
CANADA / JUDGMENT

A.M.F.D. v. S.T.D.

2020 BCSC 972

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Supreme Court of British Columbia

DECIDED

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2020 BCSC 972 A.M.F.D. v. S.T.D.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

A.M.F.D. v. S.T.D. ,

2020 BCSC 972

Date: 20200630

Docket: 18 3028

Registry: Victoria

Between:

A.M.F.D.

Claimant

And

S.T.D.

Respondent

Before: The Honourable Mr. Justice Punnett

Reasons for Judgment

(On Costs)

Counsel for the Claimant:

Jon A.C. Stewart

Counsel for the Respondent:

Samantha J. de Wit

Place and Date of Hearing:

Victoria, B.C.

June 12, 2020

Place and Date of Judgment:

Victoria, B.C.

June 30, 2020

- [1] This family law claim was tried over 12 days between July 16, 2019 and October 30, 2019. Multiple issues were in dispute including matters of parenting, specifically the respondent's application to relocate with the children of the marriage to Vancouver, division of family property, child and spousal support including retroactive support and occupational rent.
- [2] The parties agreed only to joint custody and guardianship and shared parenting responsibilities and that shared parenting was in the best interests of their children.
- [3] The parties had leave to address costs which they have now done.

Background: Trial Results

- [4] The parties cohabited in 2002, married in 2004 and separated in 2017. They are the parents of two young boys. At the time of separation, they were residents of Victoria. They separated on March 5, 2017 but continued to reside in the former matrimonial home (the "Family Residence") until August 30, 2018. The respondent accepted a promotion to Vancouver after the parties separated but while they were still sharing the Family Residence. Knowing the claimant refused to move to the lower mainland the respondent, without notice to the claimant, moved to Vancouver with the boys, rented a home there and enrolled the children in school. An order was made shortly thereafter that he return the children to Victoria, which he did.
- [5] As the new school year was rapidly approaching the mobility issue was addressed first. The Court dismissed the mobility application on August 27, 2019 with reasons to follow. The respondent sought to re-open the trial to address his intended return to Victoria rather than remaining in Vancouver without the children. That application was granted and a further two days of evidence were heard on October 29 and 30, 2019.
- [6] Reasons for Judgment were issued on April 3, 2020 and are indexed at 2020 BCSC 529 (the "Trial Reasons").
- [7] The matters in dispute were summarized at paragraph 33 of the Trial Reasons:
 - a) The respondent's proposed relocation to Vancouver with the children;

- b) Excluded property and the date of cohabitation;
 - c) Division of property, including:
 - i. The former Family Residence;
 - ii. Financial assets;
 - iii. Personal and household property including sentimental items.
 - d) Occupational rent;
 - e) The parties' respective incomes;
 - f) Child and spousal support, including retroactive support;
 - g) The costs of the s. 211 report and attendance of Dr. Waterman and Dr. Burrows at trial;
 - h) Costs.
- [8] The results at trial follow.

The respondent's proposed relocation to Vancouver with the children

- [9] The respondent's relocation application occupied the majority of trial time and the majority of witnesses and was dismissed.

Excluded property and the date of cohabitation

- [10] The respondent sought orders excluding the net sale proceeds from his townhouse in Ottawa which he purchased prior to the parties' cohabitation. The net sale proceeds were \$241,210.99 and of those funds he used \$10,000 for the down payment on the Family Residence and \$181,456.45 to complete the purchase for a total of \$191,456.45. The respondent's application to exclude those funds was unsuccessful and the Family Residence was divided equally.
- [11] He also sought to exclude investment property pre-owned by him worth \$49,233.64 at the date of cohabitation. As well his parents had gifted \$100,000 to him and he sought to exclude \$80,000 of that amount. He succeeded in having both amounts excluded.
- [12] The parties had mixed success on the issue of their date of cohabitation.

Personal and household property including sentimental items

- [13] There was mixed success on these items.

Jewellery

- [14] The respondent claimed jewellery he gave to the claimant before their marriage was an investment. That claim was dismissed.

Motorcycle post-separation upgrade

- [15] The respondent sought an additional \$500 from the sale of the parties' motorcycle because of alleged upgrades he made to it. Those were not proven nor was their effect on its value. The claim was unsuccessful.

Countertop and trim

- [16] The respondent testified he attended at the former Family Residence in October 2018 with a countertop and trim required to finish a bathroom. He sought reimbursement for one-half of the cost being \$1,842.86. There was no evidence of the now used value of those items nor what, if any value, they might have added to the house value. The claim was dismissed.

