

CANADA / JUDGMENT

Bennett v. Lariviere

2021 BCSC 493

COURT

Supreme Court of British Columbia

DECIDED

18 March 2021

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2021 BCSC 493 Bennett v. Larivière IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Bennett v. Larivière, 2021 BCSC 493 Date: 20210318 Docket: E8728 Registry: Rossland Between: Kenneth Mark Bennett Plaintiff And Anik Larivière Defendant Before: The Honourable Madam Justice Gropper (appearing via teleconference) Reasons for Judgment The Plaintiff, appearing in person (via videoconference): K. Bennett Counsel for the Defendant (via videoconference): M. Yates Place and Date of Hearing: Rossland, B.C. February 2, 2021 Place and Date of Judgment: Rossland, B.C. March 18, 2021

Introduction

- [1] In my reasons for judgment in this matter indexed at 2020 BCSC 2198, I dismissed Mr. Bennett's (the father) application for child support to be paid by Ms. Larivière (the mother).
- [2] I granted leave to the mother to make submissions in respect of costs.
- [3] The mother seeks double costs of the entire proceedings in accordance with Supreme Court Family Rules, B.C. Reg. 169/2009, Rule 11-1.
- [4] Rule 11-1(4)-(6) provides: Offer may be considered in relation to costs
- (4) The court may consider an offer to settle when exercising the court's discretion in relation to costs. Cost options
- (5) In a family law case in which an offer to settle has been made, the court may do one or more of the following:
 - (b) award double costs of all or some of the steps taken in the family law case after the date of delivery or service of the offer to settle;
 - (d) if the party who made the offer obtained a judgment as favourable as, or more favourable than, the terms of the offer, award to the party the party's costs in respect of all or some of the steps taken in the family law case after the date of delivery or service of the offer to settle. Considerations of court
- (6) In making an order under subrule (5), the court may consider the following:

- (a) whether the offer to settle was one that ought reasonably to have been accepted, either on the date that the offer to settle was delivered or served or on any later date;
 - (b) the relationship between the terms of settlement offered and the final judgment of the court;
 - (c) the relative financial circumstances of the parties;
 - (d) any other factor the court considers appropriate.
- [5] The mother also seeks that I fix costs in accordance with Rule 16-1(14) that provides:
- (14) The court may award costs
- (a) of a family law case,
 - (b) that relate to some particular application, step or matter in or related to the family law case, or
 - (c) except so far as they relate to some particular application, step or matter in or related to the family law case and in awarding those costs the court may fix the amount of costs, including the amount of disbursements.
- [6] In her application for summary trial, the mother sought the following orders:
1. a declaration that the mother has no outstanding child support payable to the father for the support of the children;
 2. interest of penalties levied by the Family Maintenance Enforcement Program (FMEP) as against the mother are cancelled and relieved including interest accruing under the Family Maintenance Enforcement Act, R.S.B.C. 1996, c. 127;
 3. the mother is entitled to the return of any money seized by the FMEP; and
 4. the father's action be dismissed.
- [7] The mother was entirely successful in her application before me. I granted all of the orders sought.

Background

First Offer to Settle

- [8] When the mother was advised by the FMEP in April 2019 that, under the father's instruction, they were enforcing the support payments as ordered by Master Keighley in the interim order of February 9, 2007 (interim order) the mother retained counsel.
- [9] On October 31, 2019 the mother's counsel wrote to the father formally requesting that he instruct FMEP to cease the enforcement proceedings immediately (the "first offer to settle"). The first offer to settle set out the relevant facts, including that from 2008 to 2019 the father and mother had shared custody of the children; the mother paid for the vast majority of the

children's expenses; at no point since 2007 did the father request child support from the mother; the youngest daughter has recently ceased to be a child of the marriage. It pointed out that the interim order for child support was intended to apply as long as the mother resided in Québec and once the mother returned to the family home the order no longer applied.

