
CANADA / JUDGMENT

Dhillon v. Dhillon

2014 BCSC 1707

COURT

Supreme Court of British Columbia

DECIDED

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2014 BCSC 1707 Dhillon v. Dhillon

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Dhillon v. Dhillon,

2014 BCSC 1707

Date: 20140910

Docket: E121773

Registry: Vancouver

Between:

Sundeep Dhillon

Claimant

And:

Kiranjeet Kaur Dhillon

Respondent

Before: The Honourable Madam Justice Watchuk

Reasons for Judgment

Counsel for the Claimant:

M.M. Patton

Counsel for the Respondent:

G.A. Phillips

Written Submissions:

Vancouver, B.C.

May 27, 2014

June 11, 2014

Place and Date of Judgment:

Vancouver, B.C.

September 10, 2014

Introduction

- [1] In this family law case, Reasons for Judgment were released on April 30, 2014, and are reported at 2014 BCSC 740. With regard to the issue of costs, I said as follows:
- [118] Unless there are matters of which I am not aware, as success has been mixed, each party will bear their own costs. If a different cost result is sought, submissions in writing may be made within 30 days of these Reasons with reply submissions 15 days thereafter.
- [2] The parties have subsequently filed written submissions with regard to costs. The husband submits that he was the substantially successful party in the litigation and seeks an award of costs in his favour.
- [3] The wife submits that as the parties experienced mixed success at trial, they should bear their own costs. In the alternative, the wife submits that if the husband is found to have been substantially successful at trial, there are reasons to otherwise order that the parties should bear their own costs. Those reasons are that an order of costs would cause the wife significant hardship, particularly in light of the disparity in income-earning capacity between the parties, and that it would upset the balance of the division of assets awarded at trial and the fairness achieved by the existing costs award.

Discussion

- [4] In support of his submission for costs, the husband notes that there were four major issues at trial:
1. Division of assets including the valuation date of the family residence;
 2. Whether or not equal division of the family residence would be unfair, and whether or not there is any reason pursuant to s. 65 of the FRA to reappportion the family home 100% in favour of the wife;
 3. The division of debt including any amounts owed to the wife's family as family debt; and
 4. Spousal support with regard to entitlement, quantum and duration.

- [5] The wife does not take serious issue with the husband's submission with regard to his success. Her submissions are focused on the potential hardship, because of her earning capacity, that would be imposed by a cost award in favour of the husband, and the balance that the existing costs award attempted to achieve.
- [6] In *MacLean v. Mio*, 2011 BCSC 148, the law regarding costs in a family law matter was thoroughly summarized by Pearlman J. at paras. 17-31:
- [17] Rule 16-1(7) of the Supreme Court Family Rules provides:
- (7) Subject to subrule (9), costs of a family law case must be awarded to the successful party unless the court otherwise orders.
- [18] In family law proceedings, Rule 16-1(7) replaced Rule 57(9) of the former Supreme Court Rules, which provided:
- (9) Subject to subrule (12), costs of an incidental to a proceeding shall follow the event unless the court otherwise orders.
- [19] Under the former Rule 57(9), costs normally followed the event, and went to the party who enjoyed "substantial success": *Gold v. Gold*, 82 B.C.L.R. (2d) 180, 32 B.C.A.C. 287.
- [20] The respondent suggests that the omission from Rule 16-1(7) of reference to costs following the event means that the determination of which party is "successful" in family law cases may no longer require an analysis of which party was "substantially successful" in the event. The respondent has not proposed an alternative test that would apply to a family law case involving multiple issues or matters in dispute.
- [21] Rule 14-1(9) of the Supreme Court Civil Rules provides that:
- (9) Subject to subrule (12), costs of the proceeding must be awarded to the successful party unless the court otherwise orders.
- [22] Rule 16-1(7) of the Supreme Court Family Rules and Rule 14-1(9) of the Supreme Court Civil Rules both state the same principle: the successful party must be awarded costs unless the court otherwise orders.
- [23] In both family law cases and civil proceedings, the court's discretion to order otherwise must be exercised judicially: *Gold v. Gold*, at para. 19.
- [24] In *Aschenbrenner v. Yahemech*, 2010 BCSC 1541, Mr. Justice Metzger in awarding costs under Rule 14-1(9) applied the law as developed under the former Rule 57(9). Referring to Rule 14-1(9), Metzger J. at para. 13 said this:

While the Rule itself does not include the term "substantial success" under the former Rule 57(9), it was held to be a necessary and sufficient condition for an award of costs under Rule 57(9) that success in the outcome of the trial be "substantial": see *Gold v. Gold*, 82 B.C.L.R. (2d) 180, 32 B.C.A.C. 287.

