

CANADA / JUDGMENT

Brody v. Brody

2020 BCSC 1772

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DECIDED

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2020 BCSC 1772 Brody v. Brody

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Brody v. Brody,

2020 BCSC 1772

Date: 20201105

Docket: E51013

Registry: New Westminster

Between:

Robert Henry Brody

Claimant

And

Shawn Mary Brody also known as Shawn Mary Hallman

Respondent

Before: The Honourable Mr. Justice Veenstra

Oral Reasons for Judgment

(Review of Decision of Registrar)

In Chambers

Counsel for the Claimant, appearing via teleconference:

G.A. Lang

Counsel for the Respondent, appearing via teleconference:

D.J. Barker

Place and Date of Hearing:

Vancouver, B.C.

November 5, 2020

Place and Date of Judgment:

Vancouver, B.C.

November 5, 2020

- [1] THE COURT: This is an application pursuant to Rule 16-1(26) of the Supreme Court Family Rules for a review of an assessment of costs conducted by the Registrar subsequent to a trial of this proceeding.
- [2] The document that was actually filed to initiate this hearing was a notice of appeal, which is provided for in Rule 22-7(8.1), but is not the proper document to challenge a registrar's assessment of costs under Rule 16-1. However, no objection was made to this very technical issue and I am satisfied that I am able to treat this as an irregularity and proceed to deal with the review on its merits: *Xerox Canada Inc. v. Sweany*, [1990] B.C.J. No. 1234 (S.C.).
- [3] This action was commenced on May 26, 2016. It was initially scheduled for a trial in May 2017, but that trial did not proceed. Ultimately, a five-day trial was heard by Marzari J. on May 27 to 31, 2019. Her reasons for judgment were released on November 14, 2019: *Brody v. Brody*, 2019 BCSC 1950 (the "Trial Judgment").
- [4] Justice Marzari heard an application respecting costs in July 2020. In reasons for judgment issued July 24, 2020, she ordered that the respondent be awarded her costs of the proceeding on the basis of a matter of more than ordinary difficulty: *Brody v Brody*, 2020 BCSC 1091 (the "Costs Judgment").
- [5] Costs were assessed in a telephone hearing before Registrar Nielsen on October 16, 2020. By the time of that hearing, the only outstanding issue was whether a disbursement incurred by the respondent by way of expert fees for a forensic accountant had been necessarily or properly incurred. Registrar Nielsen concluded that they had and allowed the amount of the expert's fees, being \$74,401.31, in full. It is that decision that I am asked to review today.
- [6] The Trial Judgment sets out the background facts in detail. It is 124 paragraphs long and I will not attempt to summarize the facts in full. I note that:

- a) The claimant, Robert Brody, and the respondent, Shawn Brody, embarked on a 16-year relationship and marriage in May 2000. At the time, the claimant was 54 years old and the respondent was 47 years old. They are now aged 74 and 67. They separated on April 1, 2016, and were divorced on February 14, 2018.
 - b) They were involved together in a business developing and selling homes. That business was carried on through two companies, B. Brody Holdings Ltd. and B. Brody Construction Ltd. They derived a high standard of living from those businesses, spending \$300,000 to \$600,000 a year, but do not appear to have put much aside for retirement.
 - c) From May 2016 through trial, the claimant had control of the companies and the bulk of the family assets.
 - d) The last big project developed by the parties together was a property on Gordon Place in Burnaby (the "Gordon Property"). It was sold in February 2018 for approximately \$4.5 million. The net sale proceeds (after payment of a small advance to each party) of \$636,711 were paid into trust and formed the largest family asset to be dealt with at trial.
- [7] A consent order was made at a judicial case conference in July 2016 (the "JCC Order"). The JCC Order, with limited exceptions, restrained both parties from disposing of or otherwise dealing with any family property. It also required significant document disclosure by the claimant within set deadlines. With respect to the JCC Order, Marzari J. noted in the Trial Judgment at para. 12:
- [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.
- [8] Further document disclosure orders were made by Crawford J. on February 3, 2017.
- [9] Justice Marzari commented on Mr. Brody's document disclosure at paras. 102 and 107 of the trial judgment as follows:
- [102] With respect to the second factor, I find that the 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.

