
CANADA / JUDGMENT

D.N. v. M.R.

2020 BCSC 475

COURT

Supreme Court of British Columbia

DECIDED

30 March 2020

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2020 BCSC 475 D.N. v. M.R.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

D.N. v. M.R.,

2020 BCSC 475

Date: 20200330

Docket: E181167

Registry: Williams Lake

Between:

D.N.

Claimant

And

M.R.

Respondent

Before: The Honourable Madam Justice Forth

Reasons for Judgment

Re Costs

The Claimant appearing in person:

D.N.

Counsel for the Respondent:

C.A.H. Hauser

Written Submissions of the Respondent:

November 6, 2019

Written Submissions of the Claimant:

January 20, 2020

Reply Submissions of the Respondent:

February 10, 2020

Place and Date of Judgment:

Williams Lake, B.C.

March 30, 2020

Table of Contents

Introduction.. 4

Position of the Parties. 5

Position of the Respondent 5

Position of the Claimant 5

Entitlement to Costs. 6

Issues. 7

Substantial Success. 7

Legal Principles. 7

Matters in Dispute. 9

Success on Each Matter and Relative Weight 10

Are the parties spouses under the FLA?. 10

Relocation to Kamloops. 10

Parenting Arrangements and Responsibilities. 11

Child Support / Income of the Respondent 11

Section 7 Expenses. 12

Spousal Support 12

Property Claims. 12

Return of Tigger	13
F150 Truck.	13
Notice to Admit	14
Attendance at Daycare.	14
Destruction of Intimate Photos.	15
Substantial Success Overall	15
Reasons to Depart from Default Rule.	15
Frivolous Actions or Defences.	16
Hardship and Earning Capacity of the Claimant	17
Offers to Settle.	18
Legal Principles.	18
History of Offers to Settle.	19
Analysis.	Error! Bookmark not defined.
Reasonable Acceptance.	23
Terms of Settlement and Final Judgment	24
Relative Financial Circumstances.	25
Additional Factors.	25
Conclusion..	26

Introduction

[1] I heard a family law trial in Williams Lake in November 2018. Reasons were pronounced on April 10, 2019, indexed at 2019 BCSC 537 (the "Reasons"). In the Reasons I made the following order respecting costs:

[234] As there has been divided success, there will be no orders as to costs. I adopt the views expressed by Justice Humphries in *Hansen v. Mantei-Hansen*, 2013 BCSC 876 at p 143:

[143] In general, costs in family matters follow the event. However, this is a case where each parent has a legitimate and well-founded case to put forward. It would not be in the interests of justice to pronounce one parent successful in this action and one not. The only consideration is the best interests of the children, and as I have made clear, the children would be well served living primarily with either parent. Given the parents' determination to live apart, and their equal devotion to their children, a decision had to be made for the children by a court. In these circumstances it is appropriate that the parties bear their own

costs.

- [2] The parties sought reconsideration and clarification of the Reasons. The respondent requested that he have the opportunity to make proper submissions regarding costs. The claimant submitted that there should be no change in the cost order made.
- [3] In supplementary reasons, indexed at 2019 BCSC 1354, I agreed the parties should have the opportunity to provide argument on whether the costs award should be varied: para. 38. The parties were given a timeline to provide written submissions. The respondent provided his written submissions through counsel on November 6, 2019, but the claimant sought an extension of time due to the "lack of education and resources available in Williams Lake" and the fact that she was no longer represented by counsel. The claimant was given until January 20, 2020 to provide her submissions.
- [4] On January 20, 2020, the claimant filed her written submissions. The respondent provided his reply submissions on February 10, 2020.
- [5] I granted leave for submissions respecting the issue of costs and not for "relitigating" matters that were decided in the Reasons. A great deal of the claimant's written submissions were about the conduct of the respondent and counsel acting for the respondent. There was also submissions about pre-trial conduct and the multiple applications brought by the parties. It is not necessary to examine each of the various applications made prior to trial. Suffice to say that the actions of both parties resulted in the need for court applications and orders. These reasons focus on relative success of each party at trial, the effect of any offers to settle, and whether the costs order in the Reasons should be varied.

Position of the Parties

Position of the Respondent

- [6] The respondent submits that he "substantially succeeded" on the majority of the "matters in dispute" at the trial and there is no reason to deprive him of his costs.
- [7] The respondent further submits that he made a settlement offer pursuant to Rule 11-1 of the Supreme Court Family Rules, B.C. Reg. 169/2009 [Rules] and the claimant should have accepted the offer. The respondent submits that after the date of that offer he is entitled to an award of special costs. Although the respondent submits that the claimant "filed at least one frivolous application and committed plenty of undesirable conduct in the litigation process", it appears the respondent is arguing for double costs after the date of the settlement offer, not special costs.