- [25] In Aschenbrenner, Metzger J. in determining whether to award costs to the successful party, applied the four part test stated by Bouck J. in *Fotheringham v. Fotheringham*, 2001 BCSC 1321 at para. 46:
1. First, by focusing on the "matters in dispute" at 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.
- [26] Other recent decisions of this court which have applied the substantial success test include *Chen v. Beltran*, 2011 BCSC 41, at paras. 9 and 10, an award of costs under Rule 14-1(9) of the Supreme Court Civil Rules, and *B.K.A. v. D.M.A.*, 2011 BCSC 17, at paras. 33-35, an award of costs under Rule 16-1(7) of the Supreme Court Family Rules.
- [27] Cases decided under the former Rule 57(9) established that the principles governing the award of costs in family law proceedings are the same as those applicable to other civil litigation: *Gold v. Gold* (1993), 82 B.C.L.R. (2d) 180 (C.A.) at para. 19; *Karpodinis v. Kantas*, 2006 BCCA 400 at para. 4.
- [28] The Court of Appeal has recently held that *Gold* applies to custody cases, and that there is no general principle that costs should not be awarded in a case where custody is in issue: *C. (S.J.) v. A. (S.C.)*, 2010 BCCA 31 at para. 62, and *Reis v. Bucholtz*, 2010 BCCA 115 at para. 86.
- [29] Rule 14-1(9) of the Supreme Court Civil Rules and Rule 16-1(7) of the Supreme Court Family Rules state an identical test for the award of costs. I conclude that the principles applicable to the award of costs in a family law case remain the same as those applicable in other civil proceedings.
- [30] Following the reasons for judgment of Metzger J. in *Aschenbrenner*, I also conclude that in determining which party is "successful" under Rule 16-1(7), the court must still consider, in a case involving multiple issues, whether one party has been "substantially successful". That requires an objective comparison of the relief granted and results obtained by the parties with the submissions made at trial: *Fotheringham*, at paras. 28, 60; *Rattenbury v. Rattenbury*, 2001 BCSC 593 at paras. 20, 21.
- [31] In *Fotheringham*, at para. 45, Bouck J. described substantial success as 75 percent or better, to be determined by the trial judge looking at the disputed matters globally, and weighing their relative importance to the parties.

[7] I turn first to the issue of substantial success. The matters in contention at the trial and results are well set out in the submissions of the husband, with some editing, as follows:

1. Valuation of the Matrimonial Home

- a) The Wife sought to have the value of the matrimonial home set at \$508,000.00, this being the value given to the home, pursuant to the Municipal assessment in 2012, and to have the valuation date set as July 2012, the date of the s. 57 declaration.
- b) The Husband sought to have the February 2013 appraised value of \$535,000.00 set as the valuation at trial particularly in light of the fact that he had been making the mortgage payment and payments for upkeep and utilities for the previous 19 months.
- c) The court ordered that the matrimonial home be valued at \$535,000.00 and referred specifically to the fact that the Husband had been making the mortgage payment and upkeep and utility payments.
- d) The Husband was fully successful on this issue.

2. Reapportionment of the Matrimonial Home 100% to the Wife

- a) The Wife claimed a 100% reapportionment of the matrimonial home in her favour to compensate her for alleged economic disadvantages suffered from the marriage, these being: the Claimant's greater earning power, her lost employment opportunities, her reduced earning power and her reduced income earning ability.
- b) The Husband sought an equal division of the matrimonial home on the basis that the Wife had suffered no economic disadvantage from the marriage.
- c) The Court found that the Wife had suffered no economic disadvantage from the marriage and ordered the matrimonial home to be divided equally.
- d) The Husband was fully successful on this issue.

