
CANADA / JUDGMENT

C.P. v. S.P.

2021 BCSC 191

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Supreme Court of British Columbia

DECIDED

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2021 BCSC 191 C.P. v. S.P.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

C.P. v. S.P.,

2021 BCSC 191

Date: 20210209

Docket: E116185

Registry: Kelowna

Between:

C.P.

Claimant

And

S.P.

Respondent

Before: The Honourable Mr. Justice Walker

Reasons for Judgment

Counsel for the Claimant:

W. Clarke.

The Respondent, appearing in person

S.P.

Place and Date of Hearing:

Kelowna, B.C.

January 15, 2021

Place and Date of Judgment:

Kelowna, B.C.

February 9, 2021

Introduction

- [1] The parties contest each other's claims regarding costs following trial.
- [2] The trial of this family law dispute began on September 9, 2019 and was adjourned pending the preparation and delivery of a report per s. 211 of the Family Law Act, S.B.C. 2011, c. 25, authored by Dr. Michael Elterman. I issued interim reasons for judgment on October 11, 2019, shortly after the trial adjourned, concerning, inter alia, parenting and financial issues and counselling for the children. Those reasons are indexed at 2019 BCSC 1742 ("2019 Reasons").
- [3] Dr. Elterman's report was delivered in early February 2020. His report supported the position advanced by S.P. at trial concerning parenting issues in almost every respect.
- [4] The trial did not resume until June 4, 2020 as a result of court closures caused by the COVID-19 pandemic. The trial concluded on July 3, 2020. My reasons for judgment were issued on July 15, 2020. They are indexed at 2020 BCSC 1043 ("2020 Reasons").
- [5] A helpful outline of the test for awarding costs in family law matters is found in the trial court's reasons in *Fotheringham v. Fotheringham*, 2001 BCSC 1321, leave to appeal ref'd 2002 BCCA 454, which set out a four-step approach:

Application of the Gold Principle and Rule 57(9) to this Action

- [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] Both parties were self-represented during trial, although that is not a reason to depart from the rule entitling the party who was substantially successful to their costs: *Mac v. Mak*, 2016 BCSC 1804 at paras. 39-42.
- [7] The vast majority of trial time concerned parenting issues, and in particular, the appropriate parenting regime that is in the best interests of the children. The status quo at the time of trial was a shared split-week parenting schedule. The parties spent much of the time at trial contesting whether the parenting regime should be shared equally on an alternating week basis (S.P.'s position) or whether the children should reside with the claimant, C.P., the majority of time (C.P.'s position).
- [8] At the outset of trial, during an early stage of her opening, C.P. said that although she hoped to maintain the status quo, she would also accept the position advanced by S.P. if I concluded it was in the children's best interests. A short time later, however, C.P. changed her position and advised that she wanted to change the status quo and have primary custody of the children, with significantly reduced contact between S.P. and the children. C.P. remained opposed to shared parenting (let alone on an alternating week basis) throughout the trial.
- [9] The position advanced by the respondent, S.P., was consistent throughout. She said the children's best interests would be served by shared parenting based on a week-on, week-off basis. S.P.'s position at trial in this respect and for all of the parenting issues (except the approach to the children's telephone contact with C.P.) prevailed. The parenting matters were of greatest importance at trial and I therefore give significant weight to the fact that S.P.'s position on these matters almost entirely prevailed.
- [10] The outcome of the support issues depended to a large degree upon the outcome of the parenting issues but also depended upon the starting point when income should be imputed to C.P. and the amount(s) to be imputed.
- [11] There was mixed success concerning financial and support issues (for example, S.P. was unsuccessful in imputing past income to C.P.), but on balance, S.P. enjoyed greater success overall.
- [12] In all, S.P. was the party who was substantially successful at trial. Therefore, absent some other matter engaging other costs provisions in the Supreme Court Family Rules [Family Rules], and except for those interlocutory applications where orders for costs have already been made, S.P. is entitled to her costs of the action: Family Rule 16-1(7); *Gold v. Gold* (1993), 82 B.C.L.R. (2d) 180 at para. 19, 106 D.L.R. (4th) 452 (C.A.); *S.A.M. v. J.A.M.*, 2017 BCSC 2348 at para. 7; *Wilson v. Wilson*, 2000 BCSC 37 at para. 2; *Wickstrom v. Ng*, 2020 BCSC 788 at paras. 15-20; *Fotheringham* at para. 45.

