
CANADA / JUDGMENT

Brody v. Brody

2020 BCSC 1091

COURT

Supreme Court of British Columbia

DECIDED

24 July 2020

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2020 BCSC 1091 Brody v. Brody

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Brody v. Brody,

2020 BCSC 1091

Date: 20200724

Docket: E051013

Registry: New Westminster

Between:

Robert Henry Brody

Claimant

And

Shawn Mary Brody aka Shawn Mary Hallman

Respondent

Before: The Honourable Madam Justice Marzari

Reasons for Judgment

Re Costs

Counsel for the Claimant:

G.A. Lang

Counsel for the Respondent:

D.J. Barker

Date of Written Submissions:

July 10, 2020

Place and Date of Judgment:

Vancouver, B.C.

July 24, 2020

- [1] Ms. Brody applies for special costs, or in the alternative, costs at the highest scale, grossed up by 50%, in this family proceeding, as well as an order that Mr. Brody bear the costs of an expert report that was not completed or filed in time for trial. Mr. Brody objects on the basis that this Court is now functus officio on the issue of costs and that the question of whether to allow reasonable costs of an expert report is a question for the Registrar pursuant to Rule 16-1 of the Supreme Court Family Rules [SCFR].
- [2] The basis for Ms. Brody's claim for special or increased costs, as well as for an order relating to the costs of the unfilled expert report, relate primarily to Mr. Brody's failure to disclose relevant information in his possession contrary to the SCFR as well as orders of this Court. This non-disclosure was noted at para. 12 in my Reasons for Judgment indexed at 2019 BCSC 1950:
- [12] It is apparent that while Mr. Brody provided some of the summaries and documentation set out at paragraphs f (i-iii) and g above, he did not produce all of the records, receipts, or contact information that he was required to produce. Many of the documents that he did produce, including family company Visa statements used to support certain expenses, B. Brody Holdings Ltd.'s financial statements from 2017-2019, B. Brody Holdings Ltd.'s tax and GST returns and general ledgers from 2015-2018, and numerous bank statements, were produced less than a month before the trial.
- [3] Ms. Brody argues that Mr. Brody's failure to disclose the family company's financial information added expense and delay to the trial process, warranting special or increased costs, and prevented her from completing an expensive forensic accounting report in time for trial. With respect to the report, she alleges that despite Mr. Brody's assurances that he would provide the forensic accountant with information the forensic accountant might request, the information was slow to be produced or not provided at all, increasing the cost of the report and delaying its completion. As a result of this cost and delay, Ms. Brody says that she was unable to file the report or call the expert at trial.
- [4] That report was commissioned by Ms. Brody to trace the funds related to the purchase and construction of the parties' primary family asset, referred to in my reasons as the Gordon Property. Although not a joint report, the evidence before me shows that it was agreed by Mr. Brody that it would be admissible under the SCFR. The report was also apparently

commissioned to trace funds from Mr. Brody's inheritance, which were the subject of a \$350,000 excluded property claim by Mr. Brody up to and including through Mr. Brody's testimony in chief at trial, at which point he conceded this aspect of his claim and agreed those funds were family property.

