2006 CarswellAlta 1449, 2006 ABQB 806, [2007] A.W.L.D. 8, [2007] A.W.L.D. 10, [2007] W.D.F.L. 1, 26 C.B.R. (5th) 194, 153 A.C.W.S. (3d) 26, 428 A.R. 287

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Ganden, Re

In the Matter of the Bankruptcy of Mark Edward Ganden

Alberta Court of Queen's Bench

Reg. R.B. Waller

Heard: January 1, 2006
Judgment: November 7, 2006
Docket: Calgary 25-805950

Counsel: Sandy Lyons for Trustee

Diana **Castle** for Objecting Creditor, Kovalsky

Mark Edward Ganden, Bankrupt for himself

Subject: Insolvency; Family; Property; Civil Practice and Procedure

Bankruptcy and insolvency --- Discharge of bankrupt — Conditional discharge — General principles

Costs obligations in custody dispute — Bankrupt and his former common law spouse were parties to contested custody trial that lasted 40 days, which resulted in custody award and child maintenance in favour of former spouse, and $65,000 costs award against bankrupt — During custody trial, discussions took place regarding survival of costs award in bankruptcy proceedings — Registrar ruled that trial judge did not make formal binding direction with respect to survival of costs order, but rather was merely reacting to various hypotheses put before him — While taxable costs occasioned in trial for alimony are to be treated as part of alimony claim, trial in case at bar involved custody issue, and determination of maintenance was peripheral issue — Registrar lacked authority to allocate or apportion some of costs to maintenance issue, as that is sole province of trial judge, who made no such apportionment — Trial judge found that bankrupt was largely at fault for necessity of litigation and that he prolonged process, and he remarked that bankrupt should not escape his costs obligation by declaring bankruptcy — Registrar ordered discharge on condition of payment of $40,000.00 together with retainer amount of $2,056.00, totalling $42,056.00, inclusive of funds presently in trustee's estate account — Condition was to be met by regular payments of $600.00 per month, approximating bankrupt's surplus income — As incentive to bankrupt to obtain earlier discharge, he was given option of consenting to judgment for remaining balance if he faithfully made required payments for two years.

Bankruptcy and insolvency --- Discharge of bankrupt — Effect of discharge — Debts not released by discharge — Maintenance or support

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Cases considered by *Reg. R.B. Waller*:

Bobyk, Re (1995), 1995 CarswellOnt 682, 37 C.B.R. (3d) 25, 18 R.F.L. (4th) 412 (Ont. Gen. Div.) — considered

Crew, Re (1987), 6 R.F.L. (3d) 220, 58 O.R. (2d) 575, 63 C.B.R. (N.S.) 244, 36 D.L.R. (4th) 143, 1987 CarswellOnt 165 (Ont. H.C.) — considered

Dimitroff, Re (1966), 8 C.B.R. (N.S.) 253, 1966 CarswellOnt 36 (Ont. S.C.) — referred to

Ganden v. Kovalsky (2003), 2003 CarswellAlta 891, 2003 ABQB 20 (Alta. Q.B.) — referred to

Gigault, Re (1981), 1981 CarswellOnt 150, 37 C.B.R. (N.S.) 119 (Ont. C.A.) — referred to

Kozack v. Richter (1973), [1974] S.C.R. 832, 1973 CarswellSask 5, [1973] 5 W.W.R. 470, 36 D.L.R. (3d) 612, 20 C.B.R. (N.S.) 223, 1973 CarswellSask 142 (S.C.C.) — considered

Lees, Re (2002), 2002 BCSC 570, 2002 CarswellBC 1428, 35 C.B.R. (4th) 150 (B.C. S.C.) — referred to

Manolescu v. Manolescu (2003), 47 C.B.R. (4th) 77, 2003 BCSC 1094, 2003 CarswellBC 1767, 42 R.F.L. (5th) 407 (B.C. S.C.) — referred to

Matthews, Re (1993), 17 C.B.R. (3d) 103, 44 R.F.L. (3d) 243, 1993 CarswellOnt 188 (Ont. Bktcy.) — considered