Position of the Claimant

- [8] The claimant disagrees that the respondent was successful on many of the issues at trial and points out that she made settlement offers in which she was prepared to give up on a number of issues such as the claim against the respondent's home and business.
- [9] She further submits that she is struggling financially and her situation is dire and urgent because of a lack of income. She requests that if she is to pay for all or a portion of the respondent's costs then the resulting trust claim be "open for interpretation", I think she means reopened, so that she may be given a "chance to survive and provide a healthy life for [her] child."

Entitlement to Costs

- [10] Costs are awarded to the successful party unless the court orders otherwise: R. 16-1(7).
- [11] The purpose of cost awards was summarized by the Court of Appeal in *Giles v. Westminster Savings and Credit Union*, 2010 BCCA 282:
- [74] The purposes for which costs rules exist must be kept in mind in determining whether appellate intervention is warranted. In addition to indemnifying a successful litigant, those purposes have been described as follows by this Court:
- "[D]eterring frivolous actions or defences": *Houweling Nurseries Ltd. v. Fisons Western Corp.* (1988), 37 B.C.L.R. (2d) 2 at 25 (C.A.), leave ref'd, [1988] 1 S.C.R. ix;
 - "[T]o encourage conduct that reduces the duration and expense of litigation and to discourage conduct that has the opposite effect": *Skidmore v. Blackmore* (1995), 2 B.C.L.R. (3d) 201 at para. 28 (C.A.);
 - "[E]ncouraging litigants to settle whenever possible, thus freeing up judicial resources for other cases: *Bedwell v. McGill*, 2008 BCCA 526, 86 B.C.L.R. (4th) 343 at para. 33;
 - "[T]o have a winnowing function in the litigation process" by "requir[ing] 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", and by "discourag[ing] the continuance of doubtful cases or defences": *Catalyst Paper Corporation v. Companhia de Navegação Norsul*, 2009 BCCA 16, 88 B.C.L.R. (4th) 17 at para. 16.
- [12] A succinct summary of the legal principles respecting costs in family law cases was provided by Justice Bernard in *S.A.M. v. J.A.M.*, 2017 BCSC 2348 at para. 7:
- (a) The costs of a family law case must be awarded to the successful party, unless the court otherwise orders (Rule 16-1(7)) of the Supreme Court Family Rules [Rules];
 - (b) The "successful party" is the party who has achieved substantial success at the trial/hearing (*Fotheringham v. Fotheringham*, 2001 BCSC 1321; *Marquez v. Zapiola*, 2014 BCCA 35);

- (c) The court's discretion to "order otherwise" must be exercised judicially, bearing in mind a non-exhaustive list of factors that includes hardship, earning capacity, the purpose of the particular award, the conduct of the parties in relation to the litigation, and the importance of not upsetting the balance achieved by the court in relation to the substantive issues (*Gold v. Gold* (1993), 106 D.L.R. (4th) 452 (B.C.C.A.));
- (d) The party who asks the court to "order otherwise" bears the onus to persuade the court why it should do so (*S.D.W. v. C.W.W.*, 2006 BCSC 162);
- (e) Financial hardship, without more, is not a sufficient basis for the court to exercise its discretion to depart from the usual rule that successful parties are entitled to their costs (*S.D.W. v. C.W.W.*, supra.; *K.D.P. v. A.R.K aka R.K.*, 2012 BCSC 1025; *Brown v. Kucher*, 2016 BCSC 194);
- (f) Where an offer to settle a family case has been made, the court may award double costs for all or some of the steps taken after the date of delivery or service of the offer (Rule 11-1(5) of the Rules);
- (g) As a general rule, an award of double costs should be made against a party who did not accept an offer to settle that should, in all the circumstances, have been accepted (*Hartshorne v. Hartshorne*, 2011 BCCA 29); and,
- (h) In determining whether a double costs order should be made, the court may consider any factor the court considers appropriate, including whether the offer was one that ought reasonably to have been accepted upon receipt or at any later date, the relationship between the offer and the judgment, and the relative financial circumstances of the parties (Rule 11-1(6) of the Rules).

Issues

[13] The submissions and Reasons raise the following issues:

- a) Who was substantially successful at trial?
- b) What is the effect of any offers to settle?

Substantial Success

Legal Principles

[14] In *Fotheringham v. Fotheringham*, 2001 BCSC 1321, leave to appeal ref'd 2002 BCCA 454, Justice Bouck found that to win the "event" the party must have substantial success, measured objectively by taking in account the weight of issues and importance to the parties: paras. 37 and 60.

