

CANADA / JUDGMENT

Hopson v. Hannon

2022 BCSC 1013

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Supreme Court of British Columbia

DECIDED

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2022 BCSC 1013 Hopson v. Hannon

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Hopson v. Hannon,

2022 BCSC 1013

Date: 20220616

Docket: E153430

Registry: Vancouver

Between:

Katherine Lucy Hopson

Claimant

And

Curtis Paul Hannon

Respondent

Before: The Honourable Madam Justice Warren

Reasons for Judgment re Costs

Counsel for the Claimant via videoconference:

J. Brown

Counsel for the Respondent via videoconference:

S. Ovens

Place and Dates of Hearing:

Vancouver, B.C.

February 9-10, 2022

Place and Date of Judgment:

Vancouver, B.C.

June 16, 2022

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INTRODUCTION

[1] The trial of this family law proceeding took place before me over 19 days between October 2018 and November 2019. I delivered written reasons for judgment (indexed at 2020 BCSC 794) on May 29, 2020, in which I found that the claimant, Ms. Hopson, and the respondent, Mr. Hannon, lived together in a marriage-like relationship, made orders concerning the division of property, and dismissed Ms. Hopson's spousal support claim. In November 2020,

Mr. Hannon applied to re-open the trial to introduce new evidence on several issues. I granted the application to a limited extent, allowing Mr. Hannon to adduce new evidence concerning alleged tax implications of some of my orders. Ultimately, the parties reached an agreement to settle those issues without re-opening the trial.

- [2] The parties appeared before me again on February 9 and 10, 2022, to make submissions on costs, which is the subject of these reasons for judgment. Ms. Hopson seeks costs at the "more than ordinary difficulty" scale, and double costs from the date of an offer to settle she made shortly before the trial commenced. Mr. Hannon submits that the parties should bear their own costs and, in the alternative, that Ms. Hopson should receive only a portion of her costs, on an ordinary scale.

PROCEDURAL BACKGROUND

- [3] This has been a high-conflict proceeding, marked by delay.
- [4] Ms. Hopson filed a Notice of Family Claim on November 30, 2015, seeking division of property and spousal support. Mr. Hopson filed a Jurisdictional Response on July 27, 2016.
- [5] Ms. Hopson scheduled a mediation for February 2017, which was cancelled when Mr. Hannon failed to provide requested financial disclosure.
- [6] Ms. Hopson scheduled a Judicial Case Conference ("JCC") in March 2017, which Mr. Hannon did not attend. His lawyer attended the JCC and advised that he had ceased to act for Mr. Hannon. At the JCC, Master Harper ordered Mr. Hannon to file and serve a Response to Family Claim and a Form F8 Financial Statement by May 5, 2017, and awarded costs of \$1,000 to Ms. Hopson in any event of the cause. Mr. Hannon did not comply with that order.
- [7] Ms. Hopson proceeded with her claim as an undefended matter and it was set for a two-day trial in October 2017.
- [8] In August 2017, a Notice of Change of Solicitor was filed by Mr. Hannon's new counsel. His new counsel asked Ms. Hopson to agree to adjourn the trial. She declined.
- [9] On September 29, 2017, Mr. Hannon filed a Response to Family Claim. On the same day, at a trial management conference, Master Vos ordered the parties to exchange lists of documents and financial statements by October 13, 2017. Mr. Hannon repeated his request for an adjournment of the trial. This time, Ms. Hopson agreed.
- [10] Mr. Hannon provided his list of documents and financial statement by the October 13, 2017 deadline, but they were incomplete. He provided another financial statement in April 2018, but it was still incomplete. He provided another list of documents in February 2018. Thereafter, he continued to provide documents on a rolling basis, including in the midst of his examination for discovery and during the trial.
- [11] Mr. Hannon filed a Counterclaim on March 19, 2018.