Mayrand, Re (1979), 32 C.B.R. (N.S.) 80, 1979 CarswellOnt 251 (Ont. S.C.) — referred to

McCallum, Re (1988), 29 B.C.L.R. (2d) 333, 1988 CarswellBC 298 (B.C. C.A.) — referred to

Ng, Re (1996), 1996 CarswellBC 575, 39 C.B.R. (3d) 59 (B.C. S.C.) — considered

Patterson, Re (2000), 2000 CarswellSask 26, 15 C.B.R. (4th) 245 (Sask. Q.B.) — considered

Webber, Re (1980), 1980 CarswellOnt 180, 35 C.B.R. (N.S.) 299 (Ont. S.C.) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

s. 173(1)(f) — referred to

s. 178(1)(b) — referred to

s. 178(1)(c) — referred to

Family Law Act, S.A. 2003, c. F-4.5

Generally — referred to

RULING on survival of costs award in discharge proceedings.

***Reg. R.B. Waller*:**

1 The former common law spouse of the bankrupt, Marni Jean Kovalsky and the bankrupt were parties to a contested custody trial that lasted for some 40 days. That trial ended with custody of the couple's child going to Kovalsky, a maintenance award in her favour for the child and an award of costs owed by the bankrupt in the approximate amount of $65,000.00. The issue here is whether the costs award should survive the bankruptcy in whole or in part or whether a conditional order should be granted reflecting the nature of the cost award.

2 I have been provided with the entire judgment of Justice Park (now reported as 2003 ABQB 20 (Alta. Q.B.)), a copy of the transcript of his reasons awarding costs against the bankrupt dated June 11, 2003 and on October 12th, 2006, I was provided with a transcript of proceedings on January 12, 2004 dealing with the settling of a number of issues concerning costs. This latter transcript causes me some concern as its contents were not known to me or referred to in argument at the hearing of this matter in Lethbridge.

3 This matter came before me on a regular bankruptcy list in Lethbridge along with approximately 40 other matters. It should have been set down for a special chambers hearing. However, as counsel Ms. Castle had travelled from Calgary, and the bankrupt and Kovalsky were present I agreed to hear the matter. The thrust of the argument of Kovalsky's counsel was that the cost award should survive the bankruptcy under section 178(1)(b) and (c) or 173 (1)(f) of the Bankruptcy & Insolvency Act (BIA). At the conclusion of the argument Ms. Castle indicated that there was another transcript I should see without providing any context as to why it might be relevant.

4 That transcript deals with a rather mundane application before Justice Park settling disputed amounts on the Bill of Costs but at the conclusion of that transcript there are certain comments made by Justice Park which have a substantial bearing on this application. I set out those remarks verbatim:

MS. CASTLE: There's just one other matter

MS. GOOLD: Thank you, sir.

MS. CASTLE: — that I need to raise with you. I have been advised that Mr. Ganden intends to go bankruptcy (sic) and would like to take the Bill of Costs with him. I have been in touch with a bankruptcy trustee and there is a way to prevent it. We just need the wording put in that the Bill of Costs will be taxed; that (INDISCERNIBLE) will survive any bankruptcy proceedings on this matter.

THE COURT: Okay. I'm sorry?

MS. CASTLE That they — they're not — they would survive a bankruptcy proceeding. There's a new provision in the Act now that when costs are awarded at court as long as the judge designates that they would survive the bankruptcy, they will survive bankruptcy.

THE COURT: Okay. Ms. Goold, what's your position?

MS. GOOLD: I have no idea why My Friend is talking about so I can't comment. I don't know if my client's — well, I think he told you on the stand that he had — at the end of the day that he had some issues so I don't know whether he is or is not.

THE COURT: All right.

MS. GOOLD: I'm not going to leave it with the legislation in question. I can't imagine what I could possibly say.

THE COURT: Right. Well, I appreciate your position, but as I recall he gave evidence that he was very close to bankruptcy.

MS. CASTLE: Yes.

THE COURT: It was Mr. Ganden's position to ensure that this trial was conducted and he understood as well that should he be unsuccessful the costs may very well be ordered against him. He was unsuccessful and costs were awarded against him and I'm quite satisfied that under the circumstances that he should not evade his responsibilities under the bankruptcy by declaring and — by declaring bankruptcy.

