
CANADA / JUDGMENT

H.K. v. W.K.

2018 BCSC 1447

COURT

Supreme Court of British Columbia

DECIDED

28 August 2018

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2018 BCSC 1447 H.K. v. W.K.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

H.K. v. W.K.,

2018 BCSC 1447

Date: 20180828

Docket: E107709

Registry: Kelowna

Between:

H.K.

Claimant

And

W.K.

Respondent

Before: The Honourable Madam Justice MacNaughton

Reasons for Judgment on Costs

Counsel for the Claimant:

H. Taylor

The Respondent:

In Person

Place and Date of Hearing:

Kelowna, B.C.

July 12-13, 2018

Place and Date of Judgment:

Kelowna, B.C.

August 28, 2018

TABLE OF CONTENTS

Introduction. 3

The Legal Framework for Costs in Family Cases. 3

The Effect of an Offer to Settle on a Costs Award. 6

Application of the Legal Framework in this Proceeding.. 9

Was H.K. substantially successful with respect to the issues at trial?. 9

The Issue of Spousal Support and Imputation of Income to W.K. 9

Child Support 10

Property Claims. 11

Parenting Plans. 12

Section 7 Expenses. 14

Excluded Property Claim.. 15

Overall, which party substantially succeeded?. 16

Are there otherwise reasons to deprive H.K. of his costs?. 16

H.K.'s Formal Offers to Settle. 16

The June and October Offers. 17

The July Offer 20

Conclusion. 22

Introduction

- [1] H.K. seeks his costs of this proceeding from W.K. My reasons for judgment are reported at H.K. v. W.K., 2017 BCSC 1817 (the "Reasons"). In this costs decision, I will refer to the parties and their children by the same initials used in the Reasons.

- [2] The parties separated after a 25-year marriage. Their separation, and its aftermath, have been fraught with conflict. The trial took place over 13 days from mid July until late August, 2017. The parties' conflict continued after the trial and the release of the Reasons.
- [3] The parties appeared before me on March 7, 2018 seeking: directions; clarification of the Reasons; a process for finalizing the order; and the appointment of a parenting coordinator. I set a schedule for the parties to exchange their proposed drafts of the final order and to comment on each other's drafts. Both drafts and the comments were then sent to me.
- [4] On June 1, 2018, I sent a Memorandum to the parties, clarifying the Reasons and providing direction with respect to the terms of the parties' draft orders.
- [5] The parties also appeared before a Master of the court to resolve issues with respect to the sale of the former family home to H.K.'s mother.
- [6] The parties had still not resolved the terms of the final order when they appeared before me on July 12 and 13, 2018 for the costs submissions. As a result, the parties had not benefited from the parenting coordination, which I had ordered in the Reasons. Their parenting disagreements have not abated. I settled the terms of the order during the costs submissions.

The Legal Framework for Costs in Family Cases

- [7] Supreme Court Family Rule 16-1(7) provides:

Costs to follow event

- (7) Subject to subrule (9), costs of a family law case must be awarded to the successful party unless the court otherwise orders.
- [8] There are two leading decisions interpreting Rule 16-1(7) or its predecessor: *Gold v. Gold* (1993), 82 B.C.L.R. (2d) 180 (C.A.); and *Fotheringham v. Fotheringham*, 2001 BCSC 1321, leave to appeal ref'd 2002 BCCA 454.
- [9] Recently, in *S.A.M. v. J.A.M.*, 2017 BCSC 2348 at para. 7, Justice Bernard helpfully summarized the principles applicable to costs awards in family cases:
 - (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); 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,
 - (g) 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).
- [10] There is no real dispute about these settled principles. To them I would add that substantial success is to be measured objectively taking into account the matters in dispute, their weight or importance to the parties, and the parties' relative success or failure with respect to those matters: *Fotheringham* at para. 60.
- [11] At para. 46 of *Fotheringham*, Justice Bouck suggested that a judge considering whether to award costs follow a four-step inquiry:
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.
- [12] Substantial success is to be "measured in broad terms" and the court should not finely parse issues: *Stearman v. Powers*, 2017 BCCA 165 at para. 65. As the Court of Appeal noted in *Marquez*, the consideration should not be an overly complicated mathematical problem:
- [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.
- [13] In *Litt v. Gill*, 2016 BCCA 288, Justice Garson commented on the unique problem costs pose in family law cases involving multiple issues, noting that a more flexible approach may be required in assessing the concept of "success" for the purposes of assessing costs:
- [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.
- [14] Recently, in *Reid v. Reid*, 2017 BCCA 191, the Court of Appeal said:
- [9] We do not read *Marquez* as requiring that the Court, in determining "substantial success", undertake a mathematical comparison of the amount claimed to the amount awarded. Rather, the Court has broad discretion to take into account myriad considerations in assessing whether a party has been substantially successful.