- [5] In my reasons at para. 80, I noted the lack of an expert report valuing the family companies (the main remaining asset of which was the proceeds from the sale of the Gordon Property). Such a report would have been helpful at trial. Generally, parties should be encouraged to cooperate to prepare reports on the value of key family assets such as the family companies in this case.
- [6] In this case, I found that Mr. Brody had converted, spent, and used family assets, including equity and credit, for his personal expenses and benefit, which was contrary to the court orders restraining the use of those funds. At para. 102, I also found that "Mr. Brody's disclosure fell short of what was required under the Supreme Court Family Rules and the July 29, 2016 JCC Order. Mr. Brody only disclosed some important financial and banking records for the companies that he had in his control on the eve of trial. It appears that he never did provide all of the detailed accounting for expenses on the Gordon Property required by the July 29, 2016 JCC Order." However, at para. 103 I also found that "non-disclosure is not enough to warrant a significant reapportionment if there is not also some evidence that this non-disclosure had the result of hiding assets or causing a significant financial unfairness to the other party."
- [7] At para. 107 I concluded:
- [107] Overall, I find that Mr. Brody's failure to fully comply with the orders regarding disclosure of all of the family companies' expenses, accounting records and other documentation, and the unaccounted for discrepancy in the shareholder loans between separation and trial, put Ms. Brody in a significantly unfair position regarding the division of these assets. However, this amount is generally unquantifiable on the evidence I have, and does not significantly affect the percentage of reapportionment I award.
- [8] In the end, I ordered a reapportionment of the Gordon Proceeds in Ms. Brody's favour citing a number of factors, including the inability to account for the full extent of Mr. Brody's benefit derived from the family company, which was in part due to Mr. Brody's lack of disclosure. This was not the primary basis for the 70% reapportionment, but it was a factor in ordering the reapportionment and determining its extent.
- [9] With respect to costs, I concluded:
- [124] The parties may arrange to speak to costs if there is a settlement offer or other matter that requires hearing. Should they wish to do so, they should request a hearing before me within 30 days of the issuance of these reasons. Otherwise, Ms. Brody is entitled to her costs, as she was substantially successful in establishing an entitlement to compensation and reapportionment of the family property.

- [10] The order reflecting this paragraph of my reasons was drafted by Ms. Brody's previous counsel, endorsed by Mr. Brody's counsel, and entered as follows:
- 6) The parties may arrange to speak to costs if there is a settlement offer or other matter that requires hearing and may request a hearing within 30 days of this Order. Otherwise, the Respondent is entitled to costs.
- [11] Mr. Brody says that as a result of this order, this Court is now functus officio on the issue of costs. He says Ms. Brody had 30 days to seek an order with respect to costs other than the ordinary costs and that those 30 days having passed, the order for costs (presumably at the level of ordinary difficulty) is final.
- [12] Ms. Brody says that the order specifically reserved the right to either party to speak to costs when it was entered, and that the 30-day window was not a precondition to that right. Pursuant to Rule 16-1(5) of the SCFR, where a court makes an order for costs, any party may "at any time before a registrar issues a certificate apply for direction to the judge who made the order for costs". In this case, although applications for the assessment of costs have been filed before the Registrar, that hearing has been twice adjourned, at least once as a result of COVID-19, and the assessment is currently not set to be heard until October 2020.
- [13] In my view, this Court is not functus on the issue of the scale or nature of the costs to be awarded to the respondent as a result of my direction that the parties contact the Registry within 30 days of my reasons to raise costs issues. Until the Registrar issues a costs certificate, costs issues may continue to be referred to the trial judge, and often are: see also *Workers' Compensation Board v. British Columbia (Human Rights Tribunal)*, 2009 BCSC 1165 at para. 15. Paragraph 124 of my reasons was not intended to be a restriction on the jurisdiction of this Court in that regard.
- [14] The 30-day window provided in my reasons and reflected in the entered order does reflect, however, the importance of parties bringing costs issues to the attention of the court in a timely way. This is particularly true of claims for special costs, which ought ideally to be raised before the close of submissions at trial. In family cases in particular, special costs awards can be substantial in relation to the overall division of family assets, and they can affect the delicate balance trial judges must strike in these cases.
- [15] In this case, the lack of disclosure that is the foundation for Ms. Brody's claim in special costs was also a factor in her claim for reapportionment at trial. She was aware of all of the bases for her claim in special costs at trial and did not raise this claim at any point, including in final argument, written submissions, or within the 30-day window directed by my reasons. It was only after two costs hearing adjournments, a change in counsel, and six months had passed that the issue of special costs arose. Under any definition, special costs were not raised in a "timely way".