- [12] Later that month, the parties appeared at a second trial management conference during which Mr. Hannon abandoned his Jurisdictional Response. Mr. Hannon agreed to trial dates in May 2018. However, mere weeks later and about a month before trial, he applied for another adjournment which Master Muir granted. The trial was then rescheduled for October 29, 2018, originally for five days and later increased to eight days.
- [13] On October 10, 2018, Ms. Hopson made an offer to settle. The offer presumed the parties to be spouses under the Family Law Act, S.B.C. 2011, c. 25 [FLA], proposed an equal division of property, and contemplated the dismissal of Ms. Hopson's claim for spousal support. Mr. Hannon did not accept that offer. He did not extend a counteroffer. On October 18, 2018, his counsel advised Ms. Hopson's counsel that the parties were "so far apart on settlement positions that making a counteroffer would very clearly prove futile".
- [14] The trial commenced on October 29, 2018, with Ms. Hopson opening her case. On the first day of trial, Mr. Hannon provided an 11th list of documents. As mentioned, he continued to produce documents throughout the trial.
- [15] On November 6, 2018 (the sixth day of trial), Ms. Hopson closed her case and Mr. Hannon opened his case. On November 8, 2017, the proceedings adjourned early because Mr. Hannon's counsel advised that Mr. Hannon did not have the mental or emotional capacity to continue to testify. The trial would not have completed anyway. It was scheduled to continue for an additional ten days commencing May 6, 2019.
- [16] On May 3, 2019 (the Friday before the trial was to resume), after getting short-leave, Mr. Hannon applied before me for another adjournment on the grounds that he had parted ways with his counsel and was not prepared to represent himself. He was represented by different counsel on the adjournment application. Mr. Hannon confirmed that he had retained that lawyer to represent him at the continuation of the trial, provided the adjournment was granted. After receiving that assurance, I granted the adjournment. The trial was then set to resume on July 22, 2019.
- [17] When the trial resumed on July 22, 2019, notwithstanding the assurance I had been given, Mr. Hannon appeared without counsel and represented himself with limited, out-of-court assistance from yet another lawyer. On July 23, 2019, he applied for another adjournment, which was denied.
- [18] The trial did not finish in July 2019, and continued for six additional days in October and November, 2019, when it finally completed.

TRIAL DECISION AND REOPENING DECISON

- [19] The Trial Decision was released on May 29, 2020. In those reasons for judgment, I expressed grave concern about the credibility of both parties and the reliability of their evidence. Among other things, I found that documents they tendered were not reliable because both of them demonstrated a willingness to falsify documents to advance their interests.

- [20] Mr. Hannon denied that the parties were ever in a marriage-like relationship. Accordingly, the first issue I addressed was whether the parties were spouses, as defined in the FLA. Based on the objective evidence pertaining to their relationship, which spanned many years, I found that the parties were spouses.
- [21] Mr. Hannon argued that the issues should be determined under English law, as he and Ms. Hopson lived in England for many years before moving to British Columbia. I was not persuaded by this argument. I found that the proper law of their relationship was British Columbia law.
- [22] The property in issue included what I referred to in the Trial Decision as the Yaletown Apartment, the Gibsons House, the Toyota truck, the Sam Webb receivable, and the sale proceeds of the Oxifree shares. Aside from the Toyota truck, Mr. Hannon argued that all these assets were his excluded property. I found that all were family property.
- [23] Mr. Hannon also argued, pursuant to s. 95 of the FLA, that it would be significantly unfair to equally divide family property. I did not find there was significant unfairness and ordered the family property to be divided equally.
- [24] I ordered that Ms. Hopson retain the Toyota truck and the Gibsons House, and Mr. Hannon retain the Yaletown Apartment, the Sam Webb receivable, and the Oxifree share sale proceeds. As the Gibsons House was held by the parties as joint tenants, I directed Mr. Hannon to transfer his half-interest to Ms. Hopson. I ordered Mr. Hannon to make a compensation payment to Ms. Hopson of \$72,414.50 to equalize the property division.
- [25] I dismissed Ms. Hopson's claim for spousal support.
- [26] I gave the parties leave to make submissions on costs.
- [27] On November 30, 2020, Mr. Hannon filed his application to re-open the trial. I issued written reasons on that application on January 22, 2021 (indexed at 2021 BCSC 99). The application was extremely broad in scope. For the most part, I was not persuaded by Mr. Hannon's arguments. I was also troubled by the fact that much of the additional evidence Mr. Hannon sought to tender on a re-opened trial was his own uncorroborated testimony and I had already found that his credibility had been completely and irreparably undermined. Further, he did not propose a clear plan for a re-opening, and I found the re-opening would result in prejudice to Ms. Hopson through further delay and additional costs. Ultimately, I permitted only a limited re-opening concerning the tax implications of a sale of the Yaletown Apartment and the transfer of Mr. Hannon's interest in the Gibsons House to Ms. Hopson.
- [28] Following my order on January 22, 2021, the parties reached agreement on the impact of these tax issues, such that the equalization payment owed by Mr. Hannon to Ms. Hopson was reduced to \$14,914.50. It was unnecessary to proceed with a re-opened trial.

