
CANADA / JUDGMENT

G.G. v. M.A.

2014 BCSC 2074

COURT

Supreme Court of British Columbia

DECIDED

4 November 2014

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

2014 BCSC 2074 G.G. v. M.A.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

G.G. v. M.A.,

2014 BCSC 2074

Date: 20141104

Docket: E111901

Registry: Vancouver

Between:

G.M.G.

also known as G.M.A.

Claimant

And

M.A.

Respondent

Before: The Honourable Mr. Justice Butler

Ruling on Costs

The Claimant:

Appearing In Person

Counsel for the Respondent:

Paul Daltrop

Written Submissions of the Respondent dated:

June 27, 2014

Written Reply Submissions of the Claimant dated:

July 14, 2014

Written Reply Submissions of the Respondent dated:

July 21, 2014

Place and Date of Judgment:

Vancouver, B.C.

November 4, 2014

- [1] Following a lengthy trial in this contentious family dispute, I delivered reasons for judgment which are indexed at G.G. v M.A., 2014 BCSC 1023 (the "Reasons"). The facts are set out in great detail in the Reasons, and I will only summarize them briefly here.
- [2] The claimant, G.G. and the respondent, M.A. were married in 2004 and subsequently had two children, P.A. and M.A. The claimant advanced claims related to custody of the children, the division of assets, spousal support, and child support.
- [3] A central feature of the dispute was the enforceability of an agreement signed between the parties shortly before their marriage which provided that the parties were to be financially independent (the "Marriage Agreement"). The Marriage Agreement further provided that in the event of a marital breakdown, no spousal support would be paid. Notably, the Marriage Agreement made no reference to the possibility of children.
- [4] I considered six issues at trial, including:
1. Credibility of the claimant and respondent;
 2. Custody of the children and how parenting time should be shared;
 3. The division of assets;
 4. The income of each party for the purposes of calculation of support;
 5. Child support and what amount was owing retroactively; and
 6. The appropriate amount and duration of spousal support.

- [5] As is common with high conflict family law disputes, both parties alleged the other lacked credibility in respect of critical evidence in relation to the division of property and parenting time. I ultimately concluded the claimant's evidence was more credible than that of the respondent. Although the claimant exhibited poor behaviour at times, her evidence regarding the underlying facts was generally accurate and consistent. I found her to be a credible witness.
- [6] By contrast, I found the respondent to be an unreliable witness. I concluded he attempted to mislead the Court regarding the existence of a loan on the list of his assets and liabilities which was a schedule to the Marriage Agreement. I did not accept his evidence about the parties' intentions about having children at the time of entering into the Marriage Agreement. I found his evidence generally to be less reliable than the claimant's and concluded he was not being forthright with the Court regarding his employment status as of the conclusion of the trial.
- [7] The issue of credibility was critical to the ultimate decision on many of the substantive issues. Indeed, a great deal of time was taken up by direct and cross-examination which focused on the credibility of the parties.
- [8] I summarized my decision on the six issues at para. 173 of the Reasons. I made orders respecting joint custody and an equal shared parenting arrangement. I found that the claimant was entitled to the equivalent of 30% of the value of the family home and was also entitled to spousal support. I awarded lump sum spousal support in the amount of \$110,000. I made findings regarding the parties' incomes which, while hotly contested, were not really the subject of significant dispute. I ordered the claimant to repay \$10,247 to the respondent as a retroactive adjustment for child support overpayment.
- [9] At the conclusion of the Reasons, I made the following costs order even though I had not received submissions on costs:
- [174] The claimant has been substantially successful and is entitled to costs throughout at Scale B.
- [10] Subsequent to the delivery of the Reasons, the respondent sought leave to make submissions on costs. I allowed the parties to make written submissions. The positions adopted by the parties in the submissions are summarized below. I have considered the parties' submissions, but have not been persuaded to alter the costs ruling set out in the Reasons. That ruling stands. The claimant is entitled to costs throughout at Scale B.

Position of the Respondent

- [11] The respondent seeks the costs of these proceedings. In the alternative, he seeks costs up to the date of the court order which permitted the claimant to amend pleadings. In the further alternative, the respondent seeks an order for costs for at least part of the proceeding.

