

CANADA / JUDGMENT

D.Z. v. M.Z.

2022 BCSC 1510

COURT

Supreme Court of British Columbia

DECIDED

29 August 2022

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2022 BCSC 1510 D.Z. v. M.Z.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

D.Z. v. M.Z.,

2022 BCSC 1510

Date: 20220829

Docket: E202457

Registry: Vancouver

Between:

D.Z.

Claimant

And

M.Z., Company R,

Company C, Company 919 and Company 918

Respondents

Before: The Honourable Madam Justice D. MacDonald

Reasons for Judgment Re Costs

Counsel for Claimant:

M. Henricksen

Counsel for Respondents:

J. Lewis

Place and Date of Hearing:

Vancouver, B.C.

August 3, 2022

Place and Date of Judgment:

Vancouver, B.C.

August 29, 2022

Introduction

- [1] On May 3, 2022, following a five-day trial, I issued Reasons for Judgment, indexed as D.Z. v. M.Z., 2022 BCSC 706, in this family matter (the "Reasons"). The Reasons addressed a number of issues relating to family property and support. In the Reasons, I left it open to the parties to return before me for further direction if there were any issues with respect to implementation of the order (the "Order").
- [2] On August 3, 2022, the parties returned before me to ask for clarification and reconsideration of a number of issues. I addressed these issues in Supplementary Reasons for Judgment released on August 23, 2022, indexed as 2022 BCSC 1462.
- [3] At the hearing for reconsideration on August 3, 2022, the parties addressed costs. D.Z. sought costs of the action on the basis that she was either entirely successful or substantially successful on the most significant and time-consuming issues at trial. M.Z. sought costs as of February 3, 2022 and including the trial on the grounds that he made an offer to D.Z. on February 3, 2022 that she ought reasonably to have accepted.

Legal Principles

- [4] Costs are awarded to the successful party unless the court otherwise orders: R. 16-1(7) of the Supreme Court Family Rules [Rules]. Costs orders are within the discretion of the trial judge: Sampley v. Burns, 2018 BCCA 178 at para. 64; Kumagai v. Campbell Estate, 2021 BCSC 677 at para. 32. Rule 16-1(4) provides that the court may consider an offer to settle when exercising the court's discretion in relation to costs.
- [5] Rule 11-1(5) permits the court to make a variety of different costs orders when an offer to settle has been made:

11-1(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.

[6] Rule 11-1(6) sets out the factors the court may consider in deciding whether to make such an order: *C.P. v. S.P.*, 2021 BCSC 191 at para. 45. Rule 11-1(6) provides:

11-1(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.
- [7] In *S.A.M. v. J.A.M.*, 2017 BCSC 2348 at para. 7, Justice Bernard helpfully summarized the law with respect to costs in family proceedings:
- (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).
- [8] Directions regarding costs in the context of an offer to settle were provided in Sampley:
- [65] This Court has described an award of double costs as "a punitive measure against a litigant for that party's failure, in all of the circumstances, to have accepted an offer to settle that should have been accepted": Hartshorne v. Hartshorne, 2011 BCCA 29 at para. 25. In Hartshorne, the considerations set out in Supreme Court Rule 9-1(6) (the civil analogue to Rule 11-1(6) of the Supreme Court Family Rules) were characterized as the "factors to be considered in making an award for double costs": para. 26. The Court went on to focus on the question whether the offer was one that should have been accepted, stating that:
- [27] The first factor- whether the offer to settle was one that ought reasonably to have been accepted - is not determined by reference to the award that was ultimately made. Rather, in considering that factor, the court must determine whether, at the time that the offer was open for acceptance, it would have been reasonable for it to have been accepted: Bailey v. Jang, 2008 BCSC 1372 at para. 24; A.E. v. D.W.J., 2009 BCSC 505 at para. 55. As was said in A.E. v. D.W.J., "The reasonableness of the plaintiff's decision not to accept the offer to settle must be assessed without reference to the court's decision" (para. 55). Instead, the reasonableness is to be assessed by considering such factors 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. We do not intend this to be a comprehensive list, nor do we suggest that each of these factors will necessarily be relevant in a given case.