The Effect of an Offer to Settle on a Costs Award

- [15] Rule 11-1 deals with offers to settle in family cases. There is no dispute that the offers H.K. made to settle this family proceeding are offers as defined in the Rule. Rule 11-1(4) permits the court to consider an offer to settle when exercising discretion in relation to costs. The options available to the court are set out in Rule 11-1(5) and the optional considerations for the court are set out in Rule 11-1(6). The options and considerations are as follows:
- (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) 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.

[16] As explained in *Paul v. Pumple*, 2013 BCSC 1844, offers to settle made pursuant to Rule 11-1 are only considered after the court has first determined costs pursuant to Rule 16-1(7). Rule 11-1(4) permits the court to consider an offer to settle in exercising its discretion as to costs. That discretion is however restricted and must be exercised within the parameters set out in Rule 11-1(5). The court may consider the factors in Rule 11-1(6) in making an order under subrule (5): see also *K.M. v. I.M.*, 2017 BCSC 716.

[17] In *Hartshorne*, the Court of Appeal outlined the policy reasons behind an award for double costs:

[25] An award of double costs is 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. Litigants are to be reminded that costs 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" [citations omitted]. In this regard, Mr. Justice Frankel's comments in *Giles* are apposite:

[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] S.C.C.A. No. 200

- "[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.

- [18] The cases are somewhat inconsistent about whether a party who is not otherwise entitled to costs may, nevertheless, be entitled to costs if their offer to settle is better than the result the other party obtained at trial. I am satisfied that double costs cannot be ordered if regular costs are not first awarded, but that a party who was not substantially successful at trial can still recover costs under Rule 11-1(5)(d) if the offer the party made was better than the result the other party obtained at trial: see *Paul* at para. 29 and *Judge v. Judge*, 2015 BCSC 2240 at para. 14.
- [19] In *S.M.S. v. D.M.T.*, 2016 BCSC 339, Justice Savage, when a member of this Court, determined that, considering all issues globally, neither party was entitled to regular costs. He then went on to consider the costs consequences following an offer to settle:
- [17] There are some decisions that have held that, having found neither party entitled to costs based on substantial success, there is no jurisdiction to award costs under this rule: See, for example, *de Bruijn v. de Bruijn*, 2012 BCSC 444 at para. 11.
- [18] A contrary view is found in *Paul* where it was held that an award of costs under this provision is not dependent on a party being substantially successful at trial. Although there was an amendment to Rule 11-1(5)(d) in 2014, that amendment is inconsequential in this analysis.
- [19] Since the amendment in 2014, *Paul* has been widely cited for the proposition that if neither party achieved "substantial success", the Court may nonetheless make a costs award on the basis of an offer to settle alone: *C.H.T.* at para. 30; *M.S.G. v. S.K.R.*, 2015 BCSC 913 at para. 26; *Walburger* at paras. 24-25; *Hilborn v. Wright*, 2015 BCSC 1175 at para. 22. I agree with that interpretation.

Application of the Legal Framework in this Proceeding

Was H.K. substantially successful with respect to the issues at trial?

