable by Resp	Respondent was ordered to pay child support based on his income of $70,400 for total of $1,235 per month - $1,235 payable by Resp
Transportation costs – three trips per year for three children = 18 one way fares	Petitioner offered to pay total of 12 fares Resp would pay 6 fares (Estimates $500 per fare)	Petitioner was ordered to pay cost of 6 fares Resp pays 12 fares
Total annual Difference	**Resp pays $12,500**	**Resp pays $21,820**
Non-Monetary claim	Offer to Settle	Order made
Spring Break	Petitioner offered access every spring break (Usually 9 days)	"Some" of the children's spring break (?)
Summer school vacation	Petitioner offered 6 weeks of access (42 days)	One four week period was ordered (29 days)
Christmas vacation	Petitioner offered alternating Christmases (7 days per year)	A minimum of 7 days access each Christmas was ordered. (7 days per year)
Other	Petitioner offered such other times as might be mutually agreed	No other times ordered.
Difference of 2 – 3 weeks with Resp.	**Total access offered 58 days +**	**Total access ordered: 35 – 44 days**

[10] The authorities cited by the parties would leave the matter of offers to settle in matrimonial cases in a state of some uncertainty. I find that the balance of authority, and the authority with which I agree, is that there remains a discretion with the trial judge to

decline to order double costs, notwithstanding compliance with the pre-conditions of the order in question.

[11] The offer to settle contained non-monetary and monetary terms. I treat it as a single offer, indivisible in its terms.

[12] The question of reduced or cancelled maintenance for the summer time when the children were with the respondent took virtually no time at the hearing. The hearing was almost entirely taken up with the prospects for the children in Fort McMurray and a comparison with the circumstances to be expected in Whitehorse if the removal of the children from the Yukon was not approved, and if the mother stayed in Whitehorse with the children while her common-law husband went to Fort McMurray. It also dealt with the recent past relationships between the petitioner/respondent and their children on the one hand and their children and the petitioner and her partner on the other, as such considerations might assist in determining what was the best decision to be made on the move with the paramount consideration being the best interests of the children.

[13] It is my decision that I should exercise my discretion against the ordering of double costs. This is not a case in which there are severe financial problems to be addressed, but if I were to consider that situation the evidence indicated that the financial burdens upon the respondent are of greater concern.

[14] It would be difficult for me, in looking at the offer to settle, to find that double costs were appropriate since, for the respondent to accept the offer, it would have involved him in an acceptance of the move to Fort McMurray. The arguments presented on his behalf *contra* the move were not irresponsible. In fact, the arguments were very worthy

of consideration by the court. That being the case, it is hard to fault the respondent for declining to accept the offer in that his view of what was in the best interests of the children, i.e. to remain in the Yukon, was a view reasonably held.

[15] It was a part of my deliberations, having determined the children and their mother should be allowed to move to Fort McMurray that since access or visitation was going to be an expense not previously experienced, and since I was ordering that the Guidelines not be departed from in the children's support, the order was made on the basis that it was an appropriate order notwithstanding that it was stretching the respondent's apparent financial resources to a point approaching a limit.

[16] The other consideration to which I earlier referred is that the respondent did not adopt any arguments or positions which, in any way, unnecessarily extended the time consumed in the matter. Nor did it raise the level of passion sometimes experienced in these matters. I am satisfied that the respondent, in the conduct of this matter, in declining to accept the offer, was proceeding on a genuinely held opinion that he could bring to the court arguments and submissions that would assist the court in deciding what was in the best interests of the children.

[17] I would not think it appropriate that a parent who wished to present to the court such a position should be pressured (albeit legally) to withhold these arguments from the court for economic reasons relative to his own financial resources. I chose to interpret the Rule in light of the circumstances of this case accordingly.

[18] Therefore, it is the order of this court that costs follow the event and be paid to the petitioner by the respondent. Such costs to be on Scale 3.

[19] To repeat myself, on the strictly monetary issues, there was little or no time spent on these. Although the petitioner's case is made out on these issues, the proportion of the costs of the total proceeding to be allotted to such portion of the matter would be so miniscule as to be insignificant.

[20] Looking to the future and the continuing relationship with the respondent and the children and the necessary discourse between the petitioner, her common-law husband on the one hand and the respondent on the other, I expect the relationship will be improved over what it might have been had an order for double costs been made.

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Hudson J.

Appearances:

E. Joie Quarton	Counsel for the Petitioner
Ed Horembala	Counsel for the Respondent