IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Diana M. Cameron
Mr. Justice William J. Burnett
Madam Justice Janice L. leMaistre

B E T W E E N:

THE PUBLIC GUARDIAN AND TRUSTEE OF MANITOBA as Litigation Guardian for MARIE JEANNETTE JOCELYNE RIVARD	)	***T. P. Beley*** *for the Appellant/Respondent by Cross Appeal*
(Petitioner) Respondent/Appellant by Cross Appeal	)	***L. A. Harris*** *for the Respondent/Appellant by Cross Appeal*
- and -	)	
BRADLEY DAVID THOMPSON	)	*Appeal heard and Decision pronounced:* ***January 18, 2019***
(Respondent) Appellant/Respondent by Cross Appeal	)	*Written reasons:* ***January 29, 2019***

On appeal from 2017 MBQB 126

CAMERON JA (for the Court):

[1] The respondent appeals the order of the trial judge granting periodic amounts of spousal support in excess of the terms of a separation agreement (the agreement) entered into between Ms Rivard (the petitioner) and Mr. Thompson (the respondent). The petitioner cross appeals claiming that the trial judge erred by failing to order double party and party costs pursuant to Manitoba, *Court of Queen's Bench Rules*, Man Reg 553/88, r 49 (the *QB Rules*). At the conclusion of the hearing, the appeal and cross appeal were dismissed with costs and brief reasons to follow. These are those reasons.

The Appeal

[2] The petitioner and respondent were married in 1986. They had four children born between 1988 and 1995. During the course of their marriage, each of them worked in professional positions. Each contributed to raising their children and the overall maintenance of the household. In 1999, the petitioner was diagnosed with depression. As a result of a major depressive episode in 2001, she had to leave her employment and commence disability benefits. Throughout the marriage and until the time of trial, she continued to receive those benefits.

[3] The parties separated in June of 2011. The agreement was signed in September of 2012. Of significance to this case, the agreement included a five-year fixed guaranteed term of spousal support payments commencing in September of 2012. Those payments were $2,000 per month from September 2012 to May 2013. Commencing June 1, 2013, and for the remainder of the five-year term, the payments were set at $1,750 per month, terminating in August of 2017. There was a proviso that, if the respondent's extended healthcare benefits no longer covered the petitioner, he would pay her an extra $250 per month in addition to the $1,750.

[4] At the time, the suggested amount of monthly support pursuant to the Spousal Support Advisory Guidelines was in the range of $4,183 to $5,629.

[5] The main issue at the trial was the quantum of spousal support and the duration for which the respondent was to pay the support. The petitioner argued for an order of spousal support greater than the amount in the agreement. Relying on *Miglin v Miglin*, 2003 SCC 24, she asserted that she

continued to suffer from depression throughout the negotiation and finalisation of the agreement. As a result, she argued that she was vulnerable at the time that she signed the agreement and that the respondent took advantage of her vulnerability.

[6] In support of her position, the petitioner testified and called her treating psychiatrist, as well as the lawyer who had previously represented her for the negotiations and finalisation of the agreement.

[7] The respondent testified. He also called the lawyer who represented him at the time the agreement was signed. It was his position that the agreement represented a final agreement. He maintained that the petitioner's illness did not affect her ability to enter into the agreement. He also maintained that the quick timeframe within which the agreement was negotiated directly resulted from the petitioner placing herself in a precarious positon by purchasing a house which she could not finance. He denied taking advantage of her vulnerability. In his view, he was helping her by finalising matters quickly in order to assist her purchase of the house.

[8] Applying *Miglin* and *Lang v Lang*, 2003 MBCA 158, the trial judge found that the "circumstances of pressure and other vulnerabilities which impacted the wife during the negotiation and execution of the agreement fundamentally flawed the negotiation process" (at para 69). She determined that the respondent was aware of the petitioner's mental illness and the pressure she was under due to her offer to purchase a house and her father's terminal illness. She concluded that the respondent took advantage of the petitioner's vulnerability in negotiating the terms of the agreement. She decided that the petitioner's lawyer did not compensate for her vulnerability

and that the agreement did not substantially comply with the objectives of the *Divorce Act*, RSC 1985, c 3 (2nd Supp). In the result, she ordered the respondent to pay periodic spousal support in the sum of $4,000 per month from January 1, 2014 to December 31, 2015, and $3,800 per month commencing January 1, 2016 until further order of the Court.

[9] The respondent lists a number of grounds in support of his appeal. Each of these grounds involves an asserted error of fact or mixed fact and law by the trial judge. The parties agree that, absent an error in principle, a significant misapprehension of the evidence, or unless the award is clearly wrong, the decision of the trial judge is entitled to deference (see *Hickey v Hickey*, [1999] 2 SCR 518).

[10] Applying the above standard of review, we cannot say that the trial judge erred. She applied the correct law. She carefully considered all of the evidence in light of the respondent's arguments and reached the difficult but necessary conclusions. A review of the record in its entirety demonstrates that there was an evidentiary basis on which she could have reached her conclusions. The trial judge did not misapprehend the evidence, nor, in our view, was the award clearly wrong. Thus, we dismissed the appeal.

The Cross Appeal

[11] Regarding costs, the petitioner asserts that the result of the trial was as favourable as or more favourable than the terms of an offer to settle that she made earlier to the respondent in compliance with *QB* r 49.10. The offer to settle included periodic spousal support payments of $3,000 per month from March 1, 2016 to and including May 30, 2024. The termination date

was based on the fact that the respondent's 67th birthday would be in May 2024.

[12] The trial judge refused to order double party and party costs. She ordered costs in the amount of $56,479.38, including disbursements. In her view, the fact that her order was variable at any time was more favourable to the respondent than a fixed order lasting until his 67th birthday. A review of the record shows that, at the time of the trial, the respondent had just turned 60 years old. He was contemplating retiring from his position, he had reduced his work to four days per week and he had to take five weeks off work due to stress.

[13] The parties agree that the decision of the trial judge relating to costs is entitled to significant deference absent an error in principle or a decision that is plainly wrong (see *Johnson v Mayer*, 2016 MBCA 41 at paras 21-22). In our view, no such error has been shown. As outlined earlier, the trial judge found that a variable order benefited the respondent more than a fixed order requiring him to work at the level required to be able to afford the proffered periodic spousal payments until he is 67 years old. That was a conclusion that she was entitled to draw on the evidence.

[14] Moreover, it is not possible to say with certainty that the result of the trial was as favourable as or more favourable than the terms of the offer to settle. In these circumstances, it cannot be said that the trial judge's discretionary decision regarding costs was plainly wrong and her decision is entitled to deference.

[15] It is for the above reasons that the appeal and cross appeal were dismissed with costs.

Cameron JA

Burnett JA

leMaistre JA