POSITIONS OF THE PARTIES

Claimant's Position

- [29] Ms. Hopson was substantially successful at trial. She is therefore presumptively entitled to costs. The onus is on Mr. Hannon, as the unsuccessful party, to persuade me to exercise my discretion to depart from this presumptive rule. Ms. Hopson submits that he has not met this onus.
- [30] Next, Ms. Hopson argues that she should be awarded costs at the "more than ordinary difficulty" scale. She submits that Mr. Hannon's conduct throughout made the proceedings more than ordinarily difficult. She cites his delay in responding to her Notice of Family Claim; his failure to comply with Master Harper's order at the JCC; his ongoing late disclosure of voluminous documents, including many irrelevant documents; his late production of expert reports; his changing witness lists; and his conduct at trial, including but not limited to his tendency to be argumentative and unresponsive; his attempts to deceive the Court; his unnecessarily protracted cross examination of Ms. Hopson; and his unnecessarily lengthy direct evidence.
- [31] Ms. Hopson also seeks double costs from October 10, 2018, the date of her offer to settle. She argues that her offer was one that ought reasonably to have been accepted, pointing to its timing 19 days before trial and after completion of examination for discoveries and property appraisals; its relationship to the ultimate award; that it could easily have been evaluated; and that a rational basis was provided for it. She says the result at trial was similar to the offer, but overall landed more in her favour. She says Mr. Hannon's conduct and her financial circumstances also weigh in favour of an award of double costs.
- [32] If double costs are awarded for the period after October 10, 2018, Ms. Hopson submits that I should fix the quantum at just over \$162,000. Of that amount, \$55,000 represents the double costs she seeks for the period following her offer to settle.

Respondent's Position

- [33] Mr. Hannon concedes that Ms. Hopson was substantially successful at trial and that he has the onus of persuading me to depart from the presumptive rule that the successful party is entitled to their costs. He says that in this case the parties should bear their own costs or, alternatively, only a portion of Ms. Hopson's costs should be awarded, and at ordinary difficulty.
- [34] In support of these positions, Mr. Hannon says he has limited income-earning capacity and the award Ms. Hopson seeks would cause him financial hardship. He also says that the conduct Ms. Hopson impugns resulted from factors beyond his control and the fact that he was self-represented. He emphasizes that my negative credibility findings extended to Ms. Hopson, and says this weighs against awarding costs to her. Essentially, he argues that she should not be rewarded when negative credibility findings were made with respect to both parties. Mr. Hannon also argues that a costs award in the magnitude sought by Ms. Hopson would upset the balance of the trial judgment which divided the family property equally.

Finally, Mr. Hannon submits that the case was not more than ordinarily difficult and that, as a self-represented litigant, he should not be penalized for his lack of familiarity with court proceedings.