Cost of replacement of personal possessions of respondent from former Family Residence

- [17] The respondent sought reimbursement for items he purchased for his rental home before he gained access to the former Family Residence. Those claims included a leaf blower, bedding and towels, a duvet, kitchen utensils, steam iron, rug, electrical tester, pillows, furniture, a pair of pants and items for the children. The claim for reimbursement was dismissed.

Occupational rent

- [18] The respondent sought occupational rent from the claimant as compensation for the rent he paid for his home in West Vancouver. He sought \$28,000 from the claimant, being one-half of the total of \$56,000 he paid for 14 months at \$4,000 per month. The claim was dismissed.

The parties' respective incomes

- [19] The respondent sought to impute income to the claimant. Her estimated income for 2019 was \$35,380.80. Income of \$38,000 was imputed to her commencing in 2020.
- [20] The respondent led evidence that upon returning to Victoria he would earn less than he had earned when he left and substantially less than he now earns in Vancouver. However, he did not establish that he would move to Victoria. Indeed, at the time of the costs hearing he still remained a resident of Vancouver. His income therefore was set at what he was earning in his new position, \$195,700 for 2019 plus bonuses.

Child and spousal support, including retroactive support

- [21] While the respondent acknowledged the entitlement of the claimant to both compensatory and non-compensatory spousal support, he sought to have it awarded at the low end of the Spousal Support Advisory Guidelines ("SSAG") and that it be time limited to 7 years. The claimant sought support at the mid-range of the SSAG and no time limit. Spousal support was awarded of \$2,971 being the mid-range of the SSAG and it was not time limited.
- [22] Regarding the claimant's application for retroactive child and spousal support the respondent sought an order limiting retroactive child support to July 1, 2019. It was ordered from November 1, 2018 based on shared parenting to August 31, 2019 and sole parenting by the claimant from September 1, 2019 to December 31, 2019. The claimant was therefore successful.
- [23] The respondent sought an order the parties share responsibility for \$9,136 being his travel costs to maintain shared parenting. He succeeded on that claim and such costs were ordered to be shared proportionate to the parties' incomes.

The costs of the s. 211 report and attendance of Dr. Waterman and Dr. Burrows at trial

- [24] The s. 211 report was requested by the respondent. When ordered, the respondent was to pay for it with responsibility for its cost to be determined. The respondent also required the attendance of its two authors for cross-examination.
- [25] The respondent sought reimbursement for one-half the cost of the s. 211 report plus "additional expenses related to the Claimant's numerous collaterals" as well as one-half of the costs incurred for the attendance of Dr. Burrows and Dr. Waterman. The cost of the report was \$13,832.99 and the cost of the attendance by its authors was at the date of trial \$6,607.92.
- [26] The claimant submitted the respondent was responsible for such costs.
- [27] In my Trial Reasons I noted:
- [238] The respondent seeks an order that the claimant pay 60% of the report costs and he pay 40% claiming the report cost more because of additional expenses relating to the claimant's "numerous" collaterals. He apparently had fewer collaterals allegedly because of what he was told by the report writer's staff although the evidence does not establish that was the case.
- [239] The claimant submits the respondent requested the report, not the claimant, and he chose to cross-examine Dr. Burrows and Dr. Waterman. She submits as well that Dr. Waterman's attendance was unnecessary as he did not author the report.
- [28] Those expenses were ordered to be shared proportionate to their incomes.

Position of the Claimant

- [29] The claimant seeks costs on the basis she was substantially successful, noting that the application to relocate the children to Vancouver was the most important issue to the parties. It took the majority of the trial time and was the bulk of the evidence and the majority of witnesses were on that issue. It also was the subject of the most substantial submissions.
- [30] Regarding the property issues they arose because of multiple claims by the respondent, the most important relating to the former Family Residence and occupational rent claims he advanced. The claimant submits no basis has been shown to depart from the ordinary rule that costs go to the successful party as the respondent must establish otherwise and has failed to do so.

Position of the Respondent

- [31] The respondent's position is the claimant was not substantially successful and therefore no costs should be awarded against him. In the alternative he submits that if the claimant is found to have been substantially successful each party should bear their own costs.
- [32] He submits the test he must meet takes into account the importance of the issues not the time they took and that a global approach is to be taken. Nor should a party be penalized for raising issues requiring resolution in court. If costs are awarded, he submits they should be reduced in order to address the mixed results on some issues and his success on some others.

