
CANADA / JUDGMENT

C.L.H. v. R.J.J.S.

2012 BCSC 1196

COURT

Supreme Court of British Columbia

DECIDED

8 August 2012

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2012 BCSC 1196 C.L.H. v. R.J.J.S.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

C.L.H. v. R.J.J.S.,

2012 BCSC 1196

Date: 20120808

Docket: 16761

Registry: Terrace

Between:

C.L.H.

Claimant

And

R.J.J.S.

Respondent

Before: The Honourable Mr. Justice R. Punnett

Reasons for Judgment

(Costs)

Counsel for the Claimant:

I.G. Peters

Counsel for the Respondent:

W.C. MacGregor

Written submissions of the Claimant received June 11, 2012

Written submissions of the Respondent received June 18, 2012

Written reply submissions of the Claimant received June 21, 2012

Further written submissions of the Respondent received July 18, 2012

Further written reply of the Claimant received July 24, 2012

Place and Date of Judgment:

Terrace, B.C.

August 8, 2012

- [1] Reasons for judgment in this matter are indexed at 2012 BCSC 579. The parties are unable to agree on costs and therefore apply for an order pursuant to Rule 16-1 of the Supreme Court Family Rules, B.C. Reg. 169/2009.
- [2] The issues at trial in this family dispute were child custody, spousal maintenance, property division and an allegation of contempt against the claimant.
- [3] The claimant seeks costs against the respondent on the basis that she was the successful party and provided an offer to settle that ought reasonably to have been accepted. The claimant also seeks special costs on the basis of the respondent's claim that she was in contempt of court together with the allegation that she is "insanely vindictive" and "mentally ill."
- [4] The respondent, in turn, seeks costs against the claimant given her unfounded allegations that he sexually abused his stepdaughters and physically abused his son and that he had made an offer to settle that ought reasonably to have been accepted.
- [5] In *Fotheringham v. Fotheringham*, 2001 BCSC 1321, Bouck J. discussed the approach to determining whether there has been substantial success as follows at para. 46:
- [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.
- [6] Applying these factors the claimant was substantially successful on all major issues.
- [7] Substantial success is sufficient for an order for costs (*Newham v. Newham* (1993), 50 R.F.L. (3d) 49 (B.C.C.A.)).
- [8] Costs are intended to guide counsel and litigants in the choices and strategies they pursue. An award of costs should not be refused when to do so would not be helpful in fostering the interest served by the standard practice that successful litigants should be entitled to costs (*Karpondinis v. Kantas*, 2006 BCCA 400).
- [9] However, it is clear under Rule 16-1(7) that this Court retains a discretion to order otherwise and decline to award costs in favour of a party despite the finding that the party had substantial success (*Gain v. Gain*, 2011 BCSC 621).
- [10] This discretion must be exercised judicially. As noted by McEachern C.J.B.C. (as he then was) at para. 20 of the *Gold v. Gold* (1993), 106 D.L.R. (4th) 452 at 457, 82 B.C.L.R. (2d) 180 (C.A.):

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.

- [11] The court may exercise its discretion to refuse an award of costs to a substantially successful litigant where the conduct of the party is deserving of rebuke. (*Forzley v. Forzley* (1997), 34 R.F.L. (4th) 105 (B.C.S.C.) and *Bhopal v. Bhopal*, 1997 CanLII 4223 (B.C.S.C.)).

The Parties' Conduct

- [12] At paras. 36-40 of the reasons for judgement, I noted the following:
- [36] The pleadings of both parties are inflammatory. The claimant proposed that she have sole custody and guardianship of their son alleging, in para. 26, that the defendant had sexually abused his stepdaughters from an earlier marriage. Supervised access was sought.

- [37] The respondent filed a statement of defence and counter claim on December 3, 2009 alleging, specifically in response to para. 26 of the claimant's statement of claim, that the plaintiff "is mentally ill, and insanely vindictive" and had "poisoned the child G.[S].s mind against the defendant."
- [38] Suffice it to say, their respective pleadings did not bode well for resolution of matters.
- [39] The allegation of sexually inappropriate behavior was quite properly not pursued at trial. There was no evidence at trial of any inappropriate sexual conduct by the respondent related to any of his other sons or G.S. All too often allegations such as these come before this Court on interim applications only to diminish in significance by the time of trial. They appear to arise from separations that bring out the worst in parties and in particular their inability to maintain a sense of objectivity.
- [40] Regrettably however the raising of such an issue by the claimant has contributed to the present alienation of the child from his father. So too have the allegations by the claimant that the respondent had inappropriately disciplined the child while the parties resided together. It is clear that the respondent used physical spankings to discipline G.S. and also yelled at him. However, as will be discussed later, both the claimant and G.S. blew that out of proportion.
- [13] I also noted at para. 94 that the respondent:
- [94] On interim motions [stated] categorically that a number of doctors had diagnosed [the claimant] with mental health problems. At trial he failed to provide any expert evidence that the claimant was in fact mentally ill. Allegations such as this should be supported or withdrawn. At best he resiled somewhat from this allegation (although late in these proceedings) in an affidavit dated May 4, 2011 stating that in his "tentative opinion" she "is not mentally ill, and so is not insanely vindictive. She is calculatedly vindictive."
- [14] At paras. 96 and 97 of the reasons for judgment the following:
- [96] Of concern as well is that in his original provincial court application, since joined with this proceeding, the respondent sought an order restraining the claimant from leaving Terrace. The application was adjourned in provincial court however despite knowing of the claimant's fervent desire to return to Lumby, supported by the recommendations of Dr. Altar in his report that she do so, it was only during submissions at trial that the court and presumably the claimant, was advised that mobility was not in issue.
- [97] As a result the claimant remained in the Terrace area even after the sale of the former matrimonial home. Counsel offered no explanation for the respondent or the respondent as to why, if mobility was not in issue, that fact was not communicated to the claimant or her counsel.

