

CANADA / JUDGMENT

H.S.S. v. S.H.D.

2017 BCSC 1620

COURT

Supreme Court of British Columbia

DECIDED

13 September 2017

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2017 BCSC 1620 H.S.S. v. S.H.D. IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: H.S.S. v. S.H.D., 2017 BCSC 1620 Date: 20170913 Docket: E132889 Registry: Vancouver Between: H.S.S. Claimant And S.H.D. Respondent Before: The Honourable Madam Justice Dardi Reasons for Judgment on Costs Counsel for Claimant: P.M. Daykin, Q.C. Counsel for Respondent: R. Basham, Q.C. P. Sheppard Place and Date of Trial/Hearing: Vancouver, B.C. May 23, 2017 Place and Date of Judgment: Vancouver, B.C. September 13, 2017

Introduction

- [1] This high conflict and complex matrimonial litigation spanned 24 days of trial. On July 14, 2016, I issued reasons for judgment indexed at 2016 BCSC 1300 (the "Reasons") determining all issues other than costs.
- [2] In the Reasons, I granted liberty to the parties to make submissions on the matter of costs. The parties made those submissions on May 23, 2017. Overview
- [3] The parties married on April 8, 1989. They have two adult daughters, N., who was born in 1993, and S., who was born in 1996.
- [4] There was a significant dispute between the parties regarding the date of their separation. Although the parties have not resided together since November 21, 1999, the respondent, Ms. D., asserted that the parties did not separate until the summer of 2013. The claimant, Mr. S., commenced these proceedings in October 2013 and asserted that the parties separated no later than January 2003 when he purchased another residence.
- [5] Ms. D, who is from a family with substantial wealth and for whose alleged benefit a marriage agreement was prepared, applied to set aside the marriage agreement on the basis of undue influence and unconscionability. In the alternative, she sought to vary the terms of the marriage agreement on the basis that its provisions were unfair in light of current circumstances.

- [6] Mr. S, a very successful lawyer, has amassed a considerable net worth in his own right. He asserted that the marriage agreement was valid at common law and the court should decline to vary the marriage agreement. He asserted that the Court should remediate any economic consequences of the breakdown of the marital relationship through spousal support.
- [7] It was common ground that, given the dispute with respect to the marriage agreement, the Family Relations Act, R.S.B.C. 1996, c. 128 [FRA] governed the disposition of property matters, and not the Family Law Act, S.B.C. 2011, c. 25, s. 252.
- [8] Child support and the quantum and duration of spousal support were also at issue at trial.
- [9] The factual disputes and my findings are set out in detail in the Reasons and I do not propose to recite them in this ruling. Positions of the Parties
- [10] Mr. S. submits that he was substantially successful at trial and is entitled to his costs on a scale of more than ordinary difficulty.
- [11] For her part, Ms. D. submits that neither party achieved substantial success, and that each party should bear his or her own costs.

Issues

- [12] The following issues arise:
- a) Was Mr. S. substantially successful in this family law proceeding?
 - b) If so, should the Court order otherwise and depart from the usual rule that costs follow the event?
 - c) Was this matter one of more than ordinary difficulty?

Analysis

The Legal Framework

- [13] Before turning to the question of the appropriate costs award, I will briefly summarize the law that informs the analysis.
- [14] The usual rule concerning costs in matrimonial proceedings is found in Rule 16-1(7) of the Supreme Court Family Rules. It provides that "costs of a family law case must be awarded to the successful party unless the court otherwise orders".
- [15] It is well-settled that the term "successful" in Rule 16-1(7) means "substantially successful". In a family law case involving multiple issues and where there has been divided success, the Court must engage in a "substantial success" analysis. Substantial success, as defined in the authorities, is when the prevailing party succeeds on 75% or more on the matters in dispute.