[Emphasis added.]

Analysis

[9] In the May 3, 2022 Reasons for Judgment I made the following orders, as amended by the Supplementary Reasons for Judgment:

a) Guardianship

- i. The parties are joint guardians of the children.
- ii. The parties share all parenting responsibilities under s. 41 of the FLA.

b) Parenting Arrangements

- i. Subject to the children's wishes, the parties should be moving towards a 2-2-5-5 shared parenting schedule.
- ii. If the parties cannot achieve a 2-2-5-5 schedule within six months of this Order, especially with respect to their younger daughter, they can apply to the court to resolve their dispute. I shall remain seized of the matter.

c) Guidelines Income

- i. M.Z.'s Guidelines income for support purposes from July 1, 2021 going forward is \$170,000.

ii. The parties will determine M.Z.'s Guidelines income in the future as follows:

- (1) The parties will exchange financial information as required by s. 21 of the Guidelines, including Company C.'s financial statements, no later than May 31st each year. If D.Z. believes there has been a sufficient increase in Company C.'s earnings to justify an adjustment, she may apply to this Court for an increase in support.

(2) M.Z.'s Guidelines income will be the greater of:

- (a) \$170,000; or
- (b) M.Z.'s Line 15,000 income less any dividends taken to fund compensation payments to D.Z. and associated tax on such dividends.

(3) Subject to scheduling, I will remain seized of the matter of M.Z.'s future Guidelines income.

d) Child Support

- i. Commencing March 1, 2022, and continuing until further court order or written agreement between the parties, M.Z. shall pay to D.Z. \$2,395 per month in child support for the two children.

ii. Once the children are spending at least 40% of their time with M.Z., his child support payments to D.Z. shall decrease to \$1,664 per month.

iii. M.Z. shall pay to D.Z. \$1,583 in retroactive child support for 2021.

e) Section 7 Expenses

- i. For 2021 and moving forward, M.Z.'s proportionate share of the children's s. 7 expenses is 68% and D.Z.'s share is 32%. Based on this percentage, M.Z. owes \$2,274.51 in retroactive s. 7 expenses for 2021.
- f) Spousal Support
 - i. Commencing March 1, 2022 going forward, M.Z. shall pay to D.Z. spousal support at the mid-range of the SSAG as articulated in these Reasons. Spousal support shall continue for an indefinite duration.
 - ii. M.Z. shall pay \$10,000 to D.Z. in retroactive spousal support.
- g) Security for Support Obligations
 - i. I decline to order that M.Z. maintain his life insurance policy with D.Z. as the sole irrevocable beneficiary.
 - ii. I order that M.Z. maintain his Empire Life Insurance policy with the children listed as beneficiaries. M.Z. shall continue to pay the premiums.
- h) Property Division
 - i. The funds held in trust from the sale of the family home shall be distributed as follows:
 - (1) \$47,000 to M.Z. to equalize prior distributions;
 - (2) \$4,725 shall be paid to D.Z. to reimburse her for the payment she made to Mr. Sturgess;
 - (3) \$4,725 to Mr. Sturgess;
 - (4) The order that \$3,675 of the funds held in trust be paid to R.K. is set aside; and
 - (5) The remaining \$26,356.26 will be divided equally between the parties (\$13,178.13 each).
 - ii. D.Z. will retain her 2017 Honda CRV. She will pay M.Z. \$11,111 for his interest in the vehicle.
 - iii. D.Z. will pay \$9,908 to M.Z. for his interest in her personal injury settlement.
 - iv. The order that D.Z. repay \$15,000 on the parties' shared credit card that was incurred to pay for her elective surgery is set aside.
 - v. The parties will retain the RRSPs in their name without further division.
 - vi. The parties will retain the bank accounts in their name without further division.
 - vii. M.Z. is to transfer 50% of the Aeroplan points to D.Z. If that is not possible, he must hold half of those points in trust for D.Z. and utilize them as directed by her.
 - viii. D.Z.'s SFU pension is divisible as family property from November 11, 2019 to July 18, 2020. D.Z.'s UBC pension is divisible as family property from December 1, 2002 to July 18, 2020. The pensions will be divided according to Part 6 of the FLA.