- [16] While Ms. Brody's delay may not warrant denying special costs on its own, I am not inclined to order them in this case in any event. Mr. Brody's conduct does not rise to the level of reprehensible conduct required for such an award in this case.
- [17] With respect to Ms. Brody's claim for costs grossed up by 50%, unlike the Supreme Court Civil Rules and the former rules applicable to family cases, Appendix B of the SCFR does not allow a court to "gross up" or increase costs by 50%. This Court is limited to either an award of ordinary costs adjusted on account of difficulty or an award of special costs. In *K.B. v. J.B.*, 2016 BCSC 1904, Justice Voith explained:
- [94] Appendix B of the Family Court Rules does not, however, enable courts to increase an award of costs to 1.5 times what they would otherwise be. A court is, instead, limited to either an award of ordinary costs (albeit with the potential for modest adjustment on account of difficulty) or, alternatively, an award of special costs. The relative inflexibility of these two regimes limits the options available to a court to address the disparate and competing concerns that I have identified.
- [18] In *Parton v. Parton*, 2016 BCSC 2205, Justice Butler stated that if increased costs were available in a family proceeding, it may have been an appropriate case to make such an order, but he cited para. 94 of *K.B.* and concluded that increased costs are not available. At para. 25, he suggested that "[i]t may be that the Supreme Court Family Rules should be amended to provide for more flexibility by permitting an uplift order for costs in appropriate circumstances. At present, that option is not available."
- [19] There appears to be some confusion on Ms. Brody's part about increased costs in family cases, perhaps due to the fact that increased costs were available under the former rules regime. Many of the cases cited by Ms. Brody were decided before the SCFR came into force. It also appears that courts and counsel sometimes inaccurately describe "costs at an increased scale" as "increased costs" (see, for example, *Sanai v. Mahmoud*, 2017 BCCA 155 at paras. 48-52).
- [20] With respect to Ms. Brody's claim for costs at an increased scale, under Appendix B I may determine if this family law case involves "less than ordinary difficulty, ordinary difficulty or more than ordinary difficulty". Under the Schedule to Appendix B, "the only impact of a case being determined to be of 'more than ordinary difficulty' is in Item 1 (correspondence, conferences, etc.) and Item 2 (discovery of documents)" (*Ghuman v. Ghuman*, 2014 BCSC 254 at para. 155), which amounts to a total increase of \$5000 above the costs for a case of ordinary difficulty.
- [21] In *Kopp v. Kopp*, 2012 BCCA 140, the Court of Appeal provided examples of cases that were found to be more than the ordinary level of difficulty:
- [90] In other family law cases in which costs have been awarded on a scale reflecting more than ordinary difficulty, the evidence has shown deceit (*Ahenkora v. Ahenkora*, [1999] B.C.J. No. 1770 (QL) (S.C.), appeal dismissed 2000 BCCA 85), disregard for court orders, procedure or

process that lengthened the trial and made it more difficult (Xu v. Leung, 2001 BCCA 163); misleading the court by failing to provide full and proper disclosure (Friedl v. Friedl, 2010 BCSC 139); or failure to provide information in a cooperative manner or other conduct which increased the difficulty of the case (Dhalla v. Dhalla, 2002 BCSC 984; McPhail v. McPhail, 2001 BCCA 250) .

- [22] Having reviewed the evidence on this costs application, I agree that Mr. Brody's failure to provide disclosure as required by the SCFR and by earlier orders of this court added substantial difficulty and complexity to this litigation, not just for Ms. Brody, but also for the court. It also added substantially to Ms. Brody's litigation expenses.
- [23] I therefore award costs in this proceeding on the basis of a matter of more than ordinary difficulty.
- [24] With respect to the costs of the untendered forensic accounting report, an expert report pertaining to the value (and dispersal of value) from the family companies would have assisted the Court significantly in valuing the main family assets at issue. To the extent the report was also intended to trace Mr. Brody's excluded property claim, this claim was conceded, but only during Mr. Brody's case at trial.
- [25] However, the question of whether the costs incurred with respect to that report were necessarily or properly incurred involves more than just a question of whether portions of such a report might have been helpful to the Court. The resolution of that question requires an oral hearing and a review of additional evidence. An oral hearing is already scheduled before the Registrar, and I consider that the Registrar has the expertise to consider that question in the context of these reasons and the trial reasons.
- [26] The parties have had mixed success on this application. While Ms. Brody was not successful with respect to her claim for special or increased costs, it was not because this Court is functus on the costs issue, as argued by Mr. Brody. Ms. Brody was successful on the issue of scale of costs. The issue of the expert report disbursement remains to be determined by the Registrar. The parties shall bear their own costs of this application.

"Marzari J."

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