- [16] The trial judge is to measure substantial success in the litigation objectively by considering the disputed matters globally and comparing the results achieved with the submissions made at trial. The weight and importance of all the matters in dispute are to be taken into account together with the parties' corresponding relative success or failure. The 75% success threshold is intended to serve as a "rough and ready guide" and the Court is not required to evaluate the substantial success threshold with mathematical precision: *Gold v. Gold* (1993), 82 B.C.L.R. (2d) 180, 106 D.L.R. (4th) 452 (C.A.), leave to appeal ref'd [1993] S.C.C.A. No. 441; *Fotheringham v. Fotheringham*, 2001 BCSC 1321, leave to appeal ref'd 2002 BCCA 454; *Paul v. Pumble*, 2013 BCSC 1844; *Marquez v. Zapiola*, 2014 BCCA 35 at paras. 15-16; *D.R. v. E.P.R.*, 2016 BCSC 550 at para. 8, aff'd 2016 BCCA 517.
- [17] In *Fotheringham* at para. 46, Mr. Justice Bouck endorsed a four-step inquiry in assessing whether a party in a family law case has achieved substantial success in the litigation:
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.
- [18] The appellate decisions affirm that a trial judge retains the discretion to determine whether there is a sound basis for displacing the usual costs award. Any discretionary exception to the usual costs rules must be made judicially: *Bailey v. Victory* (1995), 4 B.C.L.R. (3d) 389 at para. 13, 57 B.C.A.C. 23 (C.A.).
- [19] As summarized in *M.S. v. M.M.*, 2016 BCSC 470 at para. 16, the Court of Appeal in *Gold* at para. 20 identified hardship, earning capacity, the purpose of a particular award, the conduct of the parties in the litigation, and the importance of not upsetting the balance achieved by the award itself as factors which a trial judge may consider in exercising its discretion. The Court underscored that the assessment of the importance of such factors in the context of a particular case is best left for determination by the trial judge. Was Mr. S. substantially successful in the litigation?
- [20] As the first step in the analysis, I will summarize the significant matters in dispute in the proceeding, the positions of each party at trial with respect to those matters and the Court's disposition of those matters.
- | Issue | Mr. S's Position | Ms. D's Position | Result |
|-------------------------------------|------------------|------------------|--------------|
| 1. Date of Separation | January 2003 | September 2013 | January 2003 |
| 2. Marriage agreement at common law | Valid | Void/Voidable | Valid |

3. Marriage agreement fairness under s. 65 Fair; any unfairness to be addressed through spousal support Unfair Unfair
 4. Reapportionment \$0; in alternative, compensate based on 2003 values, which would result in a payment of \$2M \$9,200,000 [before tax payment] \$1,700,000 [after tax payment]
 5. N. eligibility for Child Support Ineligible Eligible Ineligible
 6. Quantum of Child Support for S. \$5,000/month when S is living with her mother and payment of all her living and educational expenses while S is living away from home \$8,000/month plus \$2,000/month to S plus payment of certain expenses \$5,000/month plus payment of specified expenses
 7. Quantum of Spousal Support \$30,000 per month \$110,000 per month \$40,000 per month
 8. Duration of Spousal Support Subject to review on the occurrence of specified events Indefinite Terminates Dec 2021 subject to a material change of circumstances
- [21] There can be no doubt that Mr. S. succeeded on issues #1, 2, and 5 as delineated above. In relation to issue #3, Ms. D. clearly prevailed in her contention that the marriage agreement should be varied under s. 65 of the FRA.
- [22] With respect to the balance of the matters in dispute, the parties disagree, for the purposes of the cost analysis, on how to characterize the Court's findings on those issues. Accordingly, I will address the disposition of each of those issues in turn.
- [23] I turn first to the issue of reapportionment under s. 65 of the FRA. This was a crucially important issue to both parties and their positions differed vastly at trial. Ms. D. sought a reapportionment of \$9,200,000. Mr. S.'s overarching assertion was that the marriage agreement should not be varied. In the end, I concluded the marriage agreement should be varied by ordering that Mr. S. make a payment to Ms. D. of \$1,700,000 net of tax. In my view, neither party substantially succeeded on this issue. Success was divided.
- [24] I turn next to the quantum of child support payable with respect to S. At trial Mr. S. sought an order in the following terms:
- (a) When S. is away from home and attending university, Mr. S. shall pay for all her educational and living expenses including tuition, books, rent, food, allowance, computer, cellular phone, medical, dental, and travel expenses to and from Vancouver, with such arrangements to be made between Mr. S. and S.;
 - (b) If S. is living with Ms. D. during non-academic months, Mr. S. shall pay to Ms. D. \$5,000 a month in child support;
 - (c) If S. is living with Ms. D. while attending university, Mr. S. shall pay to her child support in the sum of \$5,000 per month and shall pay for S.'s tuition and books on arrangements to be made between Mr. S. and S.