Issues

- [33] As is apparent the issues are:
- Has either party achieved substantial success?
 - How should the court exercise its discretion on awarding costs?

Law and Discussion

- [34] The parties agree on the applicable legal principles. They disagree on their application.
- [35] In *S.A.M. v. J.A.M.*, 2017 BCSC 2348 at para. 7, Bernard J. summarized the principles governing an award of costs in a family law proceeding:
- The costs of a family law case must be awarded to the successful party, unless the court otherwise orders (Rule 16-1(7)) of the Supreme Court Family Rules [Rules];
 - The "successful party" is the party who has achieved substantial success at the trial/hearing (*Fotheringham v. Fotheringham*, 2001 BCSC 1321; *Marquez v. Zapiola*, 2014 BCCA 35);

- (c) The court's discretion to "order otherwise" must be exercised judicially, bearing in mind a non-exhaustive list of factors that includes hardship, earning capacity, the purpose of the particular award, the conduct of the parties in relation to the litigation, and the importance of not upsetting the balance achieved by the court in relation to the substantive issues (*Gold v. Gold* (1993), 106 D.L.R. (4th) 452 (B.C.C.A.));
 - (d) The party who asks the court to "order otherwise" bears the onus to persuade the court why it should do so (*S.D.W. v. C.W.W.*, 2006 BCSC 162);
 - (e) Financial hardship, without more, is not a sufficient basis for the court to exercise its discretion to depart from the usual rule that successful parties are entitled to their costs (*S.D.W. v. C.W.W.*, *supra*; *K.D.P. v. A.R.K aka R.K.*, 2012 BCSC 1025; *Brown v. Kucher*, 2016 BCSC 194);
- [36] In *Fotheringham v. Fotheringham*, 2001 BCSC 1321 at para. 28 the Court noted that the Shorter Oxford English Dictionary defines "substantial" as "of ample or considerable amount, quantity or dimensions". Bouck J. described substantial success as "about 75% or better". While Rule 16-1(7) is not approached with mathematical precision, the 75% threshold referred to by Bouck J. has often been applied as a "rule of thumb": *Clarke v. Clarke*, 2015 BCSC 1005 at para. 12.
- [37] Bouck J. in *Fotheringham* set out a four step inquiry to assess whether there has been "substantial success" by one party over the other and whether to order costs:
- [46] Based on the above interpretation of Rules 57(9), 57(15) and *Gold*, a decision to award or not award costs after a trial might follow a four step inquiry.
1. First, by focusing on the "matters in dispute" at the trial. These may or may not include "issues" explicitly mentioned in the pleadings.
 2. Second, by assessing the weight or importance of those "matters" to the parties.
 3. Third, by doing a global determination with respect to all the matters in dispute and determining which party "substantially succeeded," overall and therefore won the event.
 4. Fourth, where one party "substantially succeeded," a consideration of whether there are reasons to "otherwise order" that the winning party be deprived of his or her costs and each side then bear their own costs.

Step 1: Matters in Dispute

- [38] As noted above and as is common in matrimonial disputes many "issues and sub issues" arise: *Fotheringham* at para. 40. As the Court of Appeal noted in *Litt v. Gill*, 2016 BCCA 288, in family law cases with multiple issues and divided success, a more flexible test for "substantial success" may be appropriate (at para. 53).

Step 2: Relative Importance of Matters in Dispute to the Parties

- [39] The respondent submits that while the issue of the relocation application was significant the financial issues as well were significant issues and important to the parties. The claimant submits the relocation issue outweighed the other issues in terms of importance.
- [40] Clearly (and understandably) the well-being of their children and their future was the most important issue for the parties. That was readily apparent from the history of the litigation and the trial itself. The issue of relocation was the subject of extensive evidence and submissions. The other matters addressed did not attract a similar level of detail nor emphasis.