[35] Mr. Hannon also opposes Ms. Hopson's application for double costs. Again, he relies on his alleged financial hardship. He also argues that his rejection of Ms. Hopson's offer to settle was reasonable because there were complex and unsettled legal issues, particularly concerning the treatment of excluded property that has been transferred into joint ownership or the name of the other spouse, which created a large range of potential outcomes. He also says the trial judgment and the offer are sufficiently similar, such that his refusal of the offer does not justify double costs.

[36] Finally, if I find that costs should be awarded to Ms. Hopson, Mr. Hannon agrees that I should fix the quantum, it would be appropriate to award costs thrown away in relation to the adjournments, and disbursements should be fixed at \$10,000.

ISSUES

[37] As discussed, it is conceded that Ms. Hopson was substantially successful, that she is presumptively entitled to costs, and that if costs are awarded to her, I should fix the quantum including costs thrown away in relation to the adjournments and disbursements of \$10,000. The following issues remain to be decided:

1. Has Mr. Hannon established that I should depart from the presumptive rule that Ms. Hopson, as the substantially successful party, is entitled to costs?
2. If Ms. Hopson is entitled to costs, at what scale?
3. Is Ms. Hopson entitled to double costs from the date of her offer to settle?
4. If Ms. Hopson is entitled to costs, at what amount should they be fixed?

ANALYSIS

Should I depart from the presumptive rule that Ms. Hopson, as the substantially successful party, is entitled to costs?

[38] Rule 16-1(7) of the Supreme Court Family Rules, B.C. Reg. 169/2009 [Rules] provides that costs of a family law case must be awarded to the successful party unless the court otherwise orders. The word "successful" has been interpreted to mean "substantially successful": *D.J.D. v. M.L.D.*, 2017 BCSC 1417 at para. 14. Generally, a party is considered substantially successful where at least 75 percent of the issues are decided in their favour. However, the court has the discretion to take a more flexible approach, considering the weight and importance of each issue: *Campbell v. Campbell*, 2019 BCSC 186 at paras. 5-6; *Litt v. Gill*, 2016 BCCA 288 at para. 53.

[39] As mentioned, it is conceded that Ms. Hopson was substantially successful at trial. There were five issues to be decided (which are listed at para. 114 of the Trial Decision):

1. Were the parties "spouses" as defined in the FLA?
2. What is the "proper law of the relationship" for purposes of property division under the FLA?
3. What is family property and what is excluded property?
4. Would it be significantly unfair to divide the family property equally?
5. Has Ms. Hopson established an entitlement to spousal support and, if so, how should it be paid and in what amount?

Ms. Hopson was successful on issues one through four, which were the weightiest and most time-consuming issues. She was unsuccessful on issue five but its importance and complexity paled in comparison to the others.

[40] Again, despite Ms. Hopson's substantial success at trial, I have the discretion to deny her costs. Mr. Hannon bears the onus of persuading me to do that: *Townshend v. Abbott*, 2022 BCSC 57 at para. 15. In exercising this discretion, factors to consider include "hardship, earning capacity, the purpose of the particular award, the conduct of the parties in the litigation, and the importance of not upsetting the balance achieved by the award itself": *Gold v. Gold* (1993), 82 B.C.L.R. (2d) 180 (C.A.) at para. 20.

Financial Hardship and Earning Capacity

[41] Mr. Hannon depends heavily on his claim of financial hardship and limited earning capacity. Despite the importance of these factors, he relies largely on his own uncorroborated evidence which is problematic given my very negative findings about his credibility in the Trial Decision and the Re-opening Decision: see Trial Decision at paras. 64-102, 113; Re-opening Decision at paras. 34, 38, 53 and 57.

[42] Mr. Hannon says his assets comprise the balance in his Nationwide bank account, the Grand Apartment, and the Yaletown Apartment.

[43] According to statements he provided, the balance in the Nationwide bank account is £8,263 (as of January 12, 2022). Mr. Hannon says this is what remains of an inheritance of £77,479 he received from his parents in October 2021, as well as funds he borrowed from his brother and five friends between August 2020 and August 2021 (totalling £39,670). He says the majority of the inheritance was expended on this litigation, over-due strata fees, and repaying personal loans.

