IN THE SUPREME COURT OF THE YUKON TERRITORY

Date: 2004 08 03
Docket No. S.C.No.02-D3504
Registry: Whitehorse

Citation: *Steinhagen* v. *Steinhagen*, 2004 YKSC 55

Between:

GERALD STEINHAGEN

Petitioner

- and -

RONI-SUE STEINHAGEN

Respondent

Appearances:
Christina Sutherland — Counsel for the Petitioner
Debbie Hoffman — Counsel for the Respondent

Before: Mr. Justice J.E. Richard

MEMORANDUM OF JUDGMENT

[1] In the within divorce proceedings the parties were unable to reach agreement on the terms of a custody order. Thus a three-day trial occurred, following which I issued reasons for judgment. In the final paragraph of those reasons I invited counsel to make submissions on costs. Counsel filed written submissions on costs with the Court registry within the time specified; however, unfortunately, those submissions were not forwarded to me by the Court registry. I have only recently received those submissions. I regret the delay in issuing a decision on the matter of costs.

[2] In their written submissions on costs, counsel now disclose to me that each party made an Offer to Settle prior to trial.

[3] This brings into play the provisions of Rule 37(26.1) with respect to costs:

> 37(26.1) 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to (26), if a party has made an offer to settle a claim in a family law proceeding, and the offer has not expired, been withdrawn or been accepted, and if the party making the offer obtains a judgment as favourable as, or more favourable than, the terms of the offer to settle, the party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.

[4] Since the date of separation in 2000 the parties' two children had their primary residence with the petitioner father. The respondent mother had generous access to the children on weekends, statutory holidays, during summer vacation, etc. From 2002 the mother had been asking the father to agree to a 50-50 shared custody arrangement. The father did not agree, and this became the primary issue at trial.

[5] At trial the father's proposal was to maintain the status quo, i.e., the children's principal residence being with the father, and two and three-day weekends with the mother. The mother's proposal was for 50-50 shared parenting, with the children spending alternating seven-day weeks at each parent's residence.

[6] For reasons given in my reasons for judgment, the Court's decision was that the alternating week proposal was more advantageous to the best interest of the children.

[7] The essential terms of the Court's order were as follows:

1. the parties shall have joint custody of the children of the marriage,
2 the children shall have their residence with each parent on an alternating week basis,
3. there will be no amount of basic child support payable by either parent pursuant to s.9 of the Guidelines,
4. the parties shall equally share, pursuant to s.7 of the Guidelines
   i) day care expenses, and
   ii) extraordinary expenses for extracurricular activities of the children.
5. the name(s) of the trustee of the children's education fund will be changed such that either a) the trust fund be put in the name of both parents as joint trustees, or b) the existing trust fund be divided in two equal funds, one in the name of each parent as trustee.

[8] I am now advised that three weeks prior to trial the mother made an Offer to Settle pursuant to Rule 37. The essential terms of that offer were as follows:

1. parents to share joint custody,
2. the shared parenting be based on alternating weeks at each parent's residence,
3. neither parent to pay basic child support,
4. parents to share special and extraordinary expenses for the children on a 50-50 basis,
5. children's education fund be registered in the name of both parents,
6. children spend one full month of summer vacation with each parent.

[9] With respect to this last item, the Court's order was silent on the specific issue of summer vacation. Therefore, the alternating weeks arrangement would prevail, unless adjusted by the parties by mutual agreement. Even without adjustment, the children would be with each parent one half of the school summer vacation.

[10] In all of the circumstances, it is clear that the respondent mother obtained a judgment as favourable as the terms of her Offer to Settle formally made by her counsel three weeks prior to trial. Thus Rule 37(26.1) is applicable.

[11] As this case comes within Rule 37, its provisions constitute a complete code and are mandatory. See *Jamieson* v. *Duteil*, 2001 BCCA 516, *Brown* v. *Lowe*, 2002 BCCA 7 and *Fulton* v. *Fulton*, 2002 BCSC 1194. In any event, I see no reason to deny the mother the benefit of Rule 37. She made a reasonable offer to the father in an effort to avoid further litigation costs, an offer that he did not accept.

[12] Accordingly, the respondent mother shall have her costs, assessed to the date the offer was delivered, and double costs, assessed from that date.

J.E. Richard,
J.S.C.