Step 3: Global Assessment of Matters in Dispute

- [41] Regarding assessing what party "substantially succeeded" overall, the respondent in his submission breaks down the issues and notes which were won by who and what issues had mixed success. It is not in issue that the assessment is not simply a numerical exercise given issues vary in their importance to the parties and their significance in the litigation. That is, the weight to be given in the global assessment varies.
- [42] As noted, the claimant succeeded on the relocation issue and her claims for spousal and child support. On property issues involving ascertainable funds on the matter of excluded property while the respondent established the \$80,000 gift and the pre-acquired investments of \$49,233.64 were excluded, he failed on excluding the townhouse proceeds of \$191,456.45. Nor did he succeed on his claim for occupational rent of \$28,000. He succeeded on the s. 211 cost issues.
- [43] I conclude, after taking into account the matters in dispute and weighing the various results, the claimant was substantially successful. She succeeded on the issues most important to the parties. In addition, those issues occupied the majority of the trial time, evidence, and submissions.

Step 4: Should the Court Otherwise Order

- [44] The respondent submits that if it is found the claimant has been substantially successful then the court should "otherwise order" that she be deprived of her costs and that each party should bear their own costs.
- [45] The onus is on the respondent to establish there should be a departure from the normal rule of costs to the successful party. In *Gold v. Gold* (1993), 82 B.C.L.R. (2d) 180 (C.A.) at para. 20 the court provided a non-exhaustive list of the factors to be considered:

The question, then, is: when should the Court order otherwise? With respect, when the Court should order otherwise is a matter of discretion, to be exercised judicially by the trial judge, as directed by the Rules of Court. To lay down any strict guidelines or even to attempt to give exhaustive examples is not, I think, helpful, because the facts and issues in each family law case

vary so greatly. Factors such as hardship, earning capacity, the purpose of the particular award, the conduct of the parties in the litigation, and the importance of not upsetting the balance achieved by the award itself are all matters which a trial judge, quite properly, may be asked to take into account. Assessing the importance of such factors within the context of a particular case, however, is a matter best left for determination by the trial judge.

[46] The respondent emphasises the importance of not upsetting the balance achieved by the award. While he acknowledges his high earning capacity in Vancouver, he submits that when he moves to Victoria, his income will decrease and such a move will use up additional capital. He submits as well the court should consider his request to relocate as a factor additional to those noted in *Gold* given the court must consider the best interests of the children.

[47] The respondent relies on *Hansen v. Mantei-Hansen*, 2013 BCSC 1854. In that case the only issue at trial was the primary residence of two young children. Humphries J. ordered joint custody with primary residence to the claimant father and ordered the parties to bear their own costs. She noted at para. 2:

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.

[48] Humphries J. reviewed the court's discretion to not award costs to a successful party and concluded there is no special costs rule in cases involving custody:

[12] It is clear from the appellate decisions that, although there is no special principle of general application that costs should not be awarded in custody cases, there is a clear discretion in the trial judge, to be exercised judicially, to decide whether to award costs. *Gold v. Gold* (1993) 82 B.C.L.R. (2d) 180 sets out a non-exclusive list of factors to consider when deciding how to exercise one's discretion on costs: hardship, earning capacity, purpose of the award, conduct of the parties, not upsetting the balance achieved by the award, and notes that the facts and issues in each family case vary widely.

[13] It must be kept in mind, when considering that list of factors, that *Gold v. Gold* was not a case involving children. It involved the division of substantial family assets "with each party ending up with a substantial estate", and was heard by a five person panel because a practice had arisen of requiring all family litigants to bear their own costs unless special circumstances justified a different order. The court decided there was no special rule for matrimonial cases.