[44] Mr. Hannon provided no independent and reliable evidence to corroborate the amount of the inheritance or the existence of the loans. The bank records he provided are incomplete and appear to be selective. Mr. Hannon characterized his Nationwide account as his "operating bank account". The statements he provided for that account appear to show the

amounts he says are personal loans being deposited between August 2000 and August 2021. However, the statements also show relatively large debits from the account payable to "OFX", often within a day or two of the deposit of the alleged loan. For example, the statements show £6,000 being deposited between October 12 and 13, 2020 from "Hart R K" (one of Mr. Hannon's friends) and £6,000 being immediately withdrawn on October 13, 2020 and paid to "OFX". The same is seen with a deposit of £10,000 from Mr. Hannon's brother on October 14, 2020 and a withdrawal of the same amount on the same day for payment to "OFX". The record does not identify "OFX" and no explanation is provided for the payments to OFX. Mr. Hannon says he received the inheritance in October 2021, but he failed to include corroborating documents and even omitted the statements for his Nationwide account for the material period between August 2021 and December 2021. As mentioned, he says the inheritance was expended on this litigation, over-due strata fees, and repaying personal loans, but has provided no independent evidence or corroborating documents showing any of those payments.

- [45] At trial in 2018 and 2019, it was agreed that the Grand Apartment was heavily encumbered by a mortgage and therefore had negligible equity. Mr. Hannon provided no evidence of its current value.
- [46] The assessed value of the Yaletown Apartment was \$1,223,000 as of July 31, 2021. Mr. Hannon provided BMO records showing a mortgage balance of \$217,748 as of January 17, 2022. Assuming a market value similar to the July 31, 2021 assessed value, this leaves equity of about \$1,000,000. Mr. Hannon claims that he has never paid taxes on the rental income and says he has been informed that he has a large associated tax liability. He provided no indication of the magnitude of that liability and he produced no corroborating documents or independent evidence.
- [47] Mr. Hannon says the rental income from the Yaletown Apartment is largely expended on associated costs such as mortgage payments, strata fees, and utilities. He provided no explanation for not selling the Yaletown Apartment and investing the equity in an income earning asset.
- [48] Mr. Hannon says his disposable income is largely limited to government assistance payments in the United Kingdom. He says those payments stopped in November 2021 because the agency needed more information from him following the sale of his parents' home and the receipt of his inheritance. He says he provided that information to the agency and was subsequently advised the payments would resume. He did not include any of the information he provided to the agency in the evidentiary record for this application.

- [49] In the Trial Decision, I found that Ms. Hopson had an annual income of about \$37,500. I declined to impute income to Mr. Hannon and, among other things, found that his psychological condition interferes with his ability to work. Mr. Hannon points to these findings and argues that his earning capacity is limited, while Ms. Hopson's is not. However, given the state of the record before me and my grave concerns about Mr. Hannon's credibility, I am unable to conclude that he does not have the ability to earn passive income.
- [50] In summary, the evidentiary record does not permit me to conclude that Mr. Hannon is experiencing financial hardship or that an award of costs in the magnitude sought by Ms. Hopson would cause him financial hardship because the record contains obvious, unexplained gaps and relies heavily on his bare assertions. Similarly, I am unable to conclude that he is not earning or does not have the capacity to earn passive income. For the reasons I have expressed before, my concerns about his credibility preclude me from placing any weight on his uncorroborated evidence.