- [13] However, S.P. seeks an award of double tariff costs based upon various offers to settle she delivered to C.P. before and during trial.
- [14] On the other hand, C.P. argues that both parties should bear their own costs for the whole of the trial, or at a minimum bear their own costs up until the point that Dr. Elterman's report was delivered. Her position is grounded in part on an offer to settle she says she delivered to S.P. just before trial commenced and in part on the ground that it would be unfair and unjust to order her to pay costs in the circumstances of the case. C.P. argues that there are reasons in this case to "otherwise order" as outlined in the fourth step of the Fotheringham approach.

Offers to Settle

- [15] I may consider offers to settle when exercising my discretion in respect of costs, as outlined in Family Rules 11-1(4) and (5):

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:
- (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 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.

- [16] Starting in March 2017, S.P. delivered several offers to settle to C.P. before trial commenced and then a further offer in October 2019 after the trial was adjourned. In addition to her offer of shared parenting time on an alternating week basis, S.P.'s pre-trial offers contained numerous terms regarding financial and support issues. In all of her offers, S.P. was clear that she intended to bring them to the attention of the trial judge following the conclusion of trial, as required for a formal offer to settle under Family Rule 11-1(1).
- [17] C.P. delivered an offer to settle on the Friday before the trial started on Monday, September 9, 2019. It was sent by a lawyer providing her advice to a lawyer who appears at one point to have been advising S.P. It was then forwarded to S.P.
- [18] C.P.'s offer was contained in a draft proposed separation agreement with additional terms concerning support and division of matrimonial assets and debts for S.P. to consider and respond to. Similar to S.P.'s offers, it contained terms regarding parenting time and financial issues.
- [19] Remarkably, the provision in C.P.'s offer regarding parenting time mirrored S.P.'s -- equal shared parenting time on an alternating week basis.
- [20] My findings at trial included the difficulties C.P. and the children faced from S.P.'s transition. Yet, it is clear, from C.P.'s offer to settle, that at least just prior to the start of trial, she was prepared to accept the parenting regime advocated by S.P.
- [21] S.P. responded to C.P.'s lawyer immediately, proposing some changes to various financial and support amounts proposed by C.P. but not to the provision concerning shared parenting.
- [22] As C.P.'s counsel who appeared on her behalf at the costs hearing pointed out, C.P.'s offer should have put an end to the need to proceed to trial on the parenting regime issues.
- [23] Unfortunately, that did not occur.
- [24] Neither C.P. nor her lawyer responded to S.P.'s counter-proposal before the trial began. Instead, as noted above, the trial proceeded with C.P. seeking significantly increased parenting time and opposing most of S.P.'s claims (including her counterclaim, which S.P. points out was not opposed on the pleadings).
- [25] C.P. herself eventually responded to S.P.'s changes to C.P.'s offer on September 27, 2019, after the trial had been adjourned. Unlike her position at trial, C.P. agreed to S.P.'s proposal for shared parenting on an alternating week basis, but disagreed with S.P.'s proposal that the first week of the new parenting regime begin with S.P. C.P. also disagreed with many of the other terms of S.P.'s offer (e.g., financial issues).

[26] During the costs hearing, S.P. advised me that she never received the cover letter to C.P.'s offer to settle advising that it would be brought to the court's attention at the conclusion of the trial. S.P. said she did not appreciate what she received on behalf of C.P. was a formal offer to settle. There is no evidence, direct or otherwise, to demonstrate whether she did. It is of no moment, however, since neither party succeeded in meeting or beating all of the terms contained in their respective offers to settle delivered up to that time.

[27] There is no evidence that S.P. responded to the numerous terms in C.P.'s response.