- [12] The respondent's arguments are based in part, on an offer to settle he made on August 31, 2012 (the "Offer"). The respondent contends the Offer was one that ought to have been accepted by the claimant. The claimant argued that the Offer is not proper insofar as it does not contain the language specified in Rule 11-1(1)(c) of the Supreme Court Family Rules. In response to this argument, the respondent says the letter contained sufficient information for the claimant to appreciate it might have cost consequences.
- [13] The respondent also argues he was substantially successful in these proceedings, because:
1. the claimant initially sought sole guardianship and custody of the children, but the result at trial was a shared parenting arrangement;
 2. the claimant sought half of the family assets which she said should include all of his assets. At trial, she was granted only a 30% interest in the family home and her claim to his financial assets was dismissed;
 3. the incomes imputed to the claimant and the respondent were similar to those set out in the Offer; and
 4. the spousal support ordered at trial was similar to the amount proposed in the Offer.
- [14] In the alternative, the respondent argues he should be entitled to costs accrued until October 7, 2013 when I granted the claimant's application to amend her pleadings. He says that until that order was made, there was no claim before the Court to have the Marriage Agreement set aside pursuant to s. 65 of the Family Relations Act, R.S.B.C. 1996, c. 128.
- [15] The respondent also argues the litigation was prolonged because of the claimant's difficult behaviour. He says costs should be awarded to him as a result of this behaviour. In essence, he says the claimant acted improperly and adopted unnecessarily adversarial positions which prolonged the trial. The respondent also maintains he attempted alternative dispute resolution to avoid the need for a trial, but that the claimant refused to participate. He says this is a factor I should take into account in awarding costs.

Position of the Claimant

- [16] The claimant says she should be entitled to costs of the action throughout as she was substantially successful. She says she succeeded on the issues which occupied most of the Court's time: credibility, parenting and asset division. She argues that, when considering substantial success on parenting issues, the position taken by the respondent at trial is more significant than the position initially taken in the Offer. Although the Offer proposed shared parenting, the respondent resiled from this at trial and argued that he should be the primary parent with sole custody. He did not succeed on that issue.
- [17] The claimant argues this Court should have no regard for the respondent's Offer because it did not comply with the provisions of Rule 11-1(1)(c). In particular, she says that neither the Offer, nor the letter which enclosed it, contained the specific language indicating that the

respondent was retaining the right to bring the Offer to the attention of the Court for consideration in relation to costs. The claimant says her status as a self-represented litigant is relevant to determining this issue. In light of her lack of legal representation, it was incumbent upon the respondent to take extra care to ensure that the Offer was understood to be one which would be brought to the Court's attention on the question of costs. The claimant argues the respondent failed to do so and ought not to be permitted to rely on the Offer for the purposes of this cost consideration.

- [18] In the alternative, the claimant says the Offer was not one that ought reasonably to have been accepted. It came prior to examinations for discovery, and in any event, offered an inadequate amount to compensate her for her claim to family assets.

Issues

- [19] The issues before me are:

1. Did the claimant or respondent achieve substantial success in these proceedings?
2. Is there any reason to deprive the claimant of costs?

Issue 1. Did the Claimant or Respondent achieve substantial success in these proceedings?

- [20] As set out in Rule 16-1(7), "costs of a family law case must be awarded to the successful party unless the court otherwise orders." The decision in *Gold v. Gold* (1993), 82 B.C.L.R. (2d) 180 (C.A.), sets out the proper approach to cost awards in family litigation. That approach should be the same as in civil cases; costs should be awarded to the successful party, unless the court otherwise orders. In considering whether to make a contrary order the court should take into account factors such as hardship, earning capacity, the purpose of the award, the conduct of the parties in the litigation, and the importance of maintaining the balance achieved by the award itself: *Gold* at paras. 19-20. In *Gold*, the Court of Appeal concluded the plaintiff was "substantially successful" and so should not have been deprived of her costs.

- [21] Many cases have considered what amounts to substantial success. The four-step approach to determine whether a party achieved substantial success suggested by Bouck J. in *Fotheringham v. Fotheringham*, 2001 BCSC 1321, is often applied in family law cases. This approach is summarized at para. 46:

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.

[22] The Fotheringham approach continues to be applied in cases decided under the Supreme Court Family Rules which came into force in 2010, and I see no reason not to use that analysis here. However, before doing so, I must consider the respondent's argument that he was substantially successful in these proceedings, in part because of the Offer. In other words, he says he was successful because the result at trial was, from his perspective, equivalent to or better than the position set out in the Offer.

[23] As the respondent relies on the Offer to make his argument as to substantial success, I must consider whether the Offer meets the requirements of Rule 11-1(1)(c):

(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."