Conduct of the Parties

- [51] As mentioned, Mr. Hannon says that the conduct Ms. Hopson complains about resulted from factors beyond his control and the fact that he was self-represented. In addition, he emphasizes that I made negative credibility findings against both parties and he argues that Ms. Hopson's "deceit and misleading evidence" weighs against awarding her costs.
- [52] Again, Mr. Hannon bears the burden of persuading me that I should depart from the presumptive rule. His conduct certainly does not weigh in favour of depriving Ms. Hopson of her costs.
- [53] Mr. Hannon's conduct leading up to and throughout the trial, including but not limited to his various, often late requests for adjournments, failure to follow court orders, and late document disclosure, unduly prolonged the proceedings and caused Ms. Hopson to incur additional legal fees. I do not accept that this was beyond his control.
- [54] Mr. Hannon provided no explanation for his failure to provide complete and timely document production. He disregarded Master Harper's order of March 29, 2017. He provided no adequate explanation for his lawyer withdrawing, apparently days before the trial was to resume in May 2019, resulting in an adjournment on the Friday before which no doubt resulted in wasted time on the part of Ms. Hopson's counsel and costs thrown away. He provided no explanation for telling me in May 2019 (through new counsel) that he was not prepared to represent himself at trial and that he had retained new counsel for the trial, all to secure yet another adjournment, and then showing up for the new trial dates in July 2019 without counsel. Although he was an intelligent and resourceful litigant, his choice to represent himself resulted in much wasted court time and caused Ms. Hopson's counsel to shoulder a far greater burden in terms of organizing for trial and assisting the court than would otherwise have been the case.

- [55] Much trial time was taken up with evidence relevant to the issue of whether the parties were in a marriage-like relationship; something Mr. Hannon contested. The evidence was overwhelming that the parties were spouses. Mr. Hannon's unreasonable position on this issue unnecessarily and significantly prolonged the trial.
- [56] I turn now to consider the impact on the costs award of my negative assessment of Ms. Hopson's credibility. As is apparent from the Trial Decision and the Re-opening Decision, my concern about the credibility of both parties was grave in the extreme. Mr. Hannon says that Ms. Hopson should not be rewarded with a costs award when negative credibility findings were made with respect to both parties. I am not persuaded by that argument. While I do not condone her conduct, the presumption is that Ms. Hopson, as the successful party, will be awarded costs. Departing from that presumption in Mr. Hannon's favour would be rewarding him, which would be particularly unjust given his attempts to mislead and all the other ways in which his conduct prolonged and complicated the proceedings.

Upsetting the Balance

- [57] Awarding costs in a family proceeding involving monetary issues will inevitably shift the balance of the judgment to some degree. It does not necessarily follow that a substantially successful litigant should be denied their costs: *Judge v. Judge*, 2015 BCSC 2240 at para. 71. The question is whether the impact on the balance would be unacceptable for some reason: *K.A.M.R. v. W.H.G.*, 2014 BCSC 783 at para. 18; *S.D.W. v. C.W.W.*, 2006 BCSC 752 at para. 6.
- [58] The importance of this factor must be assessed within the context of the particular case. In *Rayner v. Doering*, 2013 BCSC 759, the successful party was awarded costs even though the unsuccessful party had limited income, far less than the successful party, in part because the unsuccessful party was left with substantial assets. In contrast, it may be unacceptable to award costs where the parties are left with meagre assets, where it would undermine reapportionment in favour of one party, or where it would affect the interests of a child.
- [59] In this case, following the trial each of the parties was left with assets valued at about \$1 million. As I have explained, the evidentiary record does not permit me to make findings about Mr. Hannon's current financial circumstances or his ability to earn passive income. In the circumstances, I am not persuaded that the impact of a costs award on the balance achieved by the trial judgment would be unacceptable or unfair.

Conclusion

- [60] Taking account of the principles addressed in *Gold*, Mr. Hannon has not met the onus of establishing that I should depart from the usual rule that a substantially successful litigant is entitled to costs. While the cost consequences will shift the balance achieved by the judgment to some extent, I do not, in all the circumstances, consider that this should operate to deprive the substantially successful litigant of her costs.

[61] Mr. Hannon argued in the alternative that Ms. Hopson should receive only a portion of her costs. The cases he relied on in support of this position turned, to a significant extent, on financial hardship that would be suffered by the unsuccessful party. Once again, I am not persuaded that Mr. Hannon will suffer financial hardship as a result of a costs award in Ms. Hopson's favour.