[28] Instead, the evidence establishes that S.P. sent C.P. a significantly truncated offer to settle on October 20, 2019 ("October 2019 Offer"). S.P.'s offer reads as follows:

I am therefore prepared to settle this matter at the present time on the following terms:

1. The parties will equally share parenting responsibilities and parenting time on an alternating week basis for the children: [A.P.], [J.P.], and [L.P.];
2. The following orders will remain in effect:
 1. Paragraphs 6, 16 of the Order of Mister Justice J.K. Bracken dated 25 May 2018;
 2. Paragraph 3 of the Order of Madam Justice J. Dillon dated 3 Jul[y] 2018;
 3. Paragraphs 3, 4, 5, and 6 of the Order of Judge M McParland dated 23 Oct 2018;
 4. Paragraphs 11, 13, 14 of the Order of Mister Justice Walker dated 19 Sep[t] 2019;

We have a clear and reasonable path to settle matters between us. If we do not take that path, we will each spend more in legal fees than either stands to gain. This offer has been carefully crafted to position myself to receive double costs. I reserve the right to bring this, and the previous offer to the attention of the court for consideration in relation to costs after the court has pronounced judgment on all other issues in this proceeding. This offer will remain open for acceptance until 4:00 p.m. on the last business day before trial of this matter, unless otherwise revoked or amended.

[29] The October 2019 Offer was never revoked. It expired when trial resumed in June 2020.

[30] C.P. did not accept S.P.'s renewed proposal of an alternating week parenting regime in the October 2019 Offer even though C.P. proposed it in the offer she sent to S.P. on September 27, 2019.

[31] The paragraphs from the court orders referred to in the October 2019 Offer concern parenting issues and counselling, not financial issues. In the final result, S.P. met or improved upon the terms of the October 2019 Offer.

- [32] S.P. asks that I exercise my discretion under Family Rule 11-1(5)(b) and award her double costs after the delivery of her first offer to settle because she was successful in respect of the parenting regime and nearly all of the issues concerning the children. She also submits that for those terms of her various offers to settle that she did not meet or exceed, in particular the two she delivered closest to the start of trial and then in October 2019 after it was adjourned, she came close.
- [33] The factors I may consider in making an order under Family Rule 11-1(5) are set out in Family Rule 11-1(6):

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.

[Emphasis added]

- [34] Some of the terms of S.P.'s various offers to settle she sent to C.P. prior to the October 2019 Offer concerning financial and support issues were either close to, at, or better than the outcome she achieved at trial. That said, I am not persuaded that the support provisions of those offers to settle ought reasonably to have been accepted given that I did not impute income to C.P. within the time frame and in the amounts proposed by S.P. Likewise, with financial issues, S.P. did not meet or exceed all of the terms contained in her offers.
- [35] In the circumstances, though, it is clear that the terms of S.P.'s offers concerning shared parenting (including the alternating week regime), the manner in which S.P. should be referred to by C.P., and the children's counselling were reasonable and should have been accepted by C.P. In particular, there was no reasonable basis not to accept the terms of the October 2019 Offer once Dr. Elterman's report was issued in early February 2020.
- [36] Instead, I find, C.P. unreasonably protracted the litigation and trial and refused to accept responsibility for her ongoing role in the emotional distress suffered by the children.
- [37] C.P. took unreasonable and unsuccessful positions concerning the admissibility of critical comments made of her by a joint expert who prepared views of the child reports, which resulted in a voir dire where C.P. cross-examined the author of the report, Brenda Forster. C.P.'s objections were wholly without merit and the report was admitted into evidence. In a similar vein, C.P. challenged the propriety and accuracy of Dr. Elterman's recommendations and his concerns about her conduct in the ongoing matrimonial conflict and its affect on the

children.

- [38] C.P. initially opposed commissioning a s. 211 report. During the costs hearing, she acknowledged in her submissions that once it was ordered, she agreed to follow Dr. Elterman's recommendations. She made a similar statement to Dr. Elterman when she met with him in December 2019.
- [39] She did not accept Dr. Elterman's recommendations. C.P. stuck to her position that the parenting regime should be significantly altered in her favour, despite Dr. Elterman's report supporting S.P.'s position.
- [40] C.P. was aware of her opportunities to have Dr. Elterman attend trial for cross-examination and to adduce expert evidence to challenge his opinions, but did not do so.
- [41] C.P. unreasonably refused to accept Dr. Elterman's findings and opinions and continued to characterize herself as the passive victim in the matrimonial conflict and question S.P.'s parenting capacity. Through her conduct, she perpetuated the children's emotional distress: see, e.g., 2020 Reasons at paras. 24-33.
- [42] I went so far in my 2020 Reasons as to convey these remarks:
- [32] My hope is that C.P. will, once she has read these reasons and reflected further on Dr. Elterman's report, appreciate that her conduct is alienating the children from S.P. This is not in the children's best interests.
- [43] With this in mind, I turn now to C.P.'s submission that each side should bear their own costs.
- Should Each Side Bear Their Own Costs?

