

CANADA / JUDGMENT

# A.J.L. v. J.G.L.

2022 BCSC 611

## COURT

Supreme Court of British Columbia

## DECIDED

20 April 2022

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2022 BCSC 611 A.J.L. v. J.G.L. IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: A.J.L. v. J.G.L., 2022 BCSC 611 Date: 20220420 Docket: 127877 Registry: Kelowna Between: A.J.L. Claimant And J.G.L. Respondent Before: The Honourable Mr. Justice Hori Reasons for Judgment on Costs Counsel for the Claimant: J.F. Chalkley Counsel for the Respondent: M.M. Sinclair C. da Luz Place and Date of Trial: Kelowna, B.C. June 21-25, June 28 and October 27-28, 2021 Written submissions of the Claimant filed: March 15, 2022 Written submissions of the Respondent filed: March 23, 2022 Place and Date of Judgment: Kelowna, B.C. April 20, 2022

## Introduction

- [1] On December 14, 2021, I issued reasons for judgment in the first trial of this bifurcated family law action. The trial dealt with parenting arrangements for the only child of the marriage. A second trial will decide the remaining issues in this action, including child support, spousal support and property division.
- [2] In my reasons for judgment following the first trial, I granted the parties leave to make written submissions on the issue of costs. These are my reasons on the issue of costs.

## Issues

- [3] The claimant sought to relocate from British Columbia to Australia with the parties' only child. The respondent resisted the relocation and sought to maintain the child's residence with him in British Columbia.
- [4] My decision was to allow the claimant to relocate to Australia with the child of the marriage if she chose to do so. I also arranged the parenting time for the respondent to accommodate the relocation.
- [5] The claimant submits that she should have her costs of the action because she was substantially successful in the trial. The claimant also claims double costs from April 21, 2021, when she made a settlement offer (the "Offer") to resolve the parenting issues.
- [6] The respondent submits that:

- a) The issue of costs should be adjourned until after the financial issues are decided in the second trial;
  - b) In the alternative, each party should bear their own costs;
  - c) Double costs are not appropriate because:
    - i. Costs penalties are not appropriate in mobility cases; ii. The respondent's rejection of the Offer was not unreasonable; and
  - d) If costs are awarded to the claimant, the payment of those costs should be deferred until the completion of the second trial. Adjournment of the Costs Issue
- [7] The respondent seeks to defer the issue of costs until after the second trial for two reasons. The first reason is that the respondent alleges that the claimant relies, in part, on the discrepancy in the financial positions of the parties to support her claim for costs. The respondent argues that the final financial positions of the parties cannot be determined until the property division issues are decided in the second trial.
- [8] I do not accept that the claimant relies on the parties' relative financial circumstance to justify an award of costs. The claimant's submission is that she was substantially successful on the issues before the court and, as such, she is entitled to her costs.
- [9] The second reason relied upon by the respondent for deferring the costs award until after the second trial is that I referred the apportionment of the expenses associated with the s. 211 report to the second trial. The respondent argues that if I award costs now on the relocation trial and the apportionment of the expense for the s. 211 report is deferred, then the ability to offset the s. 211 report expense against the costs award is lost.
- [10] The ability of the respondent to offset the expense for the s. 211 report is not lost by a costs award now. If the respondent is required to pay for the s. 211 report in the second trial, he should be entitled to set that expense off against the property division award.
- [11] In these circumstances, I see no reason to adjourn the costs issue until after the second trial. Costs Pursuant to Rule 16-1
- [12] Rule 16-1(7) of the Supreme Court Family Rules, B.C. Reg. 169/2009 [Family Rules] provides that the costs of a family law case must be awarded to the successful party unless otherwise ordered.
- [13] The parties agree that the successful party in a family law case is the party who achieves substantial success. The respondent concedes that the claimant was substantially successful in the first trial and, as such, the court would generally award costs to her. However, the respondent submits that I should exercise my discretion in this case and order otherwise.

- [14] The respondent submits that because the issue in the trial was the relocation of the parties' child and both parties had legitimate and well-founded cases to put forward, the parties should bear their own costs.
- [15] In support of his position, the respondent relies on *Hansen v. Mantei-Hansen*, 2013 BCSC 1854; *Hefter v. Hefter*, 2016 BCSC 1504; *Walker v. Maxwell*, 2014 BCSC 2357; and *Aubin v. Aubin*, 2010 BCSC 1425. In each of those relocation cases, the court exercised its discretion to order that the parties bear their own costs. The reasoning in these cases is similar. The court in *Hansen* explained it in this way at para. 143:
- [143] In general, costs in family matters follow the event. However, this is a case where each parent has a legitimate and well-founded case to put forward. It would not be in the interests of justice to pronounce one parent successful in this action and one not. The only consideration is the best interests of the children, and as I have made clear, the children would be well served living primarily with either parent. Given the parents' determination to live apart, and their equal devotion to their children, a decision had to be made for the children by a court. In these circumstances it is appropriate that the parties bear their own costs.
- [16] Notwithstanding the cases cited by the respondent, I must take guidance from the directions given by our Court of Appeal. In *Gold v. Gold* (1993), 106 D.L.R. (4th) 452 (B.C.C.A.) the Court held, at para. 19, that "the rule that governs 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".
- [17] In *Reis v. Bucholtz*, 2010 BCCA 115, the Court held, at para. 86, that there is no general principle that costs should not be awarded in a case where custody is at issue. Similarly, in *K. (T.) v. A. (R.J.H.)*, 2015 BCCA 8, Justice Smith held as follows at para. 86:
- [86] Costs are a discretionary award. In matters of custody and access, the usual rule that "costs follow the event" applies subject to the discretion not to award costs in certain circumstances. Those circumstances do not include the nature of the issues in dispute. See *Falvai* at para. 11, *C. (S.J.) v. A. (S.C.)*, 2010 BCCA 31 (B.C. C.A.) at para. 62, and *Reis v. Bucholtz*, 2010 BCCA 115 (B.C. C.A.) at paras. 83-86. Accordingly, I find no error in the judge's exercise of discretion to award the father, as the substantially successful party in the action, ordinary costs.
- [18] The Court of Appeal has been clear in directing that costs will generally follow the event unless otherwise ordered in family law cases and that the issues in dispute do not dictate whether I should exercise my discretion to deny a successful party of their costs.