What scale of costs should be awarded?

[62] The scale of costs is determined with reference to the level of difficulty of the case. Section 1 of Appendix B of the Rules provides that when making an order for costs, the court "may determine if the family law case involves less than ordinary difficulty, ordinary difficulty or more than ordinary difficulty."

[63] Factors to consider in determining the level of difficulty include whether a difficult issue of law, fact, or construction is involved; whether the issue is of interest to a class or body of persons, or is of general interest; whether the result of the proceeding effectively determines the rights and obligations as between the parties beyond the relief that was actually granted or denied; deceit; disregard for court orders, procedure or process that lengthened the trial and made it more difficult; misleading the court by failing to provide full and proper disclosure; and failure to provide information in a cooperative manner or other conduct that increased the difficulty of the case: *Kopp v. Kopp*, 2012 BCCA 140 at paras. 86 and 90.

[64] On a consideration of those factors, I have no difficulty concluding that this case was of more than ordinary difficulty. The most significant issue was whether excluded property that was transferred from Mr. Hannon to Ms. Hopson, solely or jointly, thereby became family property. As I explained in the Trial Decision at paras. 155 to 162, this is legally complex and has given rise to several decisions that are, in some respects, difficult to reconcile. It is also a question of general interest. In this case, it was necessary to undertake a significant tracing exercise to answer it, which rendered it factually difficult as well: Trial Decision, paras. 163 to 204. In addition, as I have already said, Mr. Hannon's conduct leading up to and throughout the trial unduly prolonged the proceedings and caused Ms. Hopson to incur additional legal fees. This conduct greatly surpassed that which might be excused on the basis that he was self-represented.

[65] Ms. Hopson shall have her costs at the more than ordinary difficulty scale.

Should Ms. Hopson be awarded double costs from the date of her offer to settle?

[66] Rule 11-1(5)(b) provides that where an offer to settle has been made, the court may "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". Rule 11-1(6) identifies factors the court may consider in making such an award:

(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.

[67] Jurisprudence considering the civil analog to R. 11-1(6) (Supreme Court Civil Rules, B.C. Reg. 168/2009, Rule 9-1(6)) is helpful, as the two are identical in wording: *Sampley v Burns*, 2018 BCCA 178 at para. 65.

[68] On October 10, 2018, 19 days before the commencement of the trial, Ms. Hopson's counsel made an offer to settle by letter addressed to Mr. Hannon's counsel. The offer included the following terms:

1. The parties were in a marriage-like relationship for at least two years.
2. The FLA applies to the matter.
3. The evidence fails to establish any excluded property claims.
4. The property will be divided equally as follows:
 - (a) Mr. Hannon will retain the Yaletown Apartment and be responsible for the mortgage, the Grand Apartment and be responsible for the mortgage, the Toyota truck, his own separate bank accounts, 50 percent of the balance of all joint accounts, his own pension, and his own debts.
 - (b) Ms. Hopson will retain the Gibsons House (Mr. Hannon will transfer his half interest to Ms. Hopson and pay any and all associated tax liabilities), her own separate bank accounts, 50 percent of the balance of all joint accounts, her own pension, her own debts, and a \$50,000 equalization payment from Mr. Hannon.
5. All other claims, including Ms. Hopson's claim for spousal support, will be dismissed.
6. Each party will bear their own costs in the proceeding.

[69] The offer included a rationale for Ms. Hopson's position on the question of whether the parties were spouses and on Mr. Hannon's excluded property claims. It expressly provided that Ms. Hopson reserved the right to bring the offer to the attention of the Court for consideration in relation to costs after judgment was pronounced.

- [70] The offer was "open for acceptance until otherwise advised" but requested a response by October 17, 2018. Ms. Hopson's counsel emailed Mr. Hannon's counsel on October 17, 2018 asking whether he was planning to respond to the offer, to which counsel for Mr. Hannon said