- [20] The primary issues between the parties at trial were described in para. 17 of the Reasons. They were: division of property; spousal support including W.K.'s entitlement and, if entitled, the quantum; child support including whether A.K. was or is still a child of the marriage; s. 7 expenses; the appropriate parenting plan for B.K. and C.K.; and costs. Of course, as is so often the case in matrimonial proceedings, ancillary issues were subsumed in these primary issues.
- [21] In this case, H.K. argues that he was substantially successful. W.K. disagrees and argues that she was substantially successful on over 75% of the matters in dispute. She does so primarily on the basis that on August 23, 2017, when the trial resumed after a two-week break, H.K. withdrew an excluded property claim with respect to funds the parties received from his parents towards their various family homes. During her opening submissions, H.K.'s counsel valued his excluded property claim at \$150,000.
- [22] In what is truly a mathematical calculation, W.K. adds the value of the excluded property claim, on which she submits H.K. was unsuccessful, to the value of the other issues on which she says she succeeded, resulting in a monetary success rate to her in excess of 75%.

The Issue of Spousal Support and Imputation of Income to W.K.

- [23] In terms of the importance of these issues to the parties, I accept that the issue of whether H.K. would be required to pay spousal support, and the quantum of any such support, was an important issue to both parties.
- [24] In the Reasons, I determined that W.K. had not proven, through expert opinion evidence, that B.K.'s care needs required her to remain at home with him on a full-time basis: para. 153. I also determined that W.K. had not provided expert medical opinion evidence to support that the situational stresses in her life, including caring for B.K. and these court proceedings, prevented her from working: para. 144.
- [25] I drew an adverse inference that W.K.'s medical records would not have supported her medical need to take a leave from teaching because she failed to produce records pursuant to Justice Masuhara's order of July 5, 2016 and Justice Weatherill's order of September 2, 2016: see paras. 145-146.
- [26] As a result, I imputed income to W.K. Based on the imputed income, and taking into account child support, H.K. was not required to pay spousal support to W.K. I am satisfied that H.K. was substantially successful on this issue.
- [27] W.K. sought that income be imputed to H.K. based on his mother's monthly contribution to his living expenses and her provision to him of the use of a company truck. I did not impute an income to H.K. in the Reasons.
- [28] H.K. sought that income be imputed to W.K. on the basis that she was not renting out a suite in the home in which she was living after the separation. I did not agree with that argument in the Reasons.

Child Support

- [29] W.K.'s imputed income also had an effect on child support as the parties share parenting of C.K. Subsumed in the issue of child support was a question of whether A.K. remained a child of the marriage after he turned 19. H.K. unilaterally terminated support for A.K. once he turned 19. H.K. argued that child support for both B.K. and C.K. should terminate when they turn 19.
- [30] In the Reasons, I determined that A.K. remained a child of the marriage from the date of his 19th birthday, in April 2016, until June 1, 2017 and that H.K. should have contributed \$150 a month to A.K.'s housing and food costs in that period: see paras. 50 and 59.
- [31] I did not order that child support for B.K. and C.K. would terminate at the age of 19. B.K.'s disability made it unlikely that he would then be able to withdraw from parental support. It was also far too soon to predict whether C.K. would pursue a post-secondary education after she graduated from high school. She was clearly a bright and capable student who had the capacity to do so: see para. 198.
- [32] I am satisfied that W.K. was substantially successful on these issues.

Property Claims

- [33] Clearly, property claims were important to both parties. Reviewing the Reasons as they relate to property claims, I conclude that both parties had some success on property issues. The net equity in the two homes owned by the parties was remarkably similar. H.K.'s proposed order with respect to the two homes was not the order I made at trial. W.K. was entitled to receive her piano, which had been a gift from her parents. The parties each kept the vehicles in their possession. Their pensions were ordered to be divided under Part 6 of the Family Law Act, S.B.C. 2011, c. 25, with each paying the administrative costs for the division of the other's pensions.
- [34] As set out above, H.K. withdrew an excluded property claim during the trial. W.K. submits that this should be characterized as her having succeeded on this issue.
- [35] In *D.R. v. E.P.R.*, 2016 BCSC 550, the most significant issue in dispute was the claimant's application to relocate the child of the relationship from B.C. to Arizona. She withdrew this issue in closing submissions.
- [36] In determining costs, Justice Ballance opined that the claimant's "eleventh hour turnabout" with regard to her relocation claim was a factor relevant to assessing substantial success, and that "such an occurrence is a consideration that is properly encompassed within the global judicial perspective endorsed by *Fotheringham*": para. 65. However, she found that even without considering the mother's abandonment of the mobility claim, the respondent was substantially successful on the issues of the principal residence of the child, the parenting schedule, the location of the claimant's parenting in B.C., and the imputation of income to the claimant for both child and spousal support purposes. The respondent was

found to be the substantially successful party and was entitled to his costs.