- [44] C.P.'s submission that it would be unfair and not in the interests of justice to order her to pay costs in this case is grounded on Family Rule 11-1(5) along with the reasons in Fotheringham and Gold. She acknowledges that her capacity to pay is not an issue. Instead, in support of her submission, C.P. argues, inter alia, that:
- (a) she was successful on some issues (e.g., to have S.P. reimburse her for the cost of hearing aids for one of the children and not imputing past income to her for support purposes);
 - (b) S.P. should have accepted her offer to settle sent just prior to the start of trial, at least in respect of the parenting regime;
 - (b) instead, S.P. fueled the litigation with an unreasonable and overly rigid approach, and an unduly lengthy and inappropriate notice to admit, and pursued the trial because she was engaged in "axe wielding" to avenge against what she perceived to be C.P.'s insensitivity for S.P.'s gender transition and perceived past transgressions and slights;
 - (c) S.P. did not meet or exceed all of the terms of her offers to settle;

- (d) Dr. Elterman's report was commissioned mid-trial, an unusual step she asserts, that was not taken through any fault of C.P.'s but in order to bring clarity to chaos;
- (e) she was forced to proceed to trial on the financial and support issues given the vagueness of the evidence and that some of the information was wholly within the knowledge of S.P.; and
- (f) the issues in the case were difficult and complex due to S.P.'s gender transition.

[45] Family Rule 11-1(5)(a) permits the court to deprive a successful party of costs; Family Rule 11-1(6) sets out factors the court may consider in deciding whether to make such an order.

[46] Of the factors discussed by the Court of Appeal in *Gold*, I consider the purpose of the award and the conduct in the litigation to be of particular application in this case. In its reasons, the Court of Appeal said:

19 It is my further view that the rule which should govern the award of costs in matrimonial proceedings should be the same as in other civil litigation, namely, that costs should follow the event unless the Court otherwise orders as specified in *R. 57: Meneghetti v. Meneghetti* (1979), 17 B.C.L.R. 200 (S.C.), at p. 202.

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.

21 In this case, therefore, I conclude that the learned trial judge erred in depriving Mrs. Gold of her costs of the trial. None of the purposes of s. 51 will be compromised by awarding her the cost-fruits of her success. Both parties probably contributed to the prolongation of the trial, but in the end she was substantially successful and no grounds have been shown for exercising a discretion against her.

22 In my view, the costs of the appeal should also follow the event. Mrs. Gold has been substantially successful on the main issue, and the items on which Mr. Gold has been successful, although not insignificant, are not sufficient to warrant departing from the usual rule.

[Emphasis added]

[47] The onus is on the unsuccessful party -- C.P. -- to demonstrate that I should depart from the usual rule that costs should be awarded to the litigant who achieves substantial success -- S.P.: *Rattenbury v. Rattenbury*, 2001 BCSC 593 at para. 18; *S.A.M.* at para. 7.

[48] C.P. has not discharged that onus.

- [49] The primary issue in the action and at trial concerned the parenting regime and to a lesser extent, other issues relating to the children. The outcome of the parenting regime dispute had a significant effect on the support issues. In comparison, the issues for which C.P. achieved success were minor.
- [50] C.P. did not take up the opportunity to settle the parenting regime issue in spite of her own offer to settle. As I have found, C.P. changed her position shortly after the trial commenced and unreasonably protracted the litigation as she insisted upon a change in the status quo to minimize S.P.'s contact with the children.
- [51] Dr. Elterman's report was commissioned as a result of C.P.'s ongoing criticisms of S.P.'s parenting style and capacity, C.P.'s continued blame of S.P. as the cause of the children's ongoing anxiety and emotional distress, and C.P.'s position that she should have the majority of the parenting time.
- [52] Even if some of the factual issues in the case were, as C.P. contends, complex, it is not a basis to depart from the rule that the successful party is entitled to their costs. Issues arising from S.P.'s transition were addressed by Dr. Elterman within a short time after he met with the parties and children in December 2019.
- [53] I reject C.P.'s submission that S.P. was engaged in any form of vendetta or was seeking retribution towards C.P. While S.P. presented as rigid in some respects, much of it was understandable in light of evidence of C.P.'s interference with S.P.'s parenting time with the children, C.P.'s misleading conduct with Passport Canada to lock out S.P. from travelling with the children, public attacks directed towards S.P. by members of the church that she used to attend with C.P., and C.P.'s decision to call S.P.'s mother as part of her case to testify against S.P. These matters, along with C.P.'s departure from her initial stance at trial where she said wished to take a positive approach towards S.P. and C.P.'s continued challenge of S.P.'s capacity to parent, further inflamed already strained tensions between the parties.
- [54] Although some of the admissions sought by S.P. in her notice to admit were argument in the guise of facts, many were uncontroversial and should have been admitted by C.P.
- [55] I also do not accept that C.P. was "forced" to proceed to trial on the financial issues for the reasons she suggests.
- [56] Although (as C.P. submits on this hearing) some of the financial information was wholly within the knowledge of S.P. and some required proof through financial documents, I do not accept C.P.'s submission that as a self-represented litigant who left S.P. to look after the financial issues during their marriage, her seeming lack of understanding of financial issues on display during her evidence at trial was credible. S.P. produced the requisite financial documents before trial and C.P. was clearly consulting with a lawyer about financial issues (as shown by her offer to settle which contained numerous provisions concerning the division of assets and debts).