- [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.
- [10] There was discussion between counsel in 2018 with respect to retainer of a joint expert to undertake a forensic accounting exercise. In November 2018, after some back and forth and changes in counsel on both sides, Mr. Brody's counsel advised that he would not stand in the way of the retainer of an expert, but would not share in the costs. Counsel advised that Mr. Brody would provide documents for the expert, if requested.
- [11] Ms. Brody proceeded to retain Cheryl Shearer of Blair Mackay Mynett Valuations Inc. ("BMMV") to conduct that forensic accounting exercise by way of a written contract dated December 12, 2018. The scope of work asked BMMV to:
- a) trace the funds advanced to purchase the property and construct a house at the Gordon Property;
 - b) trace the disposition of inheritance funds received by Mr. Brody from his mother's estate;
 - c) identify the source of funds used by Mr. Brody to purchase a property located in Penticton, B.C.; and
 - d) identify if any funds in relation to the Gordon Property were used by Mr. Brody to purchase other assets for other purposes.
- [12] Ms. Shearer embarked on a review of the documents that were then available to her. She prepared a list of additional documents that she wanted to see. Various lists of requests were sent by Ms. Brody's counsel to Mr. Brody's counsel from January 24 to February 11, 2019, with several follow-up reminders sent over the next several weeks.
- [13] Mr. Brody's counsel responded to these requests with various sets of documents provided on February 13, February 16, March 8, April 13, and May 7, 2019. A further list of documents was delivered by Mr. Brody's counsel on May 13, 2019, which included the documents that had been provided in response to Ms. Shearer's requests.
- [14] Ms. Shearer spent significant time reviewing the documents she received, working at an hourly rate of \$300. Her accounts, inclusive of taxes, were as follows:
- a) February 14, 2019 - \$9,495.29;
 - b) March 6, 2019 - \$10,650.15;
 - c) April 11, 2019 - \$14,916.83;
 - d) May 13, 2019 - \$33,416.78; and

e) June 6, 2019 - \$1,620.68.

- [15] As the trial date approached, there was discussion of having Ms. Shearer attend the trial as a fact witness rather than an expert witness. By this point, the deadline for delivering an expert report (which was early March 2019) had long since passed. As well, Ms. Shearer had met with Ms. Brody's counsel and shared with him the results of her work to date, which he used in preparing for trial.
- [16] As the trial date approached, BMMV advised that Ms. Shearer would not be able to complete further work or attend as a witness at trial unless outstanding fees were paid. Ms. Brody did not have the means to make that payment and Mr. Brody would not consent to a further advance from the funds held in trust. After an unsuccessful adjournment application, Ms. Brody proceeded with the trial without Ms. Shearer as a witness.
- [17] Justice Marzari identified the issues before her at paras. 18 to 26 of the Trial Judgment. Those paragraphs include the following:
- [18] Ms. Brody says that Mr. Brody used family company funds throughout the separation period to pay his living and legal expenses in this family action and that he should have to account for those funds. She also seeks accounting for family financial accounts and instruments controlled by Mr. Brody that were in existence at the time of separation but depleted by the time of trial.
- [20] Ms. Brody also says that the completion of the Gordon Property exceeded its projected cost by \$700,000 and that Mr. Brody failed to provide the ordered disclosure of invoices and receipts to explain this substantial incursion into the Gordon Property's equity. She seeks an unequal division in her favour of the Gordon Proceeds on a number of bases, including an adverse inference against Mr. Brody in relation to his failure to disclose and account for all of these expenses.
- [22] Mr. Brody says the evidence establishes that all of the funds advanced against the equity of the Gordon Property were properly incurred for construction and business purposes. He says the Gordon Property went over budget for many reasons, including the interest costs for the year that it took to sell that property, and the Gordon Proceeds should simply be divided equally.
- [18] In the Trial Judgment, Marzari J. reviewed the evidence with respect to financial transactions, including the Penticton property (paras. 56 to 67), the inheritance funds (paras. 68 to 72 and 76 to 78), the family companies (paras. 79 to 83), and Mr. Brody's use of the family company equity after separation (paras. 84 to 98).
- [19] I note that in connection with the inheritance funds, it was noted at para. 70 of the Trial Judgment that:

- [70] Documents evidencing where these withdrawn funds were transferred or spent were the subject of the initial JCC disclosure order seeking banking records, cancelled cheques, and source documents for financial transactions throughout 2015, and they were apparently the subject of ongoing requests for disclosure by counsel as well. Mr. Brody's non-disclosure of these transactions is the basis for an adverse inference sought by Ms. Brody in support of an unequal distribution of the Gordon Proceeds.
- [20] Justice Marzari went on to consider whether the proceeds of sale should be divided equally or reapportioned in favour of Ms. Brody. Beginning at para. 99, she considered three main reasons for the reapportionment. One was Mr. Brody's use of the equity and mortgage advances to the family company for his living expenses which she found warranted some reapportionment (para. 101). She then went on to consider whether Mr. Brody's failure to comply with the various court orders and ordinary disclosure requirements also justified a reapportionment. Her comment at para. 102 (quoted earlier) with respect to Mr. Brody's late disclosure was a part of this analysis.
- [21] She continued at paragraphs 103 to 107:
- [103] However, 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.
- [104] Ms. Brody says that there is another \$675,000 that is missing from the family company accounts in relation to the Gordon Property. Enough, she thinks, for Mr. Brody to have bought or built "another house."
- [105] Ms. Brody's assertion of this missing money relies primarily upon Mr. Brody's failure to provide all of the ordered accounting records, lending records, receipts, contracts, and subcontracts for the Gordon Property, and the difference between Mr. Brody's initial cost estimate for construction of the Gordon Property of \$4.2 Million and the final total cost of over \$4.9 million.
- [106] For the most part, Mr. Brody was able to explain and account for the amount by which his final Gordon Property costs exceeded his estimate, attributing the 15% increase to increased costs of numerous elements of the project, including the greater complexity of the residence and complications with the site. The greatest additional cost, according to Mr. Brody's construction cost breakdown and testimony, was the delay of a year in selling the Gordon Property, during which the parties litigated over the listing agent and asking price, and the substantial second mortgage at construction rates continued to accrue. Ultimately, the Gordon Property was sold for considerably less than the margins either party had anticipated and was a largely unprofitable venture. On all the evidence, I am not prepared to find that there is another \$675,000 missing in relation to the Gordon Property.

- [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.
- [22] Justice Marzari then considered a third basis for reapportionment: the goals of spousal support, as articulated in s. 161 of the Family Law Act, S.B.C. 2011, c. 25, which is not material to the present application.
- [23] Ultimately, Marzari J. concluded at paras. 121 to 122 that 70% of the net proceeds from the sale of the Gordon Property should be reapportioned to Ms. Brody. At para. 121, she cited five circumstances in support of this reallocation, including:
- a) Over the three years since separation, Mr. Brody has converted, spent, and used family assets, including the equity and mortgage advances to the family companies, for his personal expenses and benefit;
 - b) It is not possible to account for the full extent of Mr. Brody's personal use and benefit derived from the family companies during separation through a compensation order based on the disclosure provided and the evidence before me;
- [24] Ms. Brody subsequently applied for special costs or, in the alternative, costs at the highest scale, as well as an order that Mr. Brody bear the costs of BMMV. In the Costs Judgment, Marzari J. awarded costs of the proceeding on the basis of a matter of more than ordinary difficulty (para. 23), then continued at paras. 24 to 25:
- [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.
- [25] Costs were assessed by Registrar Nielsen by way of a telephone hearing on October 16, 2020. The only issue before him was whether the BMMV fees should be allowed as a disbursement. The Registrar gave brief oral reasons for judgment. He began by noting the provisions of Rule 16-1(4) which provides:

Disbursements

- (4) When assessing costs under subrule (1) or (2) of this rule, a registrar must
- (a) determine which disbursements have been necessarily or properly incurred in the conduct of the family law case, and
 - (b) allow a reasonable amount for those disbursements.
- [26] The Registrar recorded the arguments made by Mr. Brody as follows:
- [8] The claimant argues that they ought not to be responsible for the expert's accounts. They argue that a report was never created, that in fact by the time the expert had all the evidence that would have been needed to construct a report, and it would have been inadmissible, in any event by the passage of time.
- [9] Further, they allege that the expert essentially downed tools prior to the production date because of lack of funds, not due to a lack of documents as found by the learned trial judge.
- [27] The Registrar concluded that the BMMV costs should be allowed in full. His reasoning is found at paras. 10-14 of his reasons for judgment:
- [10] I am satisfied that going through not only the reasons for judgment of the learned trial judge and the affidavit of Ms. Shearer, the expert, that she has done a considerable amount of work, which was both useful and productive from the respondent's point of view.
- [11] When you assess the reasonableness or propriety of a disbursement, you are to do so at the time the expert is retained, not with the benefit of hindsight. Hindsight may prove that, in fact, the report or the efforts of the expert did not amount to anything beneficial to the party; but here I am satisfied that there was a benefit to the respondent, and those benefits are outlined, in part, in the affidavit. The expert provided useful assistance in a variety of ways, which I indicated are outlined in her affidavit, and that was, in part, responsible for the reapportionment of the amount of moneys that was payable to the respondent.
- [12] The claimant also alleges that the respondent essentially wasted time pursuing claims that were not proven; for example, the allegation that money was hidden. The learned trial judge made a specific finding that in fact that was not the case.
- [13] I am not satisfied on the basis of the material that is in front of me, that the expert wasted time pursuing hidden assets. The evidence of Ms. Shearer essentially goes unchallenged from the point of view that she was not requested for cross-examination. I do not have any indication that, at a pre-hearing conference, further particulars were required, or were requested, concerning what she did.

- [14] I am satisfied that the respondent has met the onus of showing that the efforts of the expert, Ms. Shearer, were proper and necessary, and I do not have any evidence to suggest she wasted a chunk of time pursuing hidden assets, which were never found as a matter of fact by the trial judge. If there was evidence to that effect, I might have considered reducing her bill in part, but I simply do not have that here. The account of the expert is allowed in full.
- [28] With respect to the Registrar's comments about Ms. Shearer not being requested for cross-examination, I am advised that, in fact, Mr. Brody did ask that Ms. Shearer be made available for cross-examination. However, the Registrar's hearing had been scheduled to occur by telephone and counsel for Ms. Brody was apparently advised by the court registry that no provision had been made for viva voce evidence at the hearing. Counsel did not raise this with the Registrar, hence his lack of awareness that at least an initial attempt had been made to have Ms. Shearer attend. Given that this issue was not raised before the Registrar, I do not think it is appropriate for consideration on review.
- [29] With respect to the standard of review, both parties accept the statement of the standard in *Waters v Michie*, 2018 BCSC 1206 at para. 4:
- [4] The assessment of costs is discretionary and fact-specific. Appeals from a Registrar's decision that involve an exercise of discretion should not be entertained unless the Registrar erred in principle or the decision was "clearly wrong": *Wright v. Sun Life Assurance Company of Canada*, 2015 BCCA 312 at para. 10. This deferential standard recognizes the Registrar's expertise in specialized matters, particularly the assessment of costs.
- [30] The standard is the same on a review of an assessment by the registrar as on an appeal from the registrar: *Narvaez v. Zhang*, 2010 BCSC 78, and *Fairchild v. British Columbia (Vancouver Coastal Health Authority)*, 2012 BCSC 1207 at paras. 7 and 10.
- [31] Mr. Brody argued on appeal that an expert report should only be claimed as a disbursement if the report is actually used at trial. That is not the law in British Columbia. As noted in *Hussack v. School District No. 33 (Chilliwack)*, 2010 BCSC 304 at para. 49:
- [49] whether an expert report disbursement will be allowed must be judged by the situation at the time the expense was incurred. Where an expert report is found inadmissible at trial or even where the report is not ultimately served on the opposing party prior to trial, the disbursements related to such a report may nevertheless be recoverable so long as the costs of the expert report were reasonably incurred in contemplation of, or in preparation for, the litigation. On taxation it is an error in principle for the registrar to focus on the usefulness of an expert's report to a trier of fact rather than on whether, at the time it was commissioned, it could have been justified as a proper expenditure to fully and properly prepare the case for trial: *Morrisette v. Smith*, [1990] B.C.J. No. 193 (S.C.).