3. Division of debt

- a) Monies claimed by the Wife to be a family debt owed to her parents.
- i) At trial, the Wife claimed that \$96,386.07 was owed to her parents and that all of that amount was a family debt. In February, 2013, there was no debt listed in the Respondent's financial statement; in her July, 2013 financial statement, the Wife claimed that \$47,500.00 was owed to her parents. One week before trial the Husband was provided with a list of alleged debts and advised that the amount being claimed to be owed to the Respondent's parents had increased to \$96,386.07. This was the first notification to him of the individual amounts comprising the alleged debt. One debt was 10 years old, one was eight years old and a number of the alleged debts were from after separation.

ii) At trial, the Husband agreed to be responsible for one-half of a portion of the listed amounts (\$12,011.00) because they related to expenses for the matrimonial home. He opposed repaying all other monies.

iii) Other than the amounts in which the Husband had agreed to share, the only portion of the \$96,386.07 which the court found to be a family debt owed to the Respondent's parents was the sum of \$700.00 which was a sponsorship fee paid on behalf of the Husband by the Respondent's father. The total amount ordered to be a family debt was \$12,711.00 (of which \$12,011.00 had already been agreed to by the Claimant). This is \$84,675.07 less than claimed by the Wife and only 13% of the total amount claimed.

iv) Looked at another way, the \$700.00 which the Claimant was ordered to pay over and above what he had agreed to pay was only 0.7 of the total claimed by the Respondent.

v) The Husband was 87% successful on this issue. (Or 99.3% by the second calculation)

vi) Additionally, a considerable portion of the trial was spent on the issue of monies claimed by the Wife to be owed as a family debt to her parents. It is submitted that the Wife's claim on this issue was not reasonable, not supported by her evidence and put the Husband to unnecessary legal fees both for time spent at trial and in the preparation for trial.

b) Student loan

i) Of the \$96,386.07 claimed by the Wife to be a family debt owed to her parents, \$11,575.07 [was] in relation to funds provided to the Wife by her parents for her tuition fees for her UK university education. Separate submissions on this issue were delivered by counsel following trial.

ii) The Husband denied that these funds were a family debt.

ii) The Court held that the \$11,575.07 was not a family debt.

iii) The Husband was fully successful on this issue.

c) Moneys loaned by the Claimant's uncles for the purchase of the Matrimonial Home

i) The Wife did not dispute that monies had been loaned to the parties, towards the purchase of the family home, by the Husband's uncles. However, she claimed that the amounts had been forgiven by the uncles.

ii) The Husband was firm in his position that the loans had not been forgiven.

iii) At some point during the trial, the Wife conceded that the loans were still owed to the uncles and had not been forgiven. The preparation of the Husband's direct examination and the preparation of the uncle's direct examination and for his appearance at trial had been costly and unnecessary.

iv) The Husband was fully successful on this issue.

4. Spousal Support

- a) The Wife claimed indefinite periodic spousal support on compensatory and non-compensatory grounds on the basis that she had suffered economic disadvantage as a result of the marriage and that the Husband had gained an economic advantage as a result of "sacrifices" which she had made during the marriage. She sought that such support be subject to a periodic right of review commencing after five years.
 - b) The Husband sought that, should the court order spousal support, it be time limited to 12 months with no review. (Claimant's opening submissions)
 - c) The Court found that there was no economic disadvantage to the Wife arising out of the marriage and no economic advantage conferred on the Husband to give rise to a claim for compensatory spousal support. Spousal support was ordered for a 12 month period during the Respondent's schooling. No review was ordered.
 - d) The Husband was fully successful, as what was ordered was what he had proposed in the alternative in his Opening Submissions. Alternatively, the Husband was substantially successful on this issue.
- [8] In applying the law as set out in *MacLean*, I find that the husband was substantially successful. He had complete success on the issues of the valuation of the matrimonial home, the valuation date, and the reapportionment of the matrimonial home on an equal basis. With regard to family debts, the husband was fully successful on the portion of debt payable to his uncles and on the amount claimed by the wife to be a family debt in relation to her loan from her parents for her tuition fees. Of the total amount of debt claimed by the wife to be family debt, \$96,386.07, other than the \$12,011 agreed to by the husband, only \$700 was found by the court to be family debt. The husband was substantially successful on the issue of family debt.
- [9] With regard to spousal support, the husband was substantially successful on this issue as spousal support was limited to twelve months with no review.
- [10] However, I note with regard to spousal support that the husband's concession of entitlement to spousal support did not occur until the commencement of the trial. Preparation time was therefore incurred by the wife who understood until that time that spousal support was entirely in issue. Prior to the trial, he also sought 75% of the assets rather than an equal division.
- [11] The wife submits that even if the husband was substantially successful, I should take into account her financial circumstances and ability to earn income. In her submission that an award of costs would cause hardship, she cites *Gold v. Gold* (1993), 82 B.C.L.R. (2d) 180, (C.A.) and *Richards v. Richards* (1993), 20 C.P.C. (3d) 332, (B.C.S.C.). In *Richards*, the court declined to award party-and-party costs to the husband because this would cause the wife significant hardship. The hardship to the wife resulted from the fact that she had not worked full-time for several years, had not made a financial success of her small catering business