- [37] I have decided that rather than treating H.K.'s late withdrawal of his excluded property claim as a "success" for W.K., it is more appropriate to address this issue in determining whether there should be a reduction in any costs awarded.
- [38] W.K. made property claims with respect to a \$48,000 overpayment to H.K.'s father from the sale of the parties' first family home in 1999. W.K. made another claim for \$21,500 with respect to H.K.'s 2009 transfer of shares to his mother. I dismissed both claims. In that regard, H.K. was successful with respect to these issues.
- [39] I accept that W.K. did not provide her position on the Scott schedule referred to during H.K.'s opening at trial. As a result, every family property and debt issue, since the date of separation, required proof, taking up days of trial time. I do not consider this conduct to be worthy of sanction as the Scott schedule was first available during the opening statement. I also do not agree that the volume of documents W.K. brought to trial should be factored into a costs order, as W.K. was self-represented and, in my view, trying her best to have her documents accessible and organized.

Parenting Plans

- [40] B.K.'s health was a primary focus of evidence at the trial, particularly because H.K. and W.K. did not agree about the extent of B.K.'s health difficulties. In his trial brief, H.K. sought a shared parenting regime with respect to B.K. However, in his closing submissions, he suggested two evenings a week.
- [41] In the Reasons, I set out H.K.'s evidence that B.K. was afraid of his mother and co-dependent on her. He testified that W.K. was too protective of B.K. and was mothering him to the point of over-dependence. He believed that W.K. was pressuring B.K. not to spend time with him. In an intake questionnaire that H.K. completed for a views of the child report for B.K., he wrote that professionals had suggested that B.K. may be suffering from Munchausen Syndrome by proxy. I concluded that H.K. had no basis, professional or otherwise, for his suggestion of Munchausen's. I concluded that the evidence demonstrated that he did not take B.K.'s health difficulties seriously enough.
- [42] In response to H.K.'s minimization of B.K.'s health difficulties, and in light of H.K.'s position that he was seeking shared parenting of B.K., W.K. called Ms. Kruger, B.K.'s treating occupational therapist, and Dr. Lippen, his treating psychologist, to give evidence about their observations and treatment of B.K. and to rebut H.K.'s concerns. W.K. also called Dr. Forster for the purpose of cross-examining her on her views of the child report with respect to B.K., on which H.K. sought to rely. In the Reasons, I expressed concern about Dr. Forster's conclusions.

- [43] Although it is difficult to assess substantial success on an issue of this kind, overall, I am satisfied that B.K.'s health difficulties were more significant than suggested by H.K. and that the evidence W.K. called was helpful to the court and informed the parenting decisions I made with respect to B.K. I did not make a specific parenting time order with respect to B.K. as he was 18 years old and enforcement would have been impossible. Rather, I encouraged him to spend time with his father, as I believed he would benefit from doing so. I conclude that W.K. was substantially successful on this issue.
- [44] From H.K.'s perspective, one of the most important issues was the parenting arrangements and responsibility for C.K., who turned 12 during the trial. The parties had shared C.K.'s parenting since shortly after separation. W.K. did not believe that a shared parenting regime was in C.K.'s best interests and proposed that she have primary care of and sole parental responsibilities for C.K. In her closing submissions, she said that she felt so strongly about this issue that she was prepared to have H.K. have primary care and sole parental responsibilities if she could not.
- [45] Apart from a change to the day on which the parties exchanged C.K. (from Monday to Friday), I continued the shared parenting regime with respect to C.K. H.K. was the successful party on issues relating to C.K.'s parenting.
- [46] W.K. opposed the appointment of a parenting coordinator as proposed by H.K. I was satisfied that a parenting coordinator was required due to the "high conflict" and "entrenched distrust" between the parties. H.K. was the successful party on this issue.
- [47] I have considered the other parenting orders in the Reasons. The parties continued to be the guardians of B.K. and C.K. H.K. was to arrange for family counselling for himself and B.K., paid for by him, after exhausting the parties' combined extended health benefits. H.K. was to ensure transportation for B.K. to appointments on alternate weeks, commencing October 30, 2017.
- [48] I understand, from the costs submissions, that these terms of the order have proved difficult to implement. W.K. blames H.K. for failing to comply with these terms. He set out his efforts to do so in an affidavit. In my view, this issue should not factor into my costs decision, as it does not relate to the issues at trial. It is unfortunate that the delay in appointing a parenting coordinator meant that the parties did not benefit from working with him or her on implementing these terms of the order.
- [49] With respect to C.K., the Reasons set out a division of school holidays, spring breaks, summer holidays and celebratory days in accordance with H.K.'s submissions, but which were not seriously opposed by W.K. Neither party achieved substantial success on these ancillary issues.

