
CANADA / JUDGMENT

Campbell v. Campbell

2019 BCSC 186

COURT

Supreme Court of British Columbia

DECIDED

15 February 2019

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2019 BCSC 186 Campbell v. Campbell

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Campbell v. Campbell

2019 BCSC 186

Date: 20190215

Docket: E95092

Registry: Kelowna

Between:

Ashley Paige Campbell

Claimant

And

Ryan Shawn Campbell

Respondent

Before: The Honourable Mr. Justice Branch

Reasons for Judgment on Costs

Counsel for the Claimant:

L.H. Thomson

Counsel for the Respondent:

W.T. Clarke

Place and Dates of Trial:

Kelowna, B.C.

January 22-26, 29-31, 2018

February 1-2, 2018

Written Submissions of the Claimant Received:

December 20, 2018

Written Submissions of the Respondent Received:

January 21, 2019

Written Reply Submissions of the Claimant Received:

January 30, 2019

Place and Date of Judgment:

Kelowna, B.C.

February 15, 2019

I. INTRODUCTION

- [1] The Court issued its reasons flowing from this family law trial on March 2, 2018, reported at 2018 BCSC 330. The parties were unable to resolve the issue of costs and have returned to the Court for directions. Both parties provided written submissions.
- [2] The respondent's position is that he was substantially successful at trial and should be awarded his costs.
- [3] The claimant's position is that success at trial was divided and therefore both parties should bear their own costs. The claimant also submits that since the mobility issue was decided on the basis of the best interests of the children, neither party should be responsible for the costs of the other on that issue. Finally, the claimant argues that even if the respondent is found to be the substantially successful party, the Court should exercise its discretion to deny him costs.

II. LEGAL FRAMEWORK

- [4] In a family law case, costs are awarded to the successful party unless the Court orders otherwise: Supreme Court Family Rules, R. 16-1(7).
- [5] The "successful party" is the party who achieved substantial success: *Fotheringham v. Fotheringham*, 2001 BCSC 1321; *Marquez v. Zapiola*, 2014 BCCA 35. As a rule of thumb, a party who succeeds on at least 75% of the issues is considered to have been substantially successful: *Fotheringham* at para. 45; *L.I.W. v. T.R.W.*, 2017 BCSC 693 at para. 40. That said, in

a family law matter involving multiple claims, the Court may take a more flexible approach to determining which party was substantially successful: *Litt v. Gill*, 2016 BCCA 288 at para. 53.

[6] Fotheringham sets out the approach at para. 46:

1. First, the Court should consider the matters that were in dispute and assess the weight and importance of those issues to the parties.
2. Next, the Court makes a global determination of the matters in dispute and draws a conclusion about which party was substantially successful.
3. Finally, where one party was substantially successful, the Court should consider whether, despite the usual rule, there are reasons to "otherwise order" that the winning party be deprived of his or her costs and instead, each party should bear their own costs.

Does the Usual Rule Apply in Mobility Cases?

- [7] The most significant issue in this case was the claimant's mobility application. This is clear from paragraph 1 of the trial judgment where the Court stated, "The key issue at trial was a mobility request by the claimant". The claimant was unsuccessful on this key issue.
- [8] However, the claimant cites *Morrison v. Morrison*, 2001 BCSC 909 for the proposition that, given that mobility is determined on the basis of the best interests of the child, the parties should bear their own costs on that issue.
- [9] It has been suggested that there are divergent lines of authority regarding the proper approach to costs in custody and mobility cases. Justice Brown summarized the different approaches in *D.L.S. v. R.S.*, 2013 BCSC 2269 at paras. 27-28:
- [27] Respondent's counsel submitted that two divergent lines of cases govern cost awards on cases where child custody and access are the primary issues - although the law appears gradually to be near to settling on one set of principles. One line favours the view that caring parents engaged in a case focused on the best interests of the children where custody is at stake should not be discouraged by the possible penalty of an award for costs: see *Morrison v. Morrison*, 2001 BCSC 909; *P.E.P. v. D.W.P.*, 2004 BCSC 1590; *D.K.H. v. M.M.H.*, 2003 BCSC 1418; *Cameron v. Cameron*, 2005 BCSC 190 at para.23.
- [28] The other line, rooted in the Court of Appeal decision *Gold v. Gold*, [1993] B.C.J. No. 1792 (C.A.) [Gold], endorses the view that custody litigation should not be treated differently than other litigation, subject always to the court's discretion: see *S.M.M. v. J.P.H.*, 2012 BCSC 1080 at para. 5 for a thorough summary of previous jurisprudence.
- [10] I am of the opinion that in light of the Court of Appeal's decisions in *Reis v. Bucholtz*, 2010 BCCA 115 and *T.K. v. R.J.H.A.*, 2015 BCCA 8, there is no longer ambiguity about whether the usual rule of costs applies in custody or mobility cases.

- [11] In *Reis*, Justice Groberman stated as follows at para. 86:
- [86] There is no general principle that costs should not be awarded in a case where custody is at issue. At most, there may be discretion not to award costs in such cases. This is not an appropriate case in which to explore the precise bounds of that discretion. The trial judge exercised her discretion judicially, and determined that costs should follow the event. There is no basis for interfering with that order.
- [12] More recently, in a case involving mobility issues, Justice Smith stated in *T.K.* at para. 86:
- [86] Costs are a discretionary award. In matters of custody and access, the usual rule that "costs follow the event" applies subject to the discretion not to award costs in certain circumstances. Those circumstances do not include the nature of the issues in dispute. See *Falvai* at para. 11, *S.J.C. v. S.-J.A.*, 2010 BCCA 31 at para. 62, and *Reis v. Bucholtz*, 2010 BCCA 115 at paras. 83-86. Accordingly, I find no error in the judge's exercise of discretion to award the father, as the substantially successful party in the action, ordinary costs.
- [13] I note that costs followed the event in the mobility decisions of *Woods v. Woods*, 2012 BCCA 312, *Karpodinis v. Kantas*, 2006 BCCA 400, *Stav v. Stav*, 2012 BCCA 154, *A.J.D. v. E.A.E.*, 2013 BCSC 2160, *S.Z. v. D.Z.*, 2015 BCSC 2157, *Fotsch v. Begin*, 2015 BCSC 227, and *Hellberg v. Netherclift*, 2019 BCCA 24. In *D.L.S.*, the Court concluded:
- [38] Gold remains the law in British Columbia on costs in custody matters; costs are to be treated like any other litigation, subject to the court's discretion. Further, the cases do not diverge on principle so much as it might appear at first. In a given case, the parties' litigation conduct might lead a judge to conclude that the nature of the custody issues and the parties' conduct of the litigation in relation to it do not warrant an award of costs against the unsuccessful parent.
- [39] To say, as a matter of principle, that the court should never award costs in a family case where custody is the central issue would unfairly prevent a costs award against an unsuccessful party whose litigation conduct does not necessarily meet the level that calls for special costs, but nonetheless, unreasonably exposed the other party to unnecessary costs. If in principle a party cannot be penalized with costs in litigation matters, the making of reasonable settlement offers would be discouraged. None of the cases cited by the respondent support that view.
- [40] In any case, Gold expressed the Court of Appeal's view.
- [14] I accept that the best interests of the child may be a relevant consideration in the exercise of the Court's discretion: *N.L. v. D.L.*, 2018 BCSC 2199. However, the simple fact that the underlying mobility or custody proceeding was decided on the basis of the best interests of the child does not in and of itself displace the usual rule that costs go to the successful party. To displace the general rule on that basis would be inconsistent with the Court of Appeal's clear statement in *T.K.* that the nature of the issues in dispute should not drive the Court's decision as to whether to award costs. The facts in this case are not akin to *N.L. v. D.L.*,

where Justice Bowden found that a costs award against the unsuccessful parent would have limited his ability to visit his children in New Zealand and thus, would likely adversely affect the children's best interests. In the case at bar, a costs order will not prevent either party from exercising their parenting time.

II. ISSUES

[15] Hence, the issues for determination are as follows:

1. Was either party substantially successful at trial?
2. If the respondent was substantially successful, should the Court exercise its discretion to deny him costs?

IV. DISCUSSION

A. Was Either Party Substantially Successful at Trial?

[16] As noted above, the most significant issue in this case was whether the claimant would be permitted to relocate with the children to Nanaimo:

[1] This is a family law matter. The key issue at trial was a mobility request by the claimant.

[2] To their credit, the parties were able [to] reach agreement on all property issues, support arrears, and on a custody/access arrangement if the mobility request was denied. Hence, the bulk of the trial was spent addressing the mobility request.

[17] The respondent was successful on this issue.

[18] The next most time-consuming topic at the trial was the claimant's allegations of abuse by the respondent. The claimant introduced substantial evidence on this topic. The respondent necessarily felt compelled to respond. As expressed in my trial reasons, the relevance of this evidence was dubious:

[26] That said, the parties' approach to the family violence allegations in this case was very problematic. Days of evidence were devoted to an extremely detailed review of every alleged or admitted incident of violence over the course of their entire relationship, and thereafter.

[27] I was troubled as to the relevance of this evidence in this particular case given that the claimant had already agreed at the outset of the trial that there should be joint guardianship, and had also agreed that access with the respondent should continue on a status quo basis should she remain in Kelowna. This raised a concern about consistency: *N.C. v. N.C.*, 2017 BCSC 2311 at para. 68. In other words, if family violence were a material concern for the claimant, why was she consenting to the maintenance of the status quo access schedule in Kelowna? Any family violence concerns associated with the respondent's access would apply whether the claimant resided in Nanaimo or Kelowna.

- [19] At the end of the day, I did not find that the abuse allegations justified a different outcome on the issues remaining for determination at trial. In her costs submissions, the claimant suggests that the evidence was relevant to parenting time. However, there was an agreement on this issue by the commencement of the trial, subject to the mobility issue. The claimant should have narrowed the evidence led at trial in light of this position.
- [20] At a simplistic level, I note that the required review of these first two issues comprised 28 pages of a 35-page judgment. They were clearly the matters of greatest weight and importance.
- [21] As noted, the parties were able to reach an agreement at or before trial on many issues. The additional material issues remaining at trial were spousal and child support. The Court's determination of support fell between the final positions of the parties, which themselves evolved over the course of the trial. Again, as to parenting time, there was no material dispute about what should occur once a mobility decision was made.
- [22] As such, I find that the respondent was the substantially successful party. Pursuant to Rule 16-1(8), costs should follow the event unless there are reasons to order otherwise.

B. Should the Court Exercise its Discretion to "Otherwise Order" and Deny the Respondent his Costs?

- [23] The onus is on the unsuccessful party to persuade the Court to exercise its discretion not to follow the usual rule that costs are awarded to the successful party: *MacLean v. Mio*, 2011 BCSC 148 at para. 39. The Court may also choose to award only a portion of the substantially successful party's costs: *MacLean* at para. 49. For the reasons that follow, I do not exercise my discretion to deny the respondent his costs, but I do impose certain conditions on the timing of the payment of such costs.
- [24] In *Gold v. Gold* (1993), 106 D.L.R. (4th) 452 (B.C.C.A.) at para. 20, the Court of Appeal set out a non-exhaustive list of factors that the Court may consider including, "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".
- [25] The decision to award costs is discretionary and must depend on the circumstances of the case.
- [26] In terms of the claimant's litigation conduct, I first note that her position at trial was inconsistent with the recommendations of the s. 211 report author. Moreover, the claimant's desire to move was largely driven by ties created while she and the children were resident in Nanaimo. But these ties only developed because the claimant was in violation of an existing court order. The claimant's financial circumstances were not a sufficient excuse to engage in "self-help" contrary to a court order.
- [27] The claimant raises a number of other reasons, however, which in her submission, justify a decision to deny costs to the respondent.

- [28] First, the claimant points to certain pre-trial production failures on the part of the respondent. I do not find that these were sufficiently egregious to displace the usual costs rule. The claimant says that the respondent's late disclosure of certain documents made it more difficult for her to prove her case. However, she did not seek an adjournment.
- [29] The claimant also raises certain compromises that she made in order to obtain an agreement regarding the respondent's arrears before the completion of the trial. I find that it is not appropriate for the Court to look behind those terms of the agreement and assess who made the most significant compromises.
- [30] Of greater moment, the claimant says that, among other terms, the respondent has failed to comply with the following terms of the trial order:
1. the \$30,000 arrears that the respondent agreed to pay as part of the consent terms made at trial has not yet been paid; and
 2. the income tax returns required to be provided have not been delivered.
- [31] The respondent does not directly dispute these allegations of non-compliance, but suggests they ought to be dealt with separately from costs.
- [32] I agree with the claimant that these failures are a serious concern. However, I conclude that the best way to address the respondent's post-trial failures is to stay any costs award payable by the claimant until such time as the respondent satisfies the terms made on consent regarding the payment of \$30,000 in arrears and the provision of income tax returns. I expect that this may encourage an "offset", and will also ease the economic hardship to the claimant by the costs order, which the claimant also raised as a relevant factor in the analysis. Indeed, the respondent acknowledges an offset potential in his own costs submissions:
32. It is also strongly submitted that the order to costs as to the trial of this matter may in the future be utilized as an "off-set" regarding ongoing payments from the Respondent to the Claimant, and that is the true rationale as to why neither party has engaged any of their grievances with each other in a monetary sense until it was again apparent that no resolution could be achieved as to costs of the trial;
37. As stated previously, if there are outstanding issues as between the parties, the award of costs can be offsetting as against any outstanding financial matters payable by the Respondent to the Claimant, while issues of parenting time would also have their own forum. This is not denied, but has been actively advocated on behalf of the Respondent since the trial.
- [33] It is not for the respondent to engage in his own "self-help" remedy by not paying the agreed arrears in the hope that a costs award would be made in his favour. The stay on the payment of costs will ensure that neither party gains improper financial leverage through the amounts owed.

- [34] This stay order is without prejudice to any other enforcement or contempt proceedings the claimant may wish to bring to enforce the terms of the orders in place. I also note that Rule 16-1(18) provides a mechanism by which the Registrar may, upon assessing costs, award costs on the basis that one party has put the other to unnecessary expense after the judgment. The claimant may be in a position to invoke this rule as well.
- [35] Pursuant to Rule 16-1(3), I leave the precise assessment of the costs award to the Registrar should the parties not be able to resolve same.

III. ADDITIONAL ISSUES

- [36] The claimant seeks certain additional terms beyond the determination of costs. Subject to one exception, I find that these items should be the subject of a separate application should the parties be unable to agree. In the interests of efficiency, I am prepared to hear any such application. However, the parties are also at liberty to appear before a different judge.
- [37] The one exception is that the parties are agreed that the word "equally" should not have been included in paragraph 8 of the post-trial order. The parties may submit a draft amending order addressing this issue.

"Branch J."

The Honourable Mr. Justice Branch

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/19/01/2019BCSC0186.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/campbell-v-campbell-2019>

Prepared on 29 October 2026 · Esheria