- [19] In *Gold*, the Court of Appeal held that whether a trial judge departs from the general rule is a matter of discretion, to be exercised judicially. While the Court did not lay down strict guidelines for the exercise of the discretion, the Court suggested that factors such as hardship, earning capacity, the purpose of the particular award, the conduct of the parties and the importance of not upsetting the balance achieved by the award itself are matters which may be considered.
- [20] In the circumstances of this case I do not see any reason to depart from the general rule that costs should follow the event. There is no evidence that a costs award in favour of the claimant would create a hardship on the respondent. There is no evidence that the payment of costs would prevent the respondent from exercising his parenting time and would thereby disrupt the balance sought to be achieved by my orders.
- [21] Accordingly, I will award costs of the first trial to the claimant. Double Costs Pursuant to Rule 11-1
- [22] Two months before the commencement of the first trial, the claimant presented the Offer dated April 21, 2021, to the respondent. The claimant made the Offer after the parties received the s. 211 report. The s. 211 report did not recommend a relocation of the child at that time but suggested that a relocation may be possible in the future.
- [23] After considering the recommendations of the s. 211 report, the claimant offered to settle the parenting issues by essentially implementing the recommendations of the report. The Offer was to adjourn the relocation claim reserving the right to renew the relocation application as contemplated by the s. 211 report.
- [24] The Offer also included the following terms that are material to the issue of double costs:
- a) The child would reside primarily with the claimant;
  - b) The respondent would have parenting time on alternating weekends;
  - c) The respondent would have parenting time on Thursdays of the week he did not have weekend time and on Tuesdays during the week he did have weekend time;
  - d) The respondent would have liberty to apply to vary the parenting schedule to an equal sharing 2-2-5-5 arrangement if a mutually acceptable third party moved into the respondent's residence and agreed, in writing, to informally supervise the respondent's parenting time;
  - e) The respondent's mother was not an acceptable person to supervise parenting time;
  - f) Any injury sustained by the child while in the respondent's care must be reported to the Ministry of Children and Family Development ("Ministry") and the respondent's parenting time would be suspended until an investigation by the Ministry was completed; and
  - g) The respondent would attend individual counselling no less than once per week.

[25] The authority to award double costs to a litigant is derived from Rule 11-1(5) of the Family Rules. In considering whether to award double costs I may consider the following pursuant to Rule 11-1(6):

- a) Whether the offer to settle was one that ought reasonably to have been accepted;
- b) The relationship between the terms of the settlement offered and the final judgment;
- c) The relative financial circumstances of the parties; and
- d) Any other factor the court considers appropriate.

[26] In this case, I need only consider the first factor above because I find that the Offer was not one that the respondent ought reasonably to have accepted. While the claimant made a significant concession to suspend her relocation claim, at least temporarily, it was not unreasonable for the respondent to reject the conditions that the claimant sought in exchange for her concession.

[27] It was not unreasonable for the respondent to reject the condition that in order to apply to vary the parenting time a mutually acceptable third party must have moved into the respondent's residence and must agree, in writing, to informally supervise the respondent's parenting time. I find that it was reasonable for the respondent to reject these terms because:

- a) It required the cooperation and agreement of a third party over which the respondent would have no control;
- b) It allowed the claimant to block any attempt to achieve equal parenting time by simply refusing to accept a proposed third party supervisor;
- c) It required the respondent to compromise his personal space by having a third party move into his residence; and
- d) By accepting these terms, the respondent would, in essence, be conceding that he required supervision during his parenting time which may have been prejudicial to him in future parenting time applications.

[28] The Offer also included a condition that required the respondent to report any "injury" sustained by the child while in the respondent's care to the Ministry. The Offer gave no definition of "injury" and, as such, is much too broad to be acceptable.

[29] Accordingly, I am not prepared to award double costs to the claimant. Specifics of the Costs Award

- [30] The costs that I award to the claimant are those costs related solely to the issues in the first trial, except the costs associated with the s. 211 report which will be apportioned in the second trial. If there are costs that are related to process that combine issues in both the first and second trials, those costs will be apportioned, if necessary, in the costs award following the second trial. Deferral of the Payment of Costs
- [31] The respondent requests that the payment of the costs award be postponed pending a determination of the financial issues between the parties. The respondent submits that most of his assets are not liquid. He contends that before the trial, only 6.8% of his assets were held in bank accounts and that the trial expenses has diminished those liquid reserves.
- [32] I am not persuaded that this is sufficient reason to delay the payment of the claimant's costs from the first trial. The respondent had the liquid reserves to absorb the cost of litigation whereas the claimant's ability to do so was limited.
- [33] Further, the respondent has control of sufficient assets from which I am sure he can raise funds to pay the claimant's costs.
- [34] Therefore, the costs awarded to the claimant will be paid by the respondent forthwith after assessment. "D.K. Hori J." HORI J.
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