[15] Relying on *Fotherington*, the Court of Appeal in *Marquez v. Zapiola*, 2014 BCCA 35 accepted that "substantial success" means 75% success:

- [16] Success in the event has been interpreted as "substantial success": see *Fotheringham v. Fotheringham*, 2001 BCSC 1321, 13 C.P.C. (5th) 302, leave to appeal ref'd 2002 BCCA 454. In *Fotheringham*, Mr. Justice Bouck described this standard as follows:
- [45] Gold now seems to say that substantial success in an action should be decided by the trial judge looking at the various matters in dispute and weighing their relative importance. The words "substantial success" are not defined. For want of a better measure, since success, a passing grade, is around 50% or better, substantial success is about 75% or better. That does not mean a court must descend into a meticulous mathematical examination of the matters in dispute and assign a percentage to each matter. Rather, it is meant to serve as a rough and ready guide when [looking] at all the disputed matters globally.
- [16] In *Litt v. Gill*, 2016 BCCA 288, Justice Garson commented on the need for a flexible approach in family law cases where there are multiple issues:
- [53] At its most basic, the successful party is the plaintiff who establishes liability and obtains a remedy, or the defendant who obtains dismissal of the plaintiff's case: *Loft v. Nat*, 2014 BCCA 108 at para. 46. This general principle is more difficult to apply in the context of family cases, where there may be a panoply of claims advanced by each party, and divided success. There, a more flexible "substantial success" test may be more appropriate: see this Court's decisions in *Harras v. Lhotka*, 2016 BCCA 246 at para. 48 and *Marquez v. Ziapola*, 2014 BCCA 35 at para. 16.
- [17] Finally, the court has a broad discretion to take into account a myriad of considerations in assessing whether a party has been substantially successful: *Reid v. Reid*, 2017 BCCA 191 at para. 9.
- [18] In *Fotheringham* at para. 46, Bouck J. proposed a four-step inquiry to determine whether costs should be awarded to either party:
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.
- [19] I will generally follow the framework set out in *Fotheringham*, although I will combine my analysis of steps 1 and 2.

Matters in Dispute

[20] The Reasons set out the following issues at trial at para. 21:

- a. Are the parties "spouses" under the Family Law Act [FLA]?
- b. Should the claimant be permitted to relocate with the Child to Kamloops?
- c. Should there be a change to the current order concerning the parenting time and responsibilities with the Child? Specifically:
 - i. Should there be a change in the allocation of parenting time?
 - ii. Should there be a change in the allocation of parenting responsibilities?
- d. Should there be a change in the respondent's current child support obligations?
- e. Should the respondent pay any retroactive child support?
- f. What s. 7 expenses should be paid?
- g. Should there be an award of spousal support and if so, in what amount and for what period of time?
- h. Does the claimant have a claim to any property owned by the respondent?
- i. Should there be an award of costs?

[21] In addition to these issues, the respondent lists the following items as "matters in dispute":

- i. return of Tigger;
- ii. F150 truck;
- iii. Notice to Admit; and
- iv. whether the respondent can attend the Child's daycare during "the Claimant's parenting time".

[22] I will add one more issue that came up during the trial which related to requests made by the claimant for the respondent to destroy intimate photos that were in his possession or control.

Success on Each Matter and Relative Weight

Are the parties' spouses under the FLA?

[23] At trial, I found the parties were not spouses for the purpose of property division. Much time was spent at trial on the issue of whether the parties had lived together continuously for two years. The issue of their relationship was important because if I found they were in a marriage-like relationship for at least two years, it would have triggered the claimant's right to claim for property division of the respondent's house and business. I found the claimant failed to prove she had lived together with the respondent for two years.

[24] The respondent was successful on this important issue.

Relocation to Kamloops

- [25] This was likely the most important issue to the parties. I found that the educational reasons provided by the claimant for moving to Kamloops were made in good faith. I also found the evidence on whether the move would enhance the well-being of the Child was divided. I was satisfied that the proposed relocation request was made in good faith by the claimant.
- [26] I had reservations on whether there existed a reasonable and workable arrangement taking into account the distance that the Child would have to travel, the impact on the Child once she was in school, the impact on the parenting schedule, and impact on the Child's relationship with the respondent and her half-brothers.
- [27] On the final component, I ultimately concluded it was not in the Child's best interest to relocate to Kamloops and denied the relocation request.
- [28] The respondent was successful on this important issue.

Parenting Arrangements and Responsibilities

- [29] With respect to parenting time, the respondent sought equal parenting time with the Child at trial. He was not successful in achieving that order. I ordered that when the Child turns four, in December 2021, the parties should have shared parenting time equally.
- [30] With respect to parenting responsibilities, I found the Master Joyce Model should be followed, with the claimant having the right to make decisions if the parties could not agree.
- [31] The parties had divided success on this issue.