[25] Ms. D. sought an order in the following terms:

- (a) Mr. S. pay \$8,000 per month to Ms. D. as child support in relation to S., irrespective of whether S. is, on any given month, in university or at home;
- (b) Ms. D. will, with the child support, pay for all expenses of daily living, including medical and educational expenditures, save and except for the following "major expenses" which shall be paid by Mr. S:
 - (i) Medical interventions, treatment or procedures (including associated travel expenses) costing, individually, more than \$1,000; (ii) Rent/accommodation and travel expenses for S.'s educational attendance at post-secondary institutions; (iii) University/post-secondary tuition.
- (c) Mr. S. will, in addition, pay an allowance of \$2,000 per month to S.

[26] In the Reasons, I ordered as follows:

- (a) While S. is attending university or a post-secondary institution, Mr. S. shall pay the cost of her tuition fees, any school-related fees, and books. Mr. S. will pay those costs directly to the educational institution in consultation with S. or, where appropriate, to S. directly.
- (b) If S. is attending university outside of Vancouver, Mr. S. shall pay S.'s reasonable travel expenses to and from university and her reasonable rent/accommodation costs. He will make arrangements for payment directly with S.
- (c) Mr. S. shall, on a quarterly basis, inform Ms. D. of the payments he has made to or for S.
- (d) Mr. S. shall pay all of S.'s reasonable health-related expenses that exceed insurance reimbursement through his health insurance plan. This shall include dental expenses, prescriptions, professional counselling, eye care and corrective lenses, and any reasonable travel expenses for S. associated with any of her medical procedures or treatments. Ms. D. shall provide supporting invoices and itemized receipts for any expenditures for which she seeks reimbursement. For the sake of clarity, Mr. S. is not responsible for payment of Ms. D.'s travel or accommodation expenses.
- (e) Commencing July 1, 2016, Mr. S. will pay child support of \$5,000 per month to Ms. D, irrespective of whether S. is at university or living at home in Vancouver, for as long as S. remains a child of the marriage within the meaning of the Divorce Act. Mr. S. is not obliged to pay any other costs or any other s. 7 expenses other than those stipulated above.

[27] In my view, neither party substantially succeeded on this issue. Success was divided.

[28] Finally, I turn to the issue of spousal support. Mr. S. maintains that he was substantially successful with respect to this issue. I disagree.

[29] Ms. D. sought an order for spousal support of \$110,000 per month for an indefinite duration.

- [30] Mr. S. maintained at trial that the appropriate quantum of support was \$30,000. With respect to the duration of support, Mr. S. submitted that it was appropriate to order a review without either party having to show a change of circumstances and that such review may be initiated by either party upon the occurrence of the first or either of the following events:
- (a) The retirement of Mr. S. from the practice of law; or
 - (b) The death of Ms. D.'s mother.
- [31] I concluded that Ms. D. was entitled to \$40,000 per month in spousal support until no later than December 31, 2021. I also ordered that the parties were at liberty to apply to vary my order upon a material change of circumstances under s. 17(1) of the Divorce Act. I also ordered a retroactive increase in spousal support.
- [32] In my view success was divided on the issue of spousal support.
- [33] Although I have considered the time spent at trial on each of the matters in dispute, I see no benefit in parsing the allocation of time. I accept Mr. S.'s submission that there was considerable trial time spent on the matter of the parties' separation date. However, many aspects of that evidence were pertinent to, and inextricably linked with, assumption of the primary parenting responsibilities by Ms. D. and the parties' financial arrangements. This, in turn, informed the analysis of the fairness of the marriage agreement and spousal support.
- [34] Viewing the various matters in dispute globally, weighing their relative importance and taking into account the parties' corresponding relative success or failure, Mr. S. was more successful than Ms. D. at trial. However, I am not persuaded that he met the 75% success threshold which serves as a "rough and ready guide" for establishing substantial success. All things considered, I conclude that Mr. S. was not substantially successful at trial.
- [35] In the result, I order that each party bear his or her own costs.
- [36] In light of my conclusion, it is not necessary for me to address whether this matter was one of more than ordinary difficulty. "Madam Justice Dardi"

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