- [10] The first offer to settle provided a copy of an agreement, signed by both parties in 2016, setting out the arrangement that the father and mother had since they separated in 2007, and states that "no support payment is required [by either party]" (the 2016 agreement).
- [11] The first offer to settle stated at page 3: In my opinion a court will have no issue with cancelling arrears of child support that have been accruing under the interim order. I have been instructed to write this letter to you, asking that you discontinue these enforcement measures now, before my client is forced to pay the legal fees associated with a Court application. If you agree, I will draft a Consent Order for your review that confirms that there are no arrears owing by my client. If you do not agree or if I do not hear from you by Thursday November 24, 2019, my client will ask the Court to make an Order that you pay her legal costs. Ms. Lariviere reserves the right to bring this letter to the attention of the Court after judgment has been rendered on all other issues for the purposes of seeking an Order for costs against you. I strongly recommend that you seek legal advice from your own lawyer. I am not your lawyer. I can only act in Ms. Lariviere's best interest.
- [12] The father did not respond to the letter. Notice of Application for Summary Trial
- [13] On May 14, 2020, the father was personally served with the mother's notice of application filed May 4, 2020 and her counsel's cover letter of May 14, 2020 that enclosed the October 31, 2019 letter.
- [14] As required, the notice of application set out the orders sought by the mother, and provided a full and complete factual and legal basis for seeking the orders.
- [15] The father did not respond after that service.
- [16] The initial hearing of the mother's application was set for July 27, 2020 but adjourned to September 8, 2020. Final Offer to Settle
- [17] On August 10, 2020 the mother's counsel sent the father a final offer to settle that enclosed a draft consent order for him to sign. It also enclosed a copy of the first offer to settle.
- [18] The final offer to settle repeated the relevant facts and documents and another copy of the 2016 agreement was attached.
- [19] The terms offered were: [The mother] offers to settle this matter as follows:
 - 1. [The mother] has no child support owing, past or future;
 - 2. All claims by either party in the family law proceedings are dismissed; and

3. Neither party pays any legal costs to the other.

- [20] The final offer to settle stated (at pages 1 & 2): If you accept this offer, please kindly sign and return the enclosed draft Court Order and I will file it with the Court. If you do not accept this offer and my client is successful at summary trial, I have instructions to seek an Order that you pay her legal fees. I look forward to hearing from you. The Defendant, [the mother], reserves the right to bring this offer to the attention of the Court after judgment has been rendered on all other issues, for the purpose of considering costs.
- [21] The father did not sign the order. He advised the mother's counsel that he rejected the offer "as it is not in my interest in the slightest". He counter offered: he would not seek spousal support from the mother; arrears of child support would be based on the Federal Child Support Guidelines for British Columbia; his income for child support purposes would show a loss from his business income; and each party would be responsible for their own legal costs. Reasons for Judgment
- [22] The matter was heard on September 30, 2020. I delivered oral reasons on October 2, 2020, granting the relief that the mother sought. Positions of the Parties The Mother
- [23] The mother says that she is entitled to double costs on the basis that the first and final offers to settle ought to reasonably have been accepted by the father either on the date the offer was delivered or served or any later date. Both offers were that the parties enter a consent order confirming that there were no arrears owing by the mother and that the mother would not seek costs.
- [24] The mother seeks an order that I fix costs and has provided a draft bill of costs which totals \$5040 in tariff items and \$973.18 in disbursements.
- [25] The mother also seeks an order that the father's signature on the order arising from my decision of October 2020 and this decision be dispensed with. The Father
- [26] The father opposes awarding the costs to the mother. He says that an award of costs would be inequitable. He says that he was given information from FMFP that it was incumbent on the payor spouse to make the payments under the interim order and thus he proceeded. The father says he was unable to obtain counsel and had to "go it alone".
- [27] The father asserts that awarding costs to the mother sets a dangerous precedent: recipients of support might be reluctant to register with FMFP, particularly if they are unable to obtain counsel, are then are unsuccessful in their claim, and are awarded double costs.
- [28] The father says that his financial circumstances are such that he cannot afford to pay costs.
- [29] The father says that he hoped that he and the mother could work things out but that attempt was unsuccessful. Discussion and Analysis

- [30] The rule in litigation, including family litigation involving self-represented parties, is that costs normally follow the event unless the court orders otherwise. In other words, the successful party is entitled to his or her costs.
- [31] In *Gold v. Gold* (1983), 82 B.C.L.R. (2d) 180 (B.C.C.A.) the Court discusses the factors that a judge can take into account to depart from the usual rule at para. 20: 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.
- [32] There was one issue before me: whether the mother was required to pay child support under the terms of the interim order. The mother's application sought a declaration that there was no outstanding support payable by her to the father for support of the children. The other orders sought were incidental to that declaration.
- [33] I accepted the mother's position. I made the declaration sought, cancelled the interest and penalties levied by FMEP and dismissed the father's action.
- [34] Applying the principle expressed in *Gold* that a trial judge may exercise her discretion and depart from the usual rule in certain cases, I find there is no reason to do so here. I expressly found that the father had agreed to the arrangement whereby the parties share joint custody and that no child support would be payable by either. I accepted that the parties agreed to that verbally in early 2008 and that it was reflected in the 2016 agreement that the father signed.
- [35] The father chose to pursue a claim for child support that he had expressly agreed both verbally and in writing in the 2016 agreement was not owing. In so doing, he attempted to upset the balance that the parties had specifically agreed to in respect of child support. He sought payment of over \$100,000 in child support in spite of his acknowledgment both by agreement and practice that the parties would share joint custody of the children and that no support was payable by either party to the other.
- [36] There are no good reasons in this case to deprive the mother of her costs.
- [37] I am not persuaded by the father's assertion that he cannot afford to pay costs. While it may be a factor in some family matters, it is not a factor here, where the father decided to pursue this matter to litigation in spite of the offers to settle. He took the risk that if he was unsuccessful in the application for summary trial, that he would be liable for costs. He cannot avoid an order for costs simply by saying that he cannot afford to pay them. He put