Child Support / Income of the Respondent

- [32] The respondent submits the claimant "requested that the Respondent's income be imputed in excess of \$400,000 per year". I have reviewed my trial notes and submissions I cannot find any reference to that number in the claimant's closing submissions.
- [33] The claimant's closing submissions sought an imputed income of \$172,137 from December 2017 to November 2018 and moving forward: Reasons at para. 130. The respondent sought to have his income imputed at \$90,100: Reasons at para. 131.
- [34] I found the claimant met the burden of showing that income should be imputed to the respondent and the respondent had failed to justify the deduction of business expenses: Reasons at para. 161. However, I imputed less income that she submitted.
- [35] The claimant was more successful on this issue.

Section 7 Expenses

- [36] This was not a significant issue at trial. The only issue was the payment of daycare expenses. The parties were to pay their proportionate share after any subsidies were applied.

[37] The parties had divided success on this issue.

Spousal Support

[38] The respondent took the position that no spousal support should be paid or, in the alternative, the spousal support should be at the low end of the scale for three years on an imputed income of \$90,100.

[39] The claimant sought spousal support at the mid range of the scale for an indeterminate period on an imputed income of \$172,137.

[40] In his submissions, the respondent asserts that the claimant was seeking spousal support based on an income above \$400,000. Again, I cannot find any reference to that number in the claimant's closing submissions.

[41] The claimant was awarded both retroactive and future spousal support. I awarded retroactive spousal support for the period from January 2018 to the date of trial and future spousal support for three more years. The spousal support award was at the low end of the scale on an imputed income of \$115,000.

[42] The claimant was slightly more successful on this issue.

Property Claims

[43] Since I found the parties had not lived together in a marriage-like relationship for more than two years, the claimant could only claim against the respondent's home and business on an equitable basis. Although there was some evidence of contributions made by the claimant, I ultimately found the claimant had not discharged her burden to establish an unjust enrichment and as such, her claims failed.

[44] There was also no basis in the evidence to support a claim for resulting or express trust.

[45] The respondent was successful on this issue.

Return of Tigger

[46] Tigger, a stuffed toy, was important to the respondent for sentimental reasons because it was a keepsake of his deceased first born. The claimant asserted she inadvertently took Tigger when she moved out of the respondent's home. Even if that was the case, the claimant should have returned Tigger as soon as the request was made. Her evidence was that she was going to keep it until the litigation was resolved and that it was only recently that she knew it was in her possession.

[47] There was no basis for the claimant to keep this keepsake from the respondent. She only returned it when I suggested during the trial that it was appropriate to return it.

- [48] The claimant's behaviour in respect to this issue was inappropriate. The respondent was successful on this issue.

F150 Truck

- [49] The truck was not a significant issue at trial, except that it was used by both parties to try and show the pre-trial actions of the other. The respondent took the truck, which shows a lack of care towards the claimant in leaving her without a means of transport in the winter. The claimant failed to respond to requests by the respondent about the financing of the truck, which shows a lack of care about the financial consequences to the respondent.
- [50] I made orders that the respondent be responsible for the debt owed and the claimant sign the papers to transfer the truck; however, these orders are not significant to the issue of costs.

Notice to Admit

- [51] Claimant's counsel served a notice of admit by fax on respondent's counsel. Respondent's counsel claims the notice to admit was not received by her. As such, she sought to withdraw the deemed admissions at trial. Respondent's counsel suggested there was an obligation on claimant's counsel to follow up to make sure she had received it. No such responsibility exists. Respondent's counsel provided a fax address for service and as such, had a responsibility to ensure mechanisms were in place in her office so that faxed documents were appropriately dealt with.
- [52] I ultimately ruled that the admissions in the notice to admit should not be relied upon. I found it was not in the interests of justice to rely on the admissions after hearing all of the evidence at trial. This ruling, however, does not excuse respondent's counsel's failure to properly reply to the notice to admit.
- [53] The notice to admit is not significant to the issue of costs.

Attendance at Daycare

- [54] At trial, the claimant expressed unhappiness that the respondent was attending at daycare on days that was her parenting time. It was not clear to me why the claimant was unhappy about this. I did not make an order restricting the respondent from attending at daycare. In my view, both parents have shown a lack of insight about how their behaviours can hurt their Child. I repeat what I said in the Reasons:
- [110] In my view, both parties have acted in ways that reflect poorly on them as parents when they should be acting as positive role models for their Child. I emphasize here that all of these negative past behaviours should cease. If this behaviour continues, it will adversely impact the Child. The parties should remain focussed on the Child's well-being rather than the disputes that may exist between each other.