operated from the home, and would probably not be able to buy her husband's interest in the matrimonial home so as to remain there (at paras. 4, 7-8).

- [12] The wife also submits that the issue of hardship may be considered in light of any discrepancies in earning-capacity between the successful and unsuccessful parties. In *Lilley v. Lilley*, [1994] B.C.W.L.D. 663, (S.C.), the court declined to award costs to the defendant because doing so would have worked a hardship on the plaintiff. The court took into account the plaintiff's history of low-paying jobs, the upcoming cessation of spousal support and the income-earning discrepancy between the plaintiff and the defendant. In *Lilley*, the defendant's income was substantial and was estimated to be approximately five times higher than the plaintiff's income. While the court in that case explicitly recognized that the fact that one party may have a greater earning capacity than the other does not necessarily dictate that discretion should be exercised against awarding costs, that discrepancy may be taken into account in light of any potential hardship that may arise if party-and-party costs are awarded (at paras. 24-25).
- [13] In deciding whether to exercise its discretion with respect to awarding the successful party costs, the court may take into account the purpose of such a costs award and the balance achieved by the award itself (*Gold* at para. 20). The court has declined to award costs to either party in situations where such an award would upset the division of assets ordered. This was the situation in the recent case of *Hanan v. Anderson*, 2014 BCSC 828 (at para. 20).
- [14] The court has also found it appropriate to order that each party bear his or her own costs in light of the importance of preserving the balance that was achieved by the award itself. For instance, in *Gosling v. Gosling*, 2006 BCSC 40, the court ordered that each party bear their own costs because "every effort was made in the resolution of the issues to fashion a fair and just solution which would enable each party to become or remain economically independent and self-sufficient" (at paras. 12-13).
- [15] Even in cases where one party has achieved substantial success, the court may nonetheless award only a portion of the successful party's costs: *Cohen v. Cohen* (1995), 15 R.F.L. (4th) 84 (B.C.C.A.), *Newstone v. Newstone*, [1994] B.C.J. No. 139 (C.A.) and *Rolls v. Rolls*, [1996] B.C.J. No. 292 (C.A.).
- [16] The unsuccessful litigant has the onus of persuading the court to exercise its discretion in favour of departing from the usual rule that the successful litigant should be awarded costs: *O'Brien v. O'Brien* (1993), 88 B.C.L.R. (2d) 183 at para. 7. In determining whether or not this onus has been met, I have weighed all relevant facts in evidence before me.
- [17] In this case, the husband's income-earning capacity significantly outweighs that of the wife. As the wife intends to return to school to complete the necessary courses to become qualified to teach in British Columbia, her income for the year that she will be taking courses will be approximately one-quarter of her present salary earned through part-time jobs. The wife intends to buy out the husband's one-half interest in the family residence. Re-financing the family residence will be necessary. The wife has borrowed heavily from her

parents and it is likely that she will continue to do so, at least until she completes her courses.

- [18] I accept that an award of costs would cause the wife some financial hardship as she completes her education and establishes herself in a new career. However, she will have equity or proceeds in or from the matrimonial home of approximately \$39,000. Her parents are willing to assist on an ongoing basis, and her income-earning capacity will increase after the one further year of education.
- [19] Taking into account that there is some financial hardship to the wife, the present and future earning capacity of both parties, the equal division of the matrimonial home, and the award for spousal support, I award to the husband 75% of his costs and disbursements.

"The Honourable Madam Justice Watchuk"

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