ix. The parties' CPP will also be divided according to Part 6 of the FLA.

x. Company R. Compensation Payment:

- (1) M.Z. owes D.Z. \$717,500 for her interest in Company R. This amount shall be reduced by 30% to account for distributive taxes. Therefore, the outstanding Compensation Payment owing to D.Z. is \$502,250.
 - (2) M.Z. shall pay \$30,000 to D.Z. each year until her interest in Company R. has been paid out. The first payment in the amount of \$30,000 is due within 60 days of this Judgment. After this payment, M.Z. should pay D.Z. \$30,000 on or before January 1, 2023 and each year thereafter until she has been fully compensated.
 - (3) If there is a change in ownership of Company C., the balance of the Compensation Payment becomes immediately due and payable.
 - (4) Until the Compensation Payment has been paid in full, I order that M.Z. hold his Class A shares in Company R. in a constructive trust for D.Z.
 - (5) D.Z. is entitled to prime plus 3% interest on her remaining shares in Company R. until they are fully paid out.
 - (6) If M.Z. defaults on his installments of the Compensation Payment, either party may bring an application before me, subject to scheduling, to determine what steps should be taken at that time.
- [10] In my view, D.Z. was the party who was substantially successful at trial. The most significant issue at trial was that of M.Z.'s Guidelines income. M.Z. took the position that his income for support purposes was only \$126,000 per year, whereas D.Z. argued that M.Z. was able to take at least \$250,000 per year out of Company C. Relying on Mr. Sturgess' expert evidence, this Court found that M.Z. had an available income of \$200,000 per year and apportioned \$170,000 per year as income for the purpose of child and spousal support. In my view, D.Z. was substantially successful on this issue.
- [11] Another significant issue at trial was the issue of how D.Z. was to be paid out for her interest in Company R. D.Z. took the position that M.Z. could pay out her interest in Company R. at a rate of \$50,000 per year. M.Z. took the position that D.Z. would have to wait until he sells his interest in Company C. to be paid out. This Court ordered that M.Z. pay a Compensation Payment to D.Z. in the amount of \$30,000 per year. In my view, D.Z. was substantially successful on this issue.
- [12] The parenting schedule was somewhat mixed at trial. However, M.Z. was the more successful party because I ordered that the parties move toward shared parenting which is what he desires. The parties had divided success on a number of more minor issues.
- [13] Overall, I find that D.Z. was substantially successful at trial on the matters that were most important to the parties. Pursuant to Rule 16-1(7), D.Z. is therefore entitled to her costs.

[14] However, M.Z. made the following offer of settlement dated February 3, 2022:

Children:

32. The parties will have joint guardianship of the children.
33. They will share all of the parental responsibilities as set out in section 41 of the Family Law Act.
34. [M.Z.] would like to have shared parenting as was the case when the parties initially separated but recognizes that they have expressed that they wish to reside primarily with [D.Z.]. He wishes to be respectful of their views. Until they are ready to have a more shared parenting arrangement, [M.Z.] seeks a structured parenting time so that he will have parenting time every second weekend from Friday after school to Sunday evening after dinner and during the week at times agreed on between the parents.
35. Neither parents will make disparaging remarks about the other parent to the children.
36. [D.Z.] will advise the children with the assistance of a counsellor that they have resolved all matters between them and that [M.Z.] did not "steal a million dollars from her or have an affair." These two comments have harmed the relationship between [M.Z.] and the girls.
37. Both parties will encourage the children to have a good and healthy relationship with the other parent.