And therefore, I'm quite satisfied to put that order — put that clause in the order.

MS. GOOLD: I think you'll have to do it as a separate —

MS CASTLE: I will do it as a separate order and I will have Mr. Hudson who is bankruptcy —

MS GOOLD: Because I'm pretty sure we've already filed the order.

MS CASTLE: Mr. Hudson is the bankruptcy trustee that I was speaking to and he will help me with the (INDISCERNIBLE) to provide you, My Lord.

THE COURT: Well, whatever the situation is you might refer me to the appropriate section in the Bankruptcy Act so that I can look at it —

MS. CASTLE: Okay. I will do that.

THE COURT: — whether it's extinguished by the bankruptcy or not, —

MS. CASTLE: Okay.

THE COURT: — but it's certainly my desire that Mr. Ganden not escape the consequences of taxable costs in this matter; by merely going to a trustee.

5 It is unclear from these remarks whether Justice Park was making a formal direction with respect to the survival of the costs award or merely expressing an initial reaction to the proposition. Obviously, if the remarks reflect a formal direction I am bound by them and must refer the entire application to Justice Park or another Justice.

6 I conclude that Justice Park was merely reacting to the hypothesis put before him and not providing a direction binding upon any Registrar who might subsequently hear the discharge application. I do so because no suggestion was made by counsel that I was bound by these remarks nor was any formal Order taken out reflecting such declaratory relief. It should also be noted that no law was put before Justice Park nor were the potentially relevant sections of the BIA put before him for proper consideration. Additionally it is probable the order sought could not be granted in any case.

7 Section 178(1)(b) or (c) of the BIA provides:

178(1) Debts not released by order of discharge - An order of discharge does not release the bankrupt from

(b) any debt or liability for alimony or alimentary pension;

(c) any debt or liability arising under a judicial decision establishing affiliation or respecting support or maintenance, or under an agreement for maintenance and support of a spouse, former spouse, former common-law partner or child living apart from the bankrupt;

8 There is clear authority that taxable costs occasioned in a trial for alimony are to be treated as part of the alimony claim. See *Dimitroff, Re* (1966), 8 C.B.R. (N.S.) 253 (Ont. S.C.). Ms. Castle argues that her client's costs should be caught by these sections. I disagree. The trial involved a custody issue. The determination of the maintenance payable for the child was at best a peripheral issue. It is equally clear that I lack any authority to in some way to allocate or apportion some of the costs to the maintenance issue that being the sole province of the trial judge who made no such apportionment. *Lees, Re* (2002), 35 C.B.R. (4th) 150 (B.C. S.C.) and *Manolescu v. Manolescu*, [2003] B.C.J. No. 1687 (B.C. S.C.). As a side note at least one author suggests that this rule represents the triumph of procedural protocol over substance that "frustrates the importance of family welfare and unfairly prejudices the support claimant." Recent Unfortunate Cases 2005: *Bankruptcy and Family Law* by Robert Klotz. The objecting creditor's application to have the cost award survive under section 178(1)(b) and (c) must fail.

9 The objecting creditor also argues that section 173(1)(f) applies to the actions of the bankrupt. That section allows the court to refuse or suspend a discharge or to pay moneys or consent to judgments in circumstances where:

> (f) the bankrupt has put any of the bankrupt's creditors to unnecessary expense by a frivolous or vexatious defence to any action properly brought against the bankrupt;

10 The problem with that submission is that the trial judge did not find the action was frivolous. In fact he said:

> This is a case where the best interests of the child were at issue. I fault no party for having that issue determined. I do not fault Mr. Ganden for bringing this matter to trial, he genuinely believed he was the better parent. He did not improperly invoke the trial process. He did not unnecessarily invoke the trial process. He did not invoke the trial process for specious or frivolous grounds.