Section 7 Expenses

- [50] W.K. sought to recover special expenses from H.K. Her claims were presented in two volumes of documents. Many of those expenses were not special or extraordinary as defined in the Guidelines.
- [51] With respect to A.K., apart from orthodontic treatment, none of the claimed expenses were allowed.
- [52] With respect to B.K., most of the special or extraordinary expenses were covered by ICBC, MSP or the parties' extended health benefits. Many other claims were for over-the-counter medications, vitamin supplements, and speciality foods, which do not qualify as s. 7 expenses.
- [53] For legitimate s. 7 expenses, incurred on behalf of B.K. or C.K., I accepted H.K.'s proposal for resolving them and set annual limits to the expenses. I conclude that H.K. was substantially successful on this issue.

Excluded Property Claim

- [54] W.K. submits that H.K.'s excluded property claim required extensive time and effort at trial. While I do not agree that the excluded property claim required extensive trial time, it did require some trial time. More than the time it consumed, it was a significant financial issue as it was worth about 30% of the total equity the parties had in both of their homes. It would have been the most complicated property issue in the trial. It was also a significant emotional issue for the parties.
- [55] I do not accept H.K.'s estimate that the excluded property claim took less than half a day of trial time. The excluded property claim formed part of counsel's opening at trial. I indicated that it had not been properly pleaded and granted leave to H.K. to specifically plead it. An amended notice of civil claim was prepared and provided to W.K. On July 25 and July 28, 2017, it formed part of the direct evidence of H.K. and his mother, and a number of exhibits were entered with respect to it. W.K. cross-examined H.K. and his mother about it. The excluded property claim also formed part of the direct evidence of W.K. It was withdrawn on August 23, 2017 before W.K. was cross-examined. By my estimate, it absorbed about a day of trial time.
- [56] In the pretrial steps, the excluded property claim was the subject of documentary disclosure and, presumably, examinations for discovery.
- [57] I have concluded that it is appropriate to reduce any costs to which H.K. may be entitled by 15% globally to take into account both the trial time and the impact of the issue on the overall litigation. The authority to make such an order is found in Rule 16-1(14), which gives the court discretion to award costs "except so far as they relate to some particular application, step or matter in or related to the family law case".

Overall, which party substantially succeeded?

[58] When the issues for determination at trial are considered globally, I am satisfied that H.K. has substantially succeeded overall and should be entitled to his costs. Although H.K. did not achieve everything he was seeking at trial, his position on most issues was accepted.

Are there otherwise reasons to deprive H.K. of his costs?

[59] Although W.K. argued that there should be a cap on any costs that I order, she has not satisfied the onus, explained in *Gold*, of establishing that I should depart from the usual rule that a substantially successful litigant is entitled to costs. I am aware that the financial and emotional cost of this litigation has been significant to the parties. I am also aware that H.K. has received ongoing financial support from his mother with respect to the cost of litigation. However, I am not satisfied that awarding H.K. his costs will upset the balance achieved by the judgment.

[60] I have concluded that there are no other reasons to deprive H.K., the substantially successful litigant, of his costs.

H.K.'s Formal Offers to Settle

[61] On June 22, 2016, prior to the first scheduled trial dates, H.K. served a formal offer to settle on W.K. (the "June offer"). The June offer met the requirements of Rule 11-1(c) as it was made in writing, served on all parties of record, and reserved H.K.'s right to bring the offer to the attention of the court after judgment. It was open for acceptance for 30 days.