- [14] The thoughtful analyses at the trial level in the custody cases listed at para. 10 above in K.D.P. and in many other cases show the overwhelming importance trial judges place on the best interests of the children, as they are statutorily bound to do. This was not a factor that was considered in Gold because it was irrelevant to the considerations there, but it clearly governs all the trial decisions referred to. Of course, the court must always consider the best interests of the children and that is not necessarily a factor that would go to costs. However, it is a factor when the children would thrive under either parent and each parent has a legitimate position to put forward that their parenting plan should be preferred. The very process of having an independent adjudicator decide which plan should be preferred then becomes a matter of the best interests of the children. In some cases, it is not fair to the children and their relationship with each parent that the recipient of an offer to settle be forced to step aside for fear of not correctly predicting the outcome of the trial.
- [15] This is not to be confused with what has been termed the "genuine belief theory" of costs - that is, if you maintain your position on custody in good faith and in the genuine belief you have a legitimate position you are somehow protected from an order for costs (see K.D.P. at para. 19). Obviously that is not a justifiable position.
- [16] The underlying reasoning in all the cases in which parents have been required to bear their own costs in a custody battle is based not on a party's "genuine belief", but on the court's assessment, after observing the parents and their witnesses and hearing all of their evidence, that each parent was a worthy primary residence/custodial parent and the decision, often heart-breaking because of its difficulty and importance, could go either way. For the children's sake, a decision has to be made, and the trial judge is given this important and difficult task of deciding what is in their best interests. Where such circumstances exist, trial judges have often declined to make orders for costs in custody cases, whether articulating it as a matter of principal (not the recommended approach, given the Court of Appeal's views on the wide applicability of Gold), or a matter of discretion (the approach approved by the Court of Appeal in Gold and the cases that have followed it).
- [19] the parties have many strengths and had cooperated in the best interests of the children, managing to resolve all the other issues. The custody issue remained, and there were two competing plans upon which the parties simply needed to have an adjudication.
- [49] Hansen is distinguishable on its facts. In the case at bar, while relocation was the main issue it was not the sole issue. I have already concluded that the claimant was substantially successful in this action, achieving success on various issues including the relocation application. In addition, I found, as the parties had agreed, that shared parenting was in the best interests of their children. I concluded:
- [123] In all of the circumstances, the best interests of the children can only be assured with shared parenting in Victoria. The increased salary of the respondent in Vancouver, the reason for the proposed move, and its benefits do not outweigh the other factors referred to. The cost of living in Vancouver and the logistics of housing and employment to facilitate

shared parenting for these children outweigh the advantages that can come from greater family income. Indeed, it is doubtful that such an increased income would be sufficient in any event to alleviate those concerns.

- [124] The parties originally chose to move to Victoria and have raised their children there. The children are happy and secure. While the status quo is not to be preferred, I am satisfied that shared parenting can be more effectively carried out in Victoria than in Vancouver given housing costs, shorter travel times and closer employment.
- [125] A move to Vancouver is unlikely to enhance the quality of life of the children and the claimant and indeed is likely to negatively affect it. The evidence does not show that the children are or will be deprived in any way, social, financial or educational, by remaining in Victoria. They have already faced the disruption arising from the breakdown of their parents' marriage and have come to terms with that. A move to Vancouver for their father's desire to facilitate his career does not justify the future of these children being placed at risk.
- [50] Hansen was also distinguished in *J.E.H. v. J.A.B.*, 2016 BCSC 2190 at paras. 10-15 and *Pasco v. Pasco*, 2015 BCSC 2143 at para. 28 on the basis that the parties had not put forward equally reasonable parenting plans to justify each party bearing their own costs.
- [51] In *S.J.C. v. S.-J.C.A.*, 2010 BCCA 31 at para. 62 the Court of Appeal confirmed the even where custody is at issue the costs follow the event "subject to a discretion to refuse costs to the successful party in certain circumstances". This remains the law in B.C. In *T.K. v. R.J.H.A.*, 2015 BCCA 8, a relocation case, Smith J.A. stated:
- [85] The judge found the father was the substantially successful party in the action and awarded him ordinary costs. The mother submits he erred in awarding the father costs in the circumstances of this case where the central issue was the custodial arrangement and residency of the children. In such circumstances, she submits, the judge should have ordered each party to bear their own costs.
- [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, *S.J.C. v. S.-J.A.*, 2010 BCCA 31 at para. 62, and *Reis v. Bucholtz*, 2010 BCCA 115 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.
- [52] Therefore, the normal rule that costs follow the event applies.
- [53] An award of costs given the parties' present circumstances does not upset the balance of the award given the findings made and the respondent's present employment and financial position.

- [54] The respondent also submits that his efforts to resolve the issues between the parties before he moved to Vancouver should be considered. Through previous counsel of both parties, counsel for the respondent suggested the parties mediate the matter. That did not occur for various reasons including the claimant's concerns that the respondent was not disclosing relevant matters to her such as his having allegedly filed a notice of change of address with Canada Post in early August 2018 without notice to her. In addition, he was in active negotiations over the position in Vancouver in June 2018 having reached agreement to accept the position with only the salary amount to be finalized. The actions of the respondent in accepting the position followed by his unilateral action of relocating with the children without informing the claimant supports her concerns about the utility of mediating. In my view the evidence does not support a finding that the claimant's refusal to mediate was unreasonable.
- [55] As a result, the usual rule shall prevail. The claimant has been substantially successful and is entitled to her costs. I decline to make the sought-after reduction.

"The Honourable Mr. Justice Punnett"

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