11 What the trial judge did find was the bankrupt was largely at fault for the necessity of the litigation and that he prolonged the process. Those matters are self evident from a review of his trial reasons and are exemplified by the following passages from those reasons:

> Mr. Ganden was successful on this point, because he was correct in law. However, he was not correct in his ethical or moral conduct in relocating the child to Medicine Hat.
>
> Mr. Ganden's conduct was to deceive this Court on the ex parte application.
>
> I award costs against Mr. Ganden on the basis of his lack of success at trial, and on his pre-trial conduct in this litigation. I am satisfied that his position at trial lengthened the trial process, and caused his counsel to attempt to discredit the two experts.

12 Those findings are further enforced by the trial judges the bankrupt comments that should not escape the consequences of a cost order by merely going to a trustee.

13 In his usual careful way the trustee has filed a lengthy report touching on all the issues in this bankruptcy. The final recommendation of the trustee is that the bankrupt pay his estate the sum of $4,384.00 by way of surplus income and reimburse the estate for a retainer given to a law firm to take proceedings against his licensing professional body. The bankrupt listed one of his causes of bankruptcy as his suspension by his professional association as an audiologist. The trustee has also summarized for the court the impact of Directives 11 and 12 and pointed out that based on maximum calculations the bankrupt could be liable to pay his estate up to $12,256.00 if the maximum period of 21 months was used to calculate surplus income.

14 While the cases cited by the trustee have a bearing on the issues before the court neither the trustee or counsel for the objecting creditors have cited the authority that is properly germaine to this situation.

15 In an article titled, *The Approach of the Courts to the Discharge of Bankrupt Judgment Debtors* by Master J. M. Ferron (1986) 61 CBR 134 the dilemma of the court is expressed in these terms.

> A heavy burden is imposed on the court in the exercise of its unlimited discretionary power in the matter of discharge. On every application the court is faced with need to evaluate the debtor's character, his ability to make payments, the circumstances under which he incurred the obligations to creditors and his willingness to cooperate in the administration of the estate, within a large contemplation which must accommodate the

> interests of the creditors who wish to be paid, the debtor who wants relief from his indebtedness and society which stresses the sanctity of obligations yet recognizes the need to forgive such obligations in order to enable the bankrupt to take his or her place in society.

16 The courts have always been reluctant to grant a discharge to a bankrupt who files in the face of a judgment and such applications have always been subject to special scrutiny. See *Mayrand, Re* (1979), 32 C.B.R. (N.S.) 80 (Ont. S.C.); *Webber, Re* (1980), 35 C.B.R. (N.S.) 299 (Ont. S.C.); *Gigault, Re* (1981), 37 C.B.R. (N.S.) 119 (Ont. C.A.).

17 In *Kozack v. Richter* (1973), [1974] S.C.R. 832 (S.C.C.) the S.C.C. used the wanton and reckless conduct of the bankrupt as a gauge of his eligibility for a discharge. Although the court found the bankrupt was "a wage earner with a large family in modest circumstances" he was required to pay 50% of his total debts "as a condition of his discharge".

18 In discussing the effect of *Kozack*, Master Ferron says at page 143:

> It is evident from a consideration of the court's approach in *Kozack* that, when dealing with an opposition by a creditor relying on a judgment for damages held against the bankrupt, the court must carefully consider the trial judges's appraisal of the bankrupt's conduct in order to ascertain whether that conduct is of a degree of reprehensibility, which justifies special scrutiny and more particularly denied precludes an absolute discharge or whether on the other hand, his liability arose out of a lesser degree of negligence, which allows the court to conclude that the bankrupt's conduct did not contribute to the imbalance of assets over liabilities.

19 Here the clearest evidence of the trial judge's finding of moral reprehensibility lies in his off the cuff remark that the bankrupt should not escape his "costs" obligation by declaring bankruptcy.

20 I am not bound to fashion a conditional order that sees the objecting creditors costs paid but I am bound to consider the trial judges remarks as to the bankrupts moral reprehensibility in crafting a discharge that factors referred to by Master Ferron.