[24] The Offer did not contain the language in Rule 11-1(1)(c), nor any statement that the respondent reserved the right to bring the offer to the attention of the Court. The Offer did refer to costs but only by stating that if the Offer was accepted within 30 days "each party shall bear their own costs". The respondent argues this reference to costs is sufficient to give a reasonable reader notice that costs will be an issue if the Offer is rejected.

[25] In *Roach v. Dutra*, 2010 BCCA 264, the Court of Appeal considered whether there is any flexibility built into the Rule requiring a specific statement reserving the right to bring the offer to the attention of the court. Prowse J.A. acknowledged the Rule may allow some room for flexibility, but held that there must be substantial compliance with the specified wording or else a party will not be able to obtain the benefit of the Rule, at para. 52:

I am also of the view that the wording of the offer must be substantially compliant with the wording of subrule 1(c)(iii) such that no reasonable person could be misled as to the intent of the offer or the fact that it was an offer within the meaning of Rule 37B. In other words, the offer must be in writing, the wording must make it clear what party is making the offer and to whom it is made, and it must include the fact that the party making the offer is reserving the right to bring the offer to the attention of the court in relation to costs after judgment on all other issues in the proceeding.

- [26] In *Sandhu v. Sandhu*, 2011 BCSC 853, the court applied Roach and refused to consider offers to settle in a family case where the offers contained no reservation of right to bring them to the attention of the court.
- [27] As the respondent failed to include the reservation required by Rule 11-1(1)(c)(iii), either in the language specified in the Rule, or at all, the Offer should not form the basis of a costs ruling adverse to the claimant. That is particularly so, given the claimant's status as a self-represented litigant. The mere reference to costs in the Offer is unlikely to satisfy the requirement in any case, but it certainly does not do so where the recipient of the Offer is not represented by counsel.
- [28] While I have concluded I should not consider the Offer and certainly cannot do so in relation to considering cost orders pursuant to Rule 11-1(5) and (6), I will nevertheless make reference to it as an aid when deciding which of the parties was substantially successful. I am taking this approach because even taking the Offer into account, I arrive at the conclusion the claimant was substantially successful.
- [29] I can quickly summarize my reasons for concluding the claimant was substantially successful. I will do so by considering the first two steps of the Fotheringham approach in relation to the six issues highlighted at trial, following which I will consider the last two factors.

Credibility of the claimant and respondent

- [30] Credibility was one of the primary focuses of the parties at trial. Each tried to attack the other's credibility and much of the trial time was spent on matters which were said to be relevant to credibility. As I indicate above, there is no question the claimant was more successful on this issue than the respondent.

Custody of the children and how parenting time should be shared

- [31] The two substantive issues which occupied the most trial time were division of assets and the fight over parenting responsibilities. The fight over custody and parenting time was of primary importance to the parties.
- [32] The respondent argues that he was successful on this issue because the Offer proposed a shared parenting arrangement, similar to that which was ordered. This argument is without merit. He notes that the claimant sought sole custody and wanted to be the primary parent. This was set out in the pleadings and remained her position until the trial adjourned in February 2013. At that time, the parties agreed to embark on a trial period of equal parenting time. When the trial resumed in April 2013, the claimant altered her trial position and sought equal parenting time. From that point on, she was content to have the Court order joint custody and shared parenting.

- [33] While the respondent made the proposal for shared parenting before the commencement of trial, throughout the course of the trial he took the position that he should have sole custody and be the primary parent. He maintained that position even after the claimant modified her position and agreed to a shared parenting arrangement. He did so in spite of the recommendations of Dr. England in the s. 15 report she prepared for trial. The respondent's decision to continue the battle for sole custody after the claimant agreed to move to the parenting arrangement recommended by Dr. England was unfortunate. Custody arrangements were a lightning rod issue during the balance of the trial, and the continued disagreement on this point kept tensions at a very high level.
- [34] Ultimately, the respondent was not successful with the position he maintained on parenting issues throughout the trial. In these circumstances, the proposal in the Offer to move to shared parenting is simply not relevant to my consideration as to which party was substantially successful. The claimant was successful at trial on this issue.