[55] It was for this reason that I ordered both parents to take the "Parenting After Separation" course. The assertions in the costs submissions suggest that both parties may have not yet taken, or not yet provided evidence of taking, this course. If the parties have not taken the course they should, as it is clearly needed by both of them.

[56] Neither party was successful on this issue.

Destruction of Intimate Photos

[57] The respondent had intimate photos the claimant sent him during their relationship. The claimant made requests for the respondent to destroy the photos. The respondent refused and at trial he continued to have the photos on his phone. His explanation was unreasonable. He claimed he wanted to keep them in case the trial judge wanted to look at them or in case the claimant made some type of allegation of sexual abuse. The circumstances of how the photos were taken was provided at trial. The evidence does not bear repeating but suffice to say there is no reasonable basis for respondent's assertion that he needed to keep them. He did not voluntarily delete the photos. An order was made pursuant to s. 222 of the Family Law Act, S.B.C. 2011, c. 25 [FLA], that they be deleted and destroyed. This order should not have been necessary.

[58] The claimant was successful on this issue.

Substantial Success Overall

[59] The respondent was successful on the two key issues: the claims against his business and home and whether the Child would remain in Williams Lake. However, the claimant was successful on other issues, including child support and spousal support. I find that neither party was substantially successful overall. As such, I must consider whether there are reasons to depart from the conclusion that neither party is entitled to their costs.

Reasons to Depart from Default Rule

[60] Whether the court should depart from the default rule is a matter of discretion to be exercised judicially, considering factors such as hardship, earning capacity, the purpose of the award, the conduct of the parties in the litigation, and the importance of not upsetting the balance achieved by the award itself: *Gold v. Gold* (1993), 106 D.L.R. (4th) 452 (B.C.C.A.).

Frivolous Actions or Defences

[61] The respondent asserts that the claimant made frivolous claims and brought frivolous applications and this supports the respondent's entitlement to costs.

[62] The respondent asserts that the claimant's application for the parties to be deemed spouses for the purpose of property division under the FLA was clearly frivolous. In support the respondent relies on the following:

In the claimant's affidavit made on January 10, and filed January 11, 2018, the claimant swore that "[o]ur relationship began on August 18, 2015, or thereabouts, and we began to cohabit in May 2016". On January 24, 2018, respondent's counsel sent a letter to claimant's counsel that pointed out s. 3 of the FLA and stated that the parties did not live together for two years as required. On February 6, 2018, the claimant filed her notice of civil claim in which she claimed that the parties "began to live together in a marriage-like relationship on about May 2016" and "separated on November 23, 2017". On February 7, 2018, respondent's counsel wrote a letter to claimant's counsel advising that since the parties had not lived together for two years, the claimant was barred from making a property division claim under the FLA. On February 13, 2018, the claimant amended her notice of civil claim to claim that the parties had begun to live in a marriage-like relationship as of August 18, 2015 as opposed to May 2016.

- [63] The thrust of the claimant's evidence was that the parties were having a sexual relationship that began in the early summer of 2015. The claimant made a Facebook post saying "In a relationship since August 18, 2015" and her evidence was that this post was the public announcement of her relationship with the respondent. She claimed that the respondent told her and wrote love notes to her professing his love for her.
- [64] The respondent did not deny his declarations of love. His explanation was set out in the Reasons:
- [44] The claimant also testified that people at work knew she was in a committed relationship with the respondent because he sent her flowers, wrote her love notes, and placed post it notes on her work station. The respondent does not deny that he on many occasions wrote and told the claimant he loved her but denies that this was an indication of a serious relationship. His evidence is that he would tell a woman he loved her for the purpose of getting her to sleep with him. He agreed that he used this line on the claimant in order to trick her into sleeping with him.
- [65] I am not prepared to find, considering the deliberate deceitful actions of the respondent, that the claimant's attempt to establish a marriage-like relationship was frivolous in all of the circumstances.
- [66] The respondent asserts that the alternative equitable claims made against the respondent's property were equally frivolous. The legitimacy of the claimant's claims was dependent on the evidence that could be mustered. I disagree that the bringing of these claims were frivolous. There was a basis for making the claim being the contributions that the claimant made as provided for by the Supreme Court of Canada in *Kerr v. Baranow*, 2011 SCC 10. The claimant failed to establish that the respondent was enriched at her expense, but the claim was not necessarily destined to fail. The claims for resulting and express trust were weak but in my view, very little time was spend on those issues at trial.

Hardship and Earning Capacity of the Claimant

[67] The claimant argues that any cost award would further her "current state of being in 'dire need'". Financial hardship, on its own, is not a sufficient basis to exercise my discretion: *Brown v. Kucher*, 2016 BCSC 194 at para. 15. However, this factor supports my conclusion that neither party should be entitled to their costs.