Assets:

38. The assets of the parties should be divided equally.
39. The net proceeds of sale of the Matrimonial Home will be divided equally. [D.Z.] has received \$47,000 more than [M.Z.]. After the parties have jointly paid for Mr. Sturgess' updated reports and R.K.'s account from the monies held in trust, [M.Z.] will get the first \$47,000 and the balance will be divided.
40. The RRSPs as of the date of separation, will be divided equally. The RRSPs will be divided as follows:
41. The equity of the Honda will be divided equally.

RESP

42. RESPs are not family assets however [D.Z.] has removed \$20,000 from the children's RESP. The parties will now have \$20,000 less for their children's education.
43. [D.Z.] is to repay \$20,000 into the RESP within 21 days of receiving the first payment of her share of [Company R.].

Division of corporations:

44. Mr. Sturgess has valued the midpoint of [Company R.] inclusive of its direct and indirect interests in [Company C.], 918 and 919 (the "Corporation"), to be \$1,435,000.
45. Therefore, [D.Z.]'s share of the Corporation is \$717,500.
46. However, the dividends will attract distributive tax of approximately 43% (the "Corporate Share") should they be paid out by way of dividends.
47. For the purposes of this offer, [M.Z.] proposes to pay Compensation Payment from the Corporation by taking out dividends. He will pay this in no less than seven years, sooner if possible.
48. [M.Z.] will pay to [D.Z.] interest of 2% per year annually and calculated from the date of the settlement agreement on the remainder of the Compensation Payment until the Compensation is paid out in full ("Interest Payment").
49. The dividends withdrawn to pay the Compensation Payment will not be included as income for support purposes. [M.Z.] will have income imputed to him of \$163,000. This means he can have income of up to \$163,000 without the support changing. Whatever dividend he takes out to pay [D.Z.] the compensation Payment over the \$163,000 will not be included in his income for support purposes.
50. [D.Z.] will take all steps necessary to transfer her shares in [Company R.] to [M.Z.] upon final payment of the Compensation Payment and Interest Payment being made in full.

Pension:

51. The SFU and UBC pensions in [D.Z.]'s name will be divided as per Part 6 of the Family Law Act with the entitlement period of December 1, 2002 to July 2020.
52. The parties will divide their CPP equally.

Support:

53. [D.Z.] is entitled to spousal support in the mid range of the Spousal Support Advisory Guidelines for 8 and a half years, or until [M.Z.]'s retirement, whichever is soonest.
54. We have calculated [M.Z.]'s income as \$163,000 per annum. This was done by analyzing what the parties have drawn over the past few years. This is a very generous estimate given the uncertainty of covid. His income in 2020 was affected by covid and was estimated to be \$120,000 by Mr. Sturgess. In fact, in 2020, [Company C.] did not make a profit.
55. Master Harper pointed at the TMC that it is not fair to ask [M.Z.] to pay support based on a higher income while he is paying her compensation from the corporation at the same time.
56. Support will be based on [M.Z.]'s income of \$163,000 and [D.Z.]'s income of \$57,882.
 - a. Based on the children residing with [D.Z.] primarily, [M.Z.] will pay to [D.Z.]:

- i. \$2,312 in child support, and
- ii. \$1,387 in spousal support.
- b. Spousal support will be paid until [M.Z.] is 65 at which time it will end absolutely and child support will be paid for as long as the Children are children of the marriage.
- 57. Spousal support will be taxable to [D.Z.] and tax deductible to [M.Z.]
- 58. The parties will exchange their tax returns annually by May 30th and adjust child support based on their line 15000 incomes, deducting dividend income paid to [M.Z.] if such dividends are paid to [D.Z.] for purposes of the division of the corporate asset.