[62] On October 20, 2016, H.K. served another formal offer to settle on W.K. (the "October offer"). The October offer followed a hearing before Justice Weatherill. It also met the requirements of Rule 11-1(c) and was open for acceptance for 30 days.

[63] On July 10, 2017, H.K. served his final offer to settle (the "July offer"). It met the requirements of Rule 11-1(c). It was open for acceptance until July 20, 2017 and the trial began on July 24, 2017.

[64] W.K. did not respond to any of the offers. Although W.K. submits that she was interested in resolving the parties' dispute without the need for a trial, her lack of response to H.K.'s offers and failure to provide her own settlement position meant that negotiation between them was impossible. It takes two willing parties and open dialogue to negotiate a resolution.

[65] H.K. seeks double costs from the date of the offers to settle.

The June and October Offers

[66] Whether an offer ought reasonably to have been accepted is not determined by reference to the award that was ultimately made at trial, but by considering whether, at the time the offer was open for acceptance, it would have been reasonable for it to have been accepted. The

reasonableness is to be assessed by considering factors including the timing of the offer, whether it had some relationship to the claim as opposed to being a nuisance offer, whether it could be easily evaluated, and whether some rationale for the offer was provided:

Hartshorne at para. 27.

- [67] In Hartshorne, the court concluded that the offer ought reasonably to have been accepted and awarded double costs. In particular, the court determined that the offer was presented 12 days before the commencement of trial and was comprehensive. If accepted, the offer would have resolved all outstanding disputes between the parties, obviating the need for a 10-day trial. The court also concluded that the offer was sufficiently clear, and that accepting it would not have required the appellant to completely accept the respondent's reasoning in support of it.
- [68] In considering the relationship between the offer and the result at trial, the court should determine 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. The court in *Kopp* also explained that precise alignment between an offer to settle and the final judgment is not required. The court said:
- [11] It is difficult, and in my view unwarranted, to approach the costs determination by forensic comparison of every offer and counter-offer with the ultimate outcome of the application, and to apply each factor in Rule 11-1(6) to each offer. I reject that approach. ... The costs issue should not be the tail that wags the dog.
- [69] In *Jukic v. Luta*, 2009 BCSC 365, the court expressed a similar view somewhat differently. It concluded that, in light of the multiple issues involved in a family proceeding, it would be "virtually impossible" to match an offer to settle with the orders made and that such a high standard was not required in order to be entitled to double costs.
- [70] I accept that the June and October offers were comprehensive offers. I also accept that the June and October offers were made with sufficient time and with sufficient information for W.K. to consider her settlement options. It is of note that in the June and October offers, H.K. offered to forego his excluded property claim.
- [71] However, in my view, the June and October offers suffered from two serious flaws, which meant that at the time they were open for acceptance, it was not reasonable for W.K. to have accepted either of them.
- [72] First, the property division proposals contained in both offers contemplated that the parties would each retain the home in which they were living at the time, and through refinancing would release the other from liability with respect to that property. The June and October offers did not contemplate the possibility that one of the parties would not be in a position to retain the home in which they lived, and did not provide an alternative if that proved to be the case. As a result, the June and October offers could not finally resolve a major division of property issue.

- [73] Second, with respect to child support, the June and October offers did not provide for retroactive child support for A.K. and contemplated that child support for B.K. and C.K. would expire on either child becoming 19 years of age.
- [74] In light of B.K.'s health difficulties, it was likely that he would be unable to withdraw from parental support for some time beyond his 19th birthday. I note that he is now 19 and still unable to withdraw from parental support. C.K. was only 12 and it was not reasonable to expect W.K. to accept an offer that terminated support for her seven years in the future.
- [75] Child support is the right of the child and while I accept that the court always has jurisdiction to review child support, the June and October offers tied such a review solely to an alteration in the parenting arrangements. It was not a review based on an assessment of the child's needs and circumstances.
- [76] Throughout, H.K. was represented by counsel. W.K. was not. Although W.K. was a sophisticated litigant, it cannot be assumed that she understood that an order terminating child support at 19 could still be subject to a variation.
- [77] In any event, based on what the parties knew about B.K.'s circumstances on the dates of the July and October offers, within two years, an application was likely to have been required to vary the order terminating support for B.K. Such an application would have been at W.K.'s cost and she would have the burden of establishing a material change in circumstances. Whether W.K. could have done so was uncertain. At the time of the June and October offers, it was arguably known to the parties that he would not complete the requirements to graduate from high school, and would require some time to do so and to pursue post-secondary education. As explained in *Willick v. Willick*, [1994] 3 S.C.R. 670 at para. 21, if the change in circumstances relied on in support of a variation application was known when the order was made, it cannot be relied on as the basis for a variation.
- [78] Similar difficulties might have arisen with respect to a variation application for C.K. after she reached the age of 19. By all accounts, C.K. was a bright and capable student. Both of her parents are professionals who achieved academic success. It was entirely likely that C.K. would pursue post-secondary education after she graduated from high school, and it is not clear that W.K. could argue that C.K. doing so would amount to a material change in circumstances.
- [79] As a result, I have concluded that it was not unreasonable for W.K. to reject H.K.'s June and October offers.