21 The factors which I consider to be relevant in addition to the trial judge's observations on moral reprehensibility are:

> (1) The bankrupt had approximately 40,000 in additional debts when he went into bankruptcy. The bankrupt says these debts for the most part arose from his failed audiology business. Although the cost order was a primary cause of his bankruptcy, it was not the only cause.
>
> (2) The bankrupt has satisfactorily performed his bankruptcy duties.
>
> (3) The bankrupt has contributed to his excess income obligations.
>
> (4) The bankrupt is now re-employed in his professional field and earns $2,936.00 per month. Pursuant to Directive 12, his surplus income would be $5,904.00 over 9 months or $12,256.00 if extended to the maximum of 21 months.

(5) The bankrupt has maintenance obligations for the child in the amount of $517.00 per month.

(6) The bankrupt had commenced an action against the College of Hearing Aid Practitioners of Alberta and at the date of his bankruptcy his lawyers had in trust the unexpended portion of their retainer in the amount of $2,055.58. As the estate has not received that amount the bankrupt has agreed to reimburse his estate in that sum.

(7) The bankrupt is a 38 year old single professional with many productive years ahead of him.

22 Although the *Kozack* principles has primarily been applied to tortious conduct it has been accepted to apply in matrimonial like causes in a number of instances. In *Crew, Re* (1987), 63 C.B.R. (N.S.) 244 (Ont. H.C.) a bankrupt sought to avoid a substantial equalization payment through bankruptcy. The court condemned the avoidance of matrimonial obligations through bankruptcy and provided for a substantial conditional order. Similar directions were provided in *Matthews, Re* (1993), 17 C.B.R. (3d) 103 (Ont. Bktcy.) and in *Ng, Re* (1996), 39 C.B.R. (3d) 59 (B.C. S.C.) with respect to other matrimonial assets.

23 *Bobyk, Re* (1995), 37 C.B.R. (3d) 25 (Ont. Gen. Div.) dealt with a situation bearing certain similarities to this matter. The parties had engaged in acrimonious Family Law Act litigation and child support litigation for a five year period. The trial judge's reasons showed that the bankrupt's claims were largely without merit and that his claims that he was indebted to third parties were not proved. In imposing a substantial conditional order Justice Feldman held:

> In my view this is a situation akin to *Kozack v. Richter* [(1973), 20 C.B.R. (N.S.) 223 (S.C.C.)] where the *Bankrupt Act* is not to be permitted to be used to avoid a judgment for tort or for a matrimonial proceeding. I note that this is not a case where Mr. Bobyk has more income or assets than he says at the moment, nor is there assault or physically abusive treatment involved as in several of the other cases cited in the court. Nevertheless our court process cannot condone a situation where spouses force each other through the financially and emotionally onerous burden of matrimonial litigation without taking responsibility for the financial consequences of losing.

24 Similarly in *Patterson, Re* (2000), 15 C.B.R. (4th) 245 (Sask. Q.B.) Registrar Herauf imposed a substantial conditional order in circumstances where "the bankrupt put his former spouse to unnecessary expense due to his lack of co-operation and participation in family law proceedings."

25 I am mindful of the admonition that conditional orders should only be made for a reasonable period of time *McCallum, Re* (1988), 29 B.C.L.R. (2d) 333 (B.C. C.A.).

26 However, in this case a substantial conditional order is required keeping in mind that the creditor it is intended to benefit Ms. Kovalsky will only receive a portion of the payments ordered because of the existence of other proven creditors.

27 In I have determined that an appropriate condition is the payment of $40,000.00 together with the retainer amount of $2,056.00 making a total of $42,056.00, such amount to be inclusive of the funds presently in the trustee's estate account. The condition is be met by regular payments of $600.00 per month (approximating the bankrupts surplus income.) As an incentive to the bankrupt to obtain an earlier discharge he will have the option of consenting to judgment for the remaining balance if he faithfully makes the required payments for a period of

two years. Judgment interest will accrue on any payment in arrears.

28 In making this order, I am mindful of the words of Master Ferron in the article previously referred to:

> The flexibility of the discretionary system is at once its strength and its weakness. Its strength is in the ability of the court to respond, unhampered by the constraints of rules, to individual cases. Its weakness is that the discretionary system inhibits the development of those same rules which can be utilized to forecast, within reasonable limits, the view the court will take on the application for discharge.

Order accordingly.

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