The assets will be divided as follows:

- 59. [M.Z.] will pay to [D.Z.] \$367,412.31 for the division of all assets as set out in the attached excel spread sheet (Schedule A) and after taking distributive tax into account.
- 60. [M.Z.] will pay half of the outstanding sec 7 expenses of \$4,068.87 from his share of the monies in trust. His share will be \$2,034.43. In addition, the school expenses should be shared once [D.Z.] has advised [M.Z.] of the amounts.
- 61. Each party will keep the RRSP in their own name. This will give [D.Z.] \$6,151 more than [M.Z.].

In terms of Rule 11-1 of the Supreme Court Family Rules, [M.Z.] reserves 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.

- [15] Pursuant to Rules 11-1(5) and (6), I must determine whether D.Z. ought reasonably to have accepted this offer at the time it was made. D.Z. submits that this offer was made prior to the examination for discovery of M.Z. and therefore not all the information was available to D.Z. to assess the offer at the time it was made. Conversely, M.Z. argues that his offer was reasonable and ought to have been accepted at that time. M.Z. argues that his offer was equal or better than this Court's final determination.
- [16] In my view, D.Z. should have accepted the offer at the time it was made. The offer was made shortly before trial. Although D.Z. may not yet have had an opportunity to conduct an examination for discovery of M.Z., she had sufficient information to assess the offer. She did not indicate to me what she learned in the discovery process that would have affected her decision.
- [17] The parties have few assets and it therefore would have been in both their interests to avoid the financial and emotional cost of trial. In my view, the offer is very similar to the orders this Court made following trial:

- M.Z.'s Guidelines income was close to what was awarded at trial;

- the child support payments are similar;
- M.Z.'s offer provided for spousal support at the mid-range which is what was awarded at trial;
- the parenting schedules both work towards shared parenting; and
- the offer and the award provided for compensation payments over a period of time.

- [18] D.Z. argues that the offer was unreasonable because it was open to M.Z. to not make any compensation payments for seven years. In my view, M.Z. would have been motivated to pay the compensation payments sooner than later in order to avoid interest costs. Further, D.Z. would have received interest on any outstanding compensation amount until she was paid out and she would have retained her shares in the company until she was fully paid out. For these reasons, I think D.Z. ought reasonably to have accepted this offer when it was made.
- [19] Rule 11-1(5) provides the court a number of options where an offer to settle has been made. In my view, although D.Z. was substantially successful at trial and is entitled to her costs pursuant to Rule 16-1(7), she should have accepted M.Z.'s offer to settle on February 3, 2022.
- [20] The Court of Appeal has held that "a plaintiff who rejects a reasonable offer to settle should usually face some sanction in costs, even in circumstances in which it cannot be said that the plaintiff should have accepted the offer": *Wafler v. Trinh*, 2014 BCCA 95 at para. 81. It is open to this Court to determine how much weight to place on this factor: *British Columbia v. Salt Spring Ventures Incorporated*, 2015 BCCA 343 at para. 20.
- [21] This is not a case that justifies double or special costs. Rule 11-1(5)(d) states that "if the party who made the offer obtained a judgment as favourable as, or more favourable than, the terms of the offer" that party may be awarded costs following the "date of delivery or service of the offer to settle". Here, I find the settlement offer was reasonable and should have been accepted at the time of the offer. However, viewing the offer globally, it is similar to but not as favourable or more favourable than the award made following the trial.
- [22] Special costs are awarded as a means of penalizing a party's conduct in the litigation. In my view, in light of the final award, D.Z.'s rejection of M.Z.'s settlement offer does not rise to such a level that D.Z. ought to be penalized. The award made after trial does not reach the threshold required by Rule 11-1(5)(d), but it was very close. Consequently, Rule 11-1(5)(a) applies and D.Z. ought to be deprived of some or all of her costs and disbursements after the date of the offer.
- [23] Based on the above, as well as the analysis in *Wafler*, I find the fairest outcome is to deprive D.Z. of her costs and disbursements after the date of the settlement offer. As a result, both parties will bear their own costs and disbursements after February 3, 2022.

"D. MacDonald J."

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Prepared on 29 October 2026 · Esheria