- [57] However, I agree with C.P. that she had to proceed to trial in respect of the issue of quantum of support in light of S.P.'s position that past income should be imputed to C.P., a claim that S.P. failed to establish. If all other issues had been resolved between the parties, determining this dispute would have taken no more than two days of trial time, including argument. All of that said, neither party was successful in their positions concerning the amount of current and prospective income that should be imputed to C.P. Consequently, this is not a basis to support C.P.'s submission that each party should bear their own costs.

Determination

- [58] In light of my findings above, there is no basis to order that each party should bear their own costs. As the party who was substantially successful, S.P. is entitled to her costs (and disbursements, including her share of the cost of Dr. Elterman's report, the views of the child reports, and the cross-examination of Ms. Forster) in accordance with the tariff.
- [59] The only matter left to consider is whether S.P. is entitled to double costs per Family Rule 11-1(5) and (6).
- [60] Considering the factors in Family Rule 11-1(6), I have determined that she is entitled to double costs for those steps taken in the action following the delivery of Dr. Elterman's report in early February 2020.
- [61] Once Dr. Elterman's report was delivered, it should have been clear to C.P. that she would not prevail on parenting regime issues and her other positions concerning the children as well as the orders I made in the 2019 Reasons concerning financial and support issues. With the exception of S.P.'s approach to the children's telephone contact with C.P. (Dr. Elterman suggested to S.P. that she reconsider her approach insisting on C.P.'s strict adherence with the prescribed time limit for each telephone call), Dr. Elterman's findings and recommendations favoured S.P.'s position in the action.
- [62] Without any credible evidence to challenge Dr. Elterman's findings, opinions, and recommendations, C.P. maintained her claim for a significant increase in parenting time and diminished contact and role in the children's lives for S.P. She continued to call into question S.P.'s capacity to parent and her bona fides, refused to acknowledge her own role in the dispute and the children's emotional distress, and prolonged the litigation.
- [63] C.P.'s approach to Dr. Elterman's report was consistent with her attitude (confirmed by her testimony) that she will avoid complying with court orders she disagrees with, her propensity to blame others, and her desire to excuse her conduct on the basis that she is an unsophisticated lay litigant: see 2019 Reasons at paras. 14-19; 2020 Reasons at paras. 24, 26.

Conclusion

- [64] Except as noted in the paragraph below and for those interlocutory matters where costs orders have been made, S.P. is entitled to her costs and disbursements of the action (including her share of the cost of Dr. Elterman's report, the views of the child reports, and the cost to have Ms. Forster attend as an expert witness).
- [65] S.P. is entitled to double costs following the delivery of Dr. Elterman's report in early February 2020.
- [66] Assessment of the quantum of S.P.'s award shall be conducted by the Registrar per Family Rule 16-1, who shall, upon the conclusion of the assessment, issue a Form F72 certificate per sub-rule (25).
- [67] The parties shall forthwith arrange a pre-hearing conference before the Registrar.
- [68] C.P. shall pay S.P.'s costs award from C.P.'s share of the funds remaining in trust from the sale of the matrimonial home. Once that occurs, the amount remaining in trust shall then be paid out in accordance with my 2020 Reasons.

"Walker J."

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