See to similar effect, *Forsythe v. Strader*, (1987), 17 B.C.L.R. (2d) 124 (C.A.) at 125-126.

[32] The test for determining whether a disbursement is to be allowed was set out by the Court of Appeal in *Van Daele v. Van Daele* (1983), 56 B.C.L.R. 178 (C.A.) at 180:

The proper test, it seems to me, from a number of authorities referred to us this morning is whether at the time the disbursement or expense was incurred it was a proper disbursement in the sense of not being extravagant, negligent, mistaken or a result of excessive caution or excessive zeal, judged by the situation at the time when the disbursement or expense was incurred.

[33] To similar effect are the comments in *D.S.W. v. D.A.W.*, 2014 BCSC 514 at para. 29:

[29] It is well-established law in British Columbia that the proper time to assess the necessity of an expert report is at the time it is ordered and not after the trial. Expenses for expert reports may be allowed if it is proven that the report was necessary or proper when it was ordered (*Van Daele v. Van Daele* (1983), 56 B.C.L.R. 178 (C.A.); *Morrisette v. Smith* (1990), 39 C.P.C. (2d) 30 (B.C.S.C.); *Forsythe v. Strader* (1987), 17 B.C.L.R. (2d) 124 (C.A.)).

[34] I am satisfied from a review of the reasons for judgment of the Registrar that he considered and applied these governing principles.

[35] Mr. Brody argued forcefully that the disclosure of documents made by him was in fact reasonable and did not prevent the BMMV report from being completed. That submission is contrary to the findings of fact in the Trial Judgment as noted above.

[36] Mr. Brody argued that by the time Ms. Brody's lawyer began making document requests, it was too late to have a report completed in advance of the deadline for delivery of expert reports. There are several problems with this submission. First, Mr. Brody was under an obligation throughout the litigation to disclose all documents in his possession or control that could be used by any party at trial to prove or disprove a material fact. Second, he had already been subject to specific court orders for production of financial documentation. Third, it was open to Ms. Brody to not actually tender a formal expert report, but to make use of BMMV's analysis in other ways. Fourth, given the slow disclosure, it would have been open to Ms. Brody to make application to apply to either admit a late delivered report or to adjourn the trial. Finally, and perhaps most importantly, the applicable test is to assess the necessity of the expert's work at the time it is commissioned, not at a time several months later.

[37] Mr. Brody further argued that the report was primarily focused on the alleged \$675,000 in funds allegedly missing from the Gordon Project. Having reviewed Ms. Shearer's affidavit and considered the many matters reviewed in the Trial Judgment, I do not accept that argument. While the question of the allegedly missing funds might have been a part of what was under consideration, it was only one part of the analysis and it is not clear to me that it was a discrete, separable issue.

- [38] Finally, Mr. Brody argued that the Registrar failed to appropriately consider the need for proportionality in the assessment. In my view, the Registrar in this case properly gave consideration to proportionality in the context of his finding that the expense was reasonable: see on this issue Fairchild at para. 17.
- [39] I conclude that the Registrar cited and applied the correct legal principles and that his analysis was not clearly wrong. The application for a review of the Registrar's assessment of costs is dismissed.
- [40] Are there any submissions on costs of this hearing?
- [SUBMISSIONS]
- [41] THE COURT: Costs to the respondent, Ms. Brody.
- "Veenstra J."

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