the mother to the expense of retaining counsel, and proceeding to court to set aside the FMEP notice of payment that she received in April 2019.

- [38] In respect of double costs, the mother made two offers to settle in October 31, 2019 and August 10, 2020. In both offers, the mother advised that she was willing to agree to an order that no outstanding child support was payable her under the terms of the interim order and that failing such an agreement that she would bring the offers to the attention of the court for the purpose of determining the matter of costs.
- [39] The offers that were made to the father were more favourable than the judgment of this court. The offers expressly excluded costs.
- [40] The father rejected the offers to settle. Instead he insisted on his position prevailing, although he suggested that he would not seek spousal support, a claim that had never been made.
- [41] Rule 11-1(6) sets out the considerations of the court in determining where an offer to settle has been made an award of double costs is justified.
- [42] In *Hartshorne v. Hartshorne*, 2011 BCCA 29 the Court referred to the guiding principles in awarding double costs at para. 25: An award of double costs is a punitive measure against a litigant for that party's failure, in all of the circumstances, to have accepted an offer to settle that should have been accepted. Litigants are to be reminded that costs rules are in place "to encourage the early settlement of disputes by rewarding the party who makes a reasonable settlement offer and penalizing the party who declines to accept such an offer". In this regard, Mr. Justice Frankel's comments in *Giles* [*Giles v. Westminster Savings Credit Union*, 2010 BCCA 282], are apposite:
- [74] The purposes for which costs rules exist must be kept in mind in determining whether appellate intervention is warranted. In addition to indemnifying a successful litigant, those purposes have been described as follows by this Court: * Deterring frivolous actions or defences; * To encourage conduct that reduces the duration and expense of litigation and to discourage conduct that has the opposite effect; * Encouraging litigants to settle whenever possible, thus freeing up judicial resources for other cases; * To have a winnowing function in the litigation process" by "requir[ing] litigants to make a careful assessment of the strength or lack thereof of their cases at the commencement and throughout the course of the litigation", and by "discourag[ing] the continuance of doubtful cases or defences". [citations omitted]
- [43] Applying the considerations referred to in Rule 11-1(6), I find as follows:
- a) The offers to settle that were made on October 31, 2019 and August 10, 2020 were not nuisance offers. They addressed the issue in the action. They could be easily evaluated. Extensive rationale for the offer was provided (see *Hartshorne* at para. 27). I find that the offer should have been accepted by the father.

- b) The final judgment of the Court was to dismiss the father's claim for child support entirely. While that was the nature of the offer to the father it was more favourable to him because no costs consequences would be borne by him.
- c) While the father claims to be in severe financial circumstances, I have no affidavit evidence to support that. In any event, I do not find that to be compelling in these circumstances, where the father clearly refused to consider the mother's position that was amply pointed out to him by her counsel in the offers to settle. Instead, he required the mother to seek summary trial to set aside the father's actions, where he knew that the parties had agreed that no child support was payable by either party. I consider that to be relevant to the father's position that awarding double costs against him would set a dangerous precedent. He accepted the risk of proceeding by not accepting the offers to settle that were made.
- d) In regard to other factors, the father says that he is self-represented and was seeking what he "believed he was entitled to". There are no different rules that apply to self-represented individuals. Pursuing litigation has costs consequences where the pursuit is unsuccessful, even for self-represented litigants.
- e) Applying the relevant considerations, I order that the mother is entitled to double costs from the date of the first offer to settle, October 31, 2019.

[44] On the basis of my findings, double costs are justified in this case.

[45] The mother seeks an order that I fix costs in accordance with Rule 16-1(14).

[46] It is best for these parties that I fix the costs. It is likely that neither of them can afford another court process, including a hearing before the Registrar to determine costs.

[47] It is appropriate to award costs on the basis of the bill of costs presented. The tariff items amount to \$5040. Double costs amount to \$10,080. The disbursements are as listed in the bill of costs.

[48] The mother is entitled to costs and disbursements related to this application for costs.

[49] The father's signature on the orders arising from this litigation are dispensed with. "Gropper J."

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