The July Offer

- [80] H.K.'s July offer addressed some of the flaws I have outlined with respect to the June and October offers.

- [81] In particular, it offered an amount for retroactive child support for A.K. and a payment towards his tuition. It also offered a fall-back position in the event that either party was unable to obtain the necessary financing to refinance their interest in the home in which they were living. It proposed that in those circumstances, the home of the party who was unable to obtain refinancing would be listed for sale and they would keep the proceeds of sale for that property: see paras. 25-28 of the July offer.
- [82] However, the July offer did not address the concern outlined above with respect to child support for B.K. and C.K. beyond the age of 19. By the time of the July offer, B.K. was 18 and his situation had not improved. Establishing a material change in circumstances on a variation application was even less likely to succeed.
- [83] As a result, I conclude that it was not unreasonable for W.K. to reject the July 2017 offer.
- [84] I will now consider the relationship between the July offer and the result at trial. The final order provided that if either party was unable to obtain refinancing to keep the home in which they were living, both properties would be listed for sale. Based on the sale of H.K.'s property to his mother, each party received approximately \$167,000 from that property. Based on the agreement for sale of W.K.'s property, each party received approximately \$152,000.
- [85] The terms of H.K.'s July offer are very similar to the terms of the final order as they relate to parenting time, parenting responsibilities and spousal support. In other respects, the terms of the July offer are marginally different to the final order:

Issue

July 2017 offer

Final order at trial

Child support

\$569/month

\$556/month

Split of s. 7 expenses

55% to H.K and 45% to W.K.

54% to H.K. and 46% to W.K.

Retroactive child support for A.K.

\$2,500 for child support including special and extraordinary expenses and 1/3 of A.K.'s tuition

\$9,449 for retroactive child support

Retroactive child support since the date of separation

See above

See above

Greenline shares

H.K. to keep

W.K. entitled to half (value before taxes $\frac{1}{2}$ of \$66,584)

Property Equalization payment

Not sought

W.K. owed \$24,946.95 (if agreed, to be offset against Greenline shares)

Cost of Dr. Forster

Offer silent

Each party to pay $\frac{1}{2}$ of her invoice

[86] Taking into account that the offer provided that each party would bear their own costs, and leaving aside the excluded property claim, W.K. would have been in roughly the same, or in a slightly better, financial position had she accepted the July offer.

[87] However, in the circumstances of this case, considering the factors in Rule 11-1(6) globally, and the concerns I have expressed about the termination of child support at age 19, I exercise my discretion to decline to award double costs to H.K.

Conclusion

[88] H.K. is critical of W.K. for unduly lengthening the trial by failing to disclose medical documents in respect of her health, requiring proof of each property claim individually, and failing to respond to questions in a clear and precise manner during her evidence. W.K. is critical of H.K. for unduly lengthening the trial by pursuing an excluded property claim and then withdrawing it, seeking a shared parenting regime with respect to B.K., and refusing to acknowledge the significance of B.K.'s health difficulties. Both parties are responsible for the length of this trial.

[89] H.K. is entitled to his costs of this proceeding but not double costs. His costs are to be reduced by 15% globally to reflect the excluded property claim which was pursued and then withdrawn during the trial.

"MacNaughton, J."

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