Division of assets

- [35] Throughout the trial, the respondent relied on the Marriage Agreement and argued it provided for the division of assets. He argued the claimant should have no interest in any of the family assets and no interest in the family home. I explained in the Reasons how the division of the family assets in accordance with the provisions of the agreement was substantially unfair, at para. 134:
- [134] The unfairness is obvious and dramatic. The Marriage Agreement was premised on the concept that each party was and would remain financially independent and self-supporting. When they decided to have children, their lives unfolded very differently from what they anticipated. At the time of distribution, the claimant was left with no personal assets, no share of the family assets, no interest in a matrimonial home, no income and no right to spousal support. In contrast, the respondent retained all of his personal assets and all of the family assets. He was employed with a substantial income and has no obligation to pay spousal support. I have no difficulty in concluding that the Marriage Agreement operated unfairly at the time of distribution.
- [36] Given my conclusion that the Marriage Agreement was unfair, I ordered a reapportionment of the assets and granted the claimant a 30% interest in the family home. I did not reapportion the financial assets and so the respondent succeeded in retaining his retirement savings and other financial assets.
- [37] While the respondent argued for enforcement of the Marriage Agreement at trial, the Offer included a proposal that he pay the claimant \$200,000 as a full and final settlement of her claim for division of family assets and liabilities.

- [38] From the start of the action, the claimant sought 50% of the family assets. She did not succeed in obtaining reapportionment, or any interest in, the financial assets. However, she succeeded in obtaining a significant compensation payment; the 30% interest in the family home equated to a compensation payment of \$243,000.
- [39] Considering the final result with a view to each of the parties' positions, I conclude the claimant was successful on the issue of asset distribution. The amount she received exceeded the amount proposed in the Offer. As I have noted, this was a central issue at trial; a large portion of the trial time was spent on the enforceability of the Marriage Agreement and the division of assets.

The income of each party for the purposes of calculation of support

- [40] The incomes I imputed to the parties were similar to the incomes set out in the Offer. However, this was not a highly contentious issue and occupied a relatively small amount of trial time. The positions of the parties were not significantly different.

Child support and what amount was owing retroactively

- [41] This was a minor issue which occupied little court time.

The appropriate amount and duration of spousal support

- [42] Although this was also a highly contested issue, the trial time devoted to it was not significant. The respondent took the position at trial that the claimant should receive little or no spousal support. He relied on the waiver of spousal support contained in the Marriage Agreement. The claimant argued she should receive spousal support in accordance with the Spousal Support Advisory Guidelines.
- [43] I rejected the respondent's argument because I concluded the parties' lives did not unfold as they anticipated at the time of entering into the Marriage Agreement and that there was a substantial inequality in their positions since separation. I also concluded that if the respondent was permitted to rely on the waiver of spousal support in the Marriage Agreement, it would leave the claimant in an impoverished situation which was aggravated by the protracted litigation. Accordingly, I found that she was entitled to spousal support which should be calculated in accordance with the Spousal Support Advisory Guidelines, both with regard to amount and duration. I awarded a lump sum amount at the respondent's suggestion.
- [44] The lump sum amount awarded for spousal support was similar to the amount of spousal support proposed by the respondent in the Offer. While the amount was similar to the Offer, the claimant was successful in obtaining an order for spousal support which accorded with her submissions at trial. In other words, this was an issue where success was divided.

[45] The third step in the Fotheringham analysis of substantial success is to make a global assessment of the result, taking into account all matters in dispute. Applying that analysis here, it is evident the claimant achieved substantial success. She succeeded on the parenting issues based on her modified position, while the respondent was unsuccessful in the position he maintained throughout the trial. As a result, I need not consider how this issue may have influenced the global determination had the respondent accepted shared parenting once the claimant modified her position. The claimant was also successful on the division of assets, whether I measure that question in relation to the Offer or the position of the respondent at trial. These were the two main substantive issues which occupied the Court's time and the claimant succeeded on both. She also succeeded on the underlying issue of credibility. Her success on these issues drives my conclusion that she achieved substantial success in this action. The fact there was mixed success on the other issues does not change that conclusion.

Issue 2. Is there any reason to deprive the Claimant of costs?

[46] The final step in the Fotheringham analysis is to consider whether there is any reason to deprive the successful party of costs. The respondent says there are two bases on which I should decline to award costs to the claimant or, alternatively, award only a portion of the costs to her. First, he says the claimant should not get costs prior to the amendment of pleadings which I permitted at the end of the trial. Second, he says the claimant should be deprived of costs because of behaviour amounting to misconduct which prolonged and unduly complicated the trial.

Amendment to Pleadings

[47] The broad discretion retained by the Court with respect to cost awards includes the ability to award costs for part of a case. This discretion is expressed in Rule 16-1(14):

(14) The court may award costs

- (a) of a family law case,
- (b) that relate to some particular application, step or matter in or related to the family law case, or
- (c) except so far as they relate to some particular application, step or matter in or related to the family law case

and in awarding those costs the court may fix the amount of costs, including the amount of disbursements.