Offers to Settle

Legal Principles

[68] Rule 16-1(7) provides that "Subject to subrule (9), costs of a family law case must be awarded to the successful party unless the court otherwise orders." Rule 11-1(4) provides that the court may consider offers to settle in exercising its discretion in relation to costs. These rules are in place "to encourage the early settlement of disputes by rewarding the party who makes a reasonable settlement offer and penalizing the party who declines to accept such an offer": *Hartshorne v. Hartshorne*, 2011 BCCA 29 at para. 25.

[69] Rule 11-1(5) provides that the court may do one or more of the following in a proceeding in which an offer to settle has been made:

- (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 proceeding 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 proceeding 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 proceeding 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 defendant and the judgment awarded to the plaintiff was no greater than the amount of the offer to settle, award to the defendant the defendant's costs in respect of all or some of the steps taken in the proceeding after the date of delivery or service of the offer to settle.

[70] Per R. 11-1(6), the court may consider the following when making an order pursuant to R. 11-1(5):

- (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.

[71] The court is also entitled to consider any other relative factors: C.P. v. RBC Life Insurance Company, 2015 BCCA 30 at para. 103.

History of Offers to Settle

[72] An "offer to settle" is defined in R. 11-1(1):

Definition

- (1) In this rule, "offer to settle" means
- (c) an offer to settle made after July 1, 2008 under Rule 37B of the former Supreme Court Rules, as that rule read on the date of the offer to settle, or made under this rule, that
- (i) is made in writing by a party to a family law case,
- (ii) has been served on all parties, and
- (iii) contains the following sentence: "The[party(ies)]....., ...[name(s) of party(ies)]....., reserve(s) the right to bring this 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."

[73] On June 21, 2018, the respondent made an offer to settle the claim on the following terms:

1. [The claimant] would not relocate with [the Child];
2. [The claimant] and [the respondent] would share parenting time with [the Child] on a week on and week off schedule;
3. [The claimant] and [the respondent] would Christmas holidays [sic] each year with one having [the Child] on Christmas and one having [the Child] on Boxing day, alternating each year;
4. [The respondent] will pay [the claimant] \$7,000 and [the claimant] will waive any current and future spousal support claims;
5. [The claimant] will waive all current and future property claims against [the respondent];
6. [The respondent] will be found to have an imputed income of \$64,000 and will pay to [the claimant] \$600 a month in child support and \$250 a month towards extraordinary expenses including daycare;
7. [The claimant] will sign over the 2016 Ford truck that she has been driving since the parties separated to [the respondent] alone, and [the respondent] will purchase and sign over the 2006 Escape depicted in the three photos attached to this email;
8. [The respondent] and [the claimant] will both be responsible for all debt in their name alone and will not hold the other one liable for debt in the other parties [sic] name;

9. [The claimant] return the Tigger Toy belonging to [the respondent's] deceased son, to [the respondent]; and
10. [The claimant] and [the respondent] will both withdraw their Family Law claims as well as their Provincial Court Small Claims action.
- [74] The claimant rejected the respondent's offer and made an offer to settle on September 28, 2018 on the following key terms:
- a. the claimant abandon all claims made against the property of the respondent;
 - b. the respondent's Guidelines income be imputed at \$90,100;
 - c. the claimant's Guidelines income be imputed at \$31,500;
 - d. the respondent pay the claimant child support in the amount of \$861 per month;
 - e. the respondent pay his proportionate share of the s. 7 childcare expenses;
 - f. no spousal support be payable but the claimant would be entitled to a review of spousal support after January 1, 2020;
 - g. the claimant be permitted to relocate to Kamloops with the Child;
 - h. the respondent have parenting time on alternate weekends from Friday to Monday and further three weeks of vacation time; and
 - i. the parties share parenting responsibilities with the claimant having the authority to make final decisions.
- [75] On October 12, 2019, the respondent responded that that the parties were nearly in agreement on the financial matters; however the respondent would not accept anything less than 50/50 parenting time with the Child.
- [76] On November 16, 2018, the respondent sought to resolve the issues relating to the financial matters on the following basis:

Property

[The respondent] is in agreement with your client's proposal as follows:

- i. The parties will mutually release each other from all property claims made within the Supreme Court action, save and except for the return of his deceased son's keepsake, the [T]igger toy;
- ii. [The respondent] will release [the claimant] from all claims made in Provincial Court action: 18-1668; and
- iii. [The respondent] will pay [the claimant] \$6000 as compensation for the vehicle she traded in for the now sold FI50 truck and [the respondent] will be solely responsible for the remaining debt on the FI50 truck \$9,168.59.