- [15] The particular circumstances of this case warrant departing from the general rule that the successful party is entitled to costs. As noted in my reasons for judgment, both parties made inappropriate allegations (the respondent's allegation that the claimant has been previously diagnosed with mental health problems and the claimant's allegation that the respondent was physically abusive toward his son and had sexually assaulted his stepdaughters). The allegation against the plaintiff was directly related to the issues of custody, access and alienation of the child as were those against the respondent. The allegations of sexual and physical abuse are matters of grave moral turpitude that were maintained for over two years until abandoned at the outset of the trial.
- [16] Of significance in this action is that by far the most contentious and time consuming aspect of the litigation up to and including the trial were the issues of custody and access. The inappropriate allegations of both parties contributed to the unfortunate alienation of their son from his father. As I commented at para. 123:
- [123] The conduct of both the claimant and the respondent has been regrettable. Both have been incapable of making decisions respecting their child with the kind of objective maturity that parents should bring to the welfare of their children.
- [17] The allegations of both parties increased the duration and expense of the litigation.
- [18] Costs are intended to deter frivolous actions or defences, encourage conduct that reduces the duration and expense of litigation and discourage conduct that has the opposite effect. Costs are also intended to encourage litigants to settle whenever possible, (thus freeing up judicial resources for other cases) and have a winnowing function in the litigation process by requiring 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. Finally, costs are also aimed at discouraging the continuance of doubtful cases or defences (*Hartshorne v. Hartshorne*, 2011 BCCA 29 at para. 25).
- [19] To award costs to either party is to condone conduct that discourages the determination of disputes in an expeditious, cost-effective manner and is therefore counter to the guiding principles set out in *Hartshorne*. However, offers to settle were made by both parties and this finding that each party should bear their own costs must be considered in the context of those offers.

Offers to Settle

- [20] Supreme Court Family Rule 11-1 governs offers to settle in family law cases. The relevant provisions are as follows:

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:

- (a) deprive a party of any or all of the costs, including any or all of the disbursements, to which the party would otherwise be entitled 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;
 - (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;
 - (c) award to a party, 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, costs to which the party would have been entitled had the offer not been made;
 - (d) if the offer was made by a respondent and the judgment awarded to the claimant was no greater than the amount of the offer to settle, award to the respondent the respondent'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.
- (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.

[21] On November 5, 2009, the respondent made an offer to settle. That offer included terms that:

- a) the child be in the sole custody of the claimant, with joint guardianship and reasonable and generous access, including access by private electronic communication and no mobility restrictions;
- b) family assets be divided equally;
- c) spousal support to be addressed once the claimant's income picture is clarified.

[22] The respondent's offer was rejected. It was not one that ought reasonably to have been accepted in light of the judgment at trial.

[23] On June 8, 2011 the claimant made an offer to settle. That offer included terms that she have interim sole custody and sole guardianship of the child for a period of two years and after that time the matter of custody and guardianship shall be reviewed. The Master Joyce model of guardianship was proposed. The claimant also proposed that:

- a) both parties undergo therapeutic mediation;
- b) the respondent consent to the claimant immediately relocating to the Okanagan area;

- c) child maintenance be paid in accordance with the Child Support Advisory Guidelines after a determination of the respondent's income;
 - d) the respondent pay spousal support in accordance with Spousal Support Advisory Guidelines with a determination that the respondent has a gross income of \$70,000 per annum;
 - e) the respondent pay for the cost of therapeutic medication pursuant to Option 4 of Dr. Altar's report.
- [24] With respect to property, the claimant offered that each party keep all tools and family assets in their current possession. The claimant proposed that there be no further outstanding claims by either party for any property and that the respondent withdraw the two contempt charges and his claim to the beds, mattress, linens, etc.
- [25] In regard to a Volkswagen Golf, the claimant agreed to a value of \$7,000 and proposed that the respondent pay one half that amount to the claimant or immediately place the vehicle on the market and share the sale proceeds.
- [26] The respondent rejected the claimant's offer.
- [27] The claimant's offer was one that ought reasonably to have been accepted given the relationship between the terms of settlement offered and the final judgment of the court (para. 225 of my reasons for judgment). Pursuant to Rule 11-1 (6) this is a factor that could encourage a finding of costs against the respondent.
- [28] However, considering all the circumstances of this case, the fact that an award of costs would upset the balance of the property division and the claimant's unfounded allegations that the respondent physically abused his son and sexually abused his stepdaughters, I order that the parties each bear their own costs of this proceeding.

"Punnett J."

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