[48] While the Court has discretion to award a portion of costs to a party, applications to apportion costs should not be a regular part of litigation but should be confined to relatively rare cases: *Sutherland v. Attorney General of Canada*, 2008 BCCA 27.

- [49] In my view, this is not one of those relatively rare cases. While the claimant did not plead a claim for reapportionment based on s. 65 of the Family Relations Act until very late in the day, I permitted the amendment for the reasons set out in my ruling indexed at G.G. v. M.A., 2013 BCSC 1834. I found that the amendment was not inconsistent with the existing pleadings and evidence, would not have changed the course of the trial, and would not be prejudicial, provided the respondent was permitted to adduce further evidence. I also found that the amendment was necessary to consider the real issues before the Court. I permitted the respondent to adduce further evidence, but the only new evidence he presented related to changes in the parties' employment status since the conclusion of the trial. In other words, the trial proceeded exactly as it would have whether or not the new pleading had been advanced earlier. This is not surprising as the claimant sought, at all times, to have the Marriage Agreement set aside and a 50% interest in all of the family assets.
- [50] There is no reason to apportion costs or decline to award costs to the claimant because of the late amendment to her pleadings, and I decline to do so.

Misconduct

- [51] The principles which guide the Court's discretion to deny costs to a successful party were succinctly summarized by Voith J. in *LeClair v. Mibrella Inc.*, 2011 BCSC 533. Although the case addressed the discretion in respect of costs under the Supreme Court Civil Rules, the principles do not differ from those applicable to the counterparts in the Supreme Court Family Rules. Examples of conduct which can support a denial of costs include giving false evidence at trial or during discovery proceedings, or failing to comply promptly with disclosure obligations. In *LeClair*, Voith J. concluded his summary with the following statement, at para. 11:

Rule 14-1(9) is not intended to provide an unsuccessful party with an opportunity to parse through the litigation conduct of the opposing party searching for behaviour that might be criticized. I do not say that the discretion which is conferred in Rule 14-1(9) is limited to exceptional cases. The Rule is not, however, intended to address imperfect or less than optimal conduct. It is generally not intended to address questionable judgment. Instead it provides the court with an objective means of communicating its censure in relation to conduct that manifestly warrants rebuke.

- [52] The claimant's conduct in the course of the litigation was far from that which a court expects. In the Reasons, I set out some of the difficulties which arose with her evidence and approach to this litigation which prolonged every aspect of the trial. She had difficulty taking guidance from the Court. She treated the respondent with outright contempt. Some of this behaviour, but certainly not all of it, might be explained by the fact she was self-represented. Much of her behaviour falls into the category of "less than optimal conduct" which was caused by her "questionable judgment". In other words, her behaviour is the kind which *LeClair* suggests the discretion conferred by Rule 14-1(9) (the equivalent of 16-1(7)) was not intended to address. The respondent is attempting to parse through the claimant's litigation

conduct in a way that should not be encouraged. In high conflict family litigation the conduct of both parties is often imperfect. Any interpretation of the Rules which would allow the Court and the parties to parse through the poor behaviour a second time on the question of costs is to be discouraged. Such an approach would be detrimental to the interests of the parties and would be an inefficient use of court time.

- [53] Although I have concluded that this is not an appropriate circumstance to sanction the claimant with a costs award, any doubt I might have had about that decision is removed when I consider the respondent's conduct in the litigation. I concluded the respondent was also guilty of misconduct in the course of the proceedings. While his improper conduct was, unlike the claimant's, not persistent it was more serious. I concluded he intentionally misled this Court regarding the existence of a family debt. When I released the Reasons, I concluded he was less than forthright about his employment status. In the course of subsequent applications, I have learned that my conclusion was justified, as it is apparent he continued to work for his employer long after the termination date set forth in the evidence and argument presented to the Court.
- [54] While the respondent's conduct might have formed the basis for a special costs application, the claimant does not seek special costs. Accordingly, I will not conduct a further examination of his conduct. When I take into account the conduct of both parties, I conclude that the proper approach is to award costs at Scale B to the claimant as the substantially successful party. There is no reason to "otherwise order". To the extent that each party acted improperly in the course of the litigation, the misconduct of one can effectively be offset against the other. The appropriate order is the one set out in the Reasons.
- [55] Accordingly the claimant is entitled to costs throughout this proceeding, including this application, at Scale B.

"Butler J."

Source & reproduction note

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

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/SC/14/20/2014BCSC2074.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/g-g-v-m-a-2014>

Prepared on 27 October 2026 · Esheria