Child and Spousal Support

[The respondent] is in agreement with your client's proposal as follows:

- i. The Respondent's income shall be imputed in accordance with the Guidelines to \$90,100;
- ii. The Claimant's income shall be imputed in accordance with the Guidelines to \$31,500;
- iii. The Respondent shall pay to the Claimant child support for [the Child], in the amount of \$861 per month on the first day of every month;
- iv. Each party will pay their proportional share of any agreed upon s. 7 expenses, above and beyond medical, dental and daycare expenses, with the Respondent to pay 67% and the Claimant to pay 33%; and
- v. Each party shall provide their Tax Return, Notice of Assessment, and any other documents required to determine their respective income to the other by no later than the 1st day of June each and every year, commencing in 2019.

My client would also like to propose the following:

- vi. [The respondent] will pay 67% of any daycare expenses that cannot be paid for by Child Care Subsidy or any other source of public funding, in the event that daycare is required because both parties are either attending to their respective employment, or necessary medical or legal appointments; and
- vii. No spousal support will be payable and [the claimant] will waive any future claims to spousal support.

[77] On the same day, the claimant rejected the respondent's November 16, 2018 offer and provided a counteroffer in respect to the issue of the property:

- a) [The respondent] will pay [the claimant] \$12,000 as compensation for her property claims;
- b) [The claimant] will locate and return [the respondent's] keepsake [T]igger toy;
- c) The parties will mutually release each other from all other property claims made within the Supreme Court action; and
- d) [The respondent] will release [the claimant] from all claims made in Provincial Court action: 18-1688.

[78] The matter proceeded to trial on November 19-23 and November 26-28, 2018.

Analysis

[79] The respondent is seeking an award of special costs pursuant to R. 11-1(5)(b) after June 11, 2018. It is not clear to me on what basis the respondent seeks special costs as opposed to double costs under this rule.

- [80] Special costs were described by Justice Gomery in *Devathasan v. Devathasan*, 2019 BCSC 661:
- [385] Special costs are awarded to punish misconduct in the course of litigation that is reprehensible in the sense of "deserving of reproof or rebuke"; *Garcia v. Crestbrook Forest Industries Ltd.* (1994), 119 D.L.R. (4th) 740 (B.C.C.A.). Examples of reprehensible conduct justifying an award of special costs in family litigation can include dissipating assets, failing to disclose assets, misleading the court, and disobeying court orders; *Kim v. Hong*, 2013 BCSC 2248 at paras. 10-18; *Hu v. Dickson*, 2015 BCSC 218 at para. 9.
- [81] The respondent has not argued the claimant engaged in reprehensible litigation conduct deserving of special costs. Therefore, I will assume the respondent is seeking double costs under R. 11-1(5)(b).
- [82] Rule 11-1(5)(b) allows the court to award double costs; however, an award of costs simpliciter is an essential pre-requisite for an award for double costs: *Paul v. Pumple*, 2013 BCSC 1844 at para. 27. Since I have found the respondent is not entitled to costs under the "substantial success" analysis, R. 11-1(5)(b) does not apply.
- [83] However, R. 11-1(5)(d) allows the court to award costs after the date of an offer to settle when the offer is better than the result the other party obtained, and is not dependant on the party being substantially successful at trial: *Paul* at para. 29. I will go on to consider whether the respondent is entitled to costs under R. 11-1(5)(d).

Reasonable Acceptance

- [84] In determining whether the offer to settle was one that ought reasonably to have been accepted, the ultimate award should not be considered. Instead, the court must determine whether at the time that the offer was open for acceptance it was reasonable to accept it. Reasonableness may be assessed by considering factors such as the timing of the offer, whether it had some relationship to the claim (as opposed to simply being a "nuisance offer"), whether it could be easily evaluated, and whether some rationale for the offer was provided. This list is non-exhaustive, and not all factors may be relevant in a given case: *Hartshorne* at para. 27.
- [85] In *Hartshorne* at para. 28, the Court of Appeal noted that the trial judge found it relevant that the offer "provided sufficient information to permit the appellant to understand the content of the order."
- [86] The court is entitled to take into account the reasons why a party declined to accept an offer to settle. The court must consider whether those reasons are objectively reasonable: *C.P.* at para. 97.
- [87] The respondent's offer to settle included conditions that the Child remained in Williams Lake and the respondent have 50/50 parenting time and nothing less.

- [88] In my view, it was objectively reasonable for the claimant to reject this offer. It was extremely important to the claimant that she be able to further educate herself and to secure better employment for herself. The comments of Justice McEwan in *D.E.C. v. J.A.C.*, 2005 BCSC 190 are applicable:
- [23] Laudable as the objectives of Rules designed to promote settlement may be, and as important as predictability and conformity may be to that end, the inflexible application of Rule 37(26.1) to all custody and mixed custody and property cases may create greater mischief than the uncertainty it seeks to avoid. While *Cridge* clearly contemplates that family cases are within its scope, it is not a family case, and the line of cases that follow *Gordon v. Goertz* with their various articulations of the need for discretion in this class of family cases, are not addressed. While there may be exceptions, I think a determination of what is in the best interests of the children, where parents honestly cannot agree, is a realm of litigation that should fall outside Rule 37(26.1). We are careful to say that child support is the right of the child, not of the recipient parent. How can we talk of a parent's "entitlement" to costs, where the issue is not his or her advantage but the "best interest of the children?"
- [89] In many of the financial issues, the claimant took a reasonable approach to settlement in that she was willing to impute an income of \$90,100 to the respondent, give up any claim for retroactive spousal support, and putting off any current spousal support claim. These positions demonstrated a reasonable approach.
- [90] This factor goes against the respondent's entitlement to costs.

Terms of Settlement and Final Judgment

- [91] In considering the relationship between the terms of the settlement offer and the final judgment, the court may make an objective measurement of the reasonableness of the offer and the decision to reject it: *C.P.* at para. 99. To put it another way, the question to ask is whether the "declining party" would have been financially better off, on a global basis, if they had accepted the offer as compared to going to trial: *Kopp v. Kopp*, 2011 BCSC 889 at para. 7.
- [92] Ultimately the claimant was unsuccessful in the issue relating to relocation and parenting time. However, on the financial side she was more successful in respect to the imputed income of the respondent and her claim for retroactive and ongoing spousal support. The claimant's claim against the respondent's house and business were not successful but the respondent was not offering any compensation for that claim in his offer.
- [93] My view is that the claimant had no choice, but to proceed to trial and attempt to establish the appropriateness of the relocation claim. She should not be faulted in her attempt to do so.

[94] The terms of the final order in respect of financial claims were more beneficial to the claimant than the respondent's offer. This factor goes against the respondent's entitlement to costs.

Relative Financial Circumstances

[95] The respondent is clearly financially better off than the claimant. He operates his own successful business and owns his own home. The claimant was struggling financially before and at the time of trial. She was unemployed and had to rely on her father for support. She submits that she is still struggling and that her situation is dire and urgent because of a lack of income.

[96] This factor goes against the respondent's entitlement to costs.

Additional Factors

[97] In my view there was some "blameworthy conduct" of both parties, see Hartshorne at para. 35. The respondent:

- a. failed to provide evidence to support the deductions he sought to make against his income: Reasons at paras. 161-165;
- b. was admittedly deceitful in his relationship with the claimant: Reasons at para. 44; and
- c. kept intimate photographs of the claimant and had to be ordered to delete them: Reasons at para. 233.

[98] The most blameworthy action of the claimant was her failure to return the respondent's Tigger keepsake although demanded prior to the trial. There was no rational or reasonable basis for her to keep this keepsake for any period of time. The evidence does not support that she returned Tigger as soon as possible as asserted by the claimant in her written submissions.

[99] It is clear that the claimant's submissions on costs went well beyond appropriate costs submissions. Allegations of perjury, false statements, false motives, and other such allegations as against the respondent are not supported and should not have been made. The claimant advised she was unable to secure any legal assistance in the drafting of her submissions and states: "I know that this is of the upmost importance and have tried the best that I can given the circumstances at hand. I do not mean to offend your Ladyship the Respondent or Opposing Council [sic] with my Submissions on Costs". The respondent was forced to spend additional expense to reply to the claimant's cost submissions to address the claimant's allegations against the respondent and counsel. This should not have been necessary.

Conclusion

[100] I find the respondent's offer to settle does not affect my costs decision.

[101] I found there was no reason to vary the cost order made in the Reasons, i.e., that both parties assume their own costs. Although the respondent was successful on the key issues of relocation and whether the parties were spouses, he was not successful in a number of other claims respecting the financial affairs. Overall, I found that neither party was substantially successful.

[102] However, the respondent was forced to expend additional resources replying to the inappropriate submissions of the claimant. He should be compensated for that.

[103] In light of all of the factors and my discretion I make the following costs award:

- a. Each side will bear their own costs at trial; and
- b. The respondent is entitled a lump sum costs of \$1,000 for having to respond to the improper allegations made by the claimant in her cost submissions.

[104] The claimant's signature on the form of the order is waived but counsel for the respondent must serve on the claimant a copy of the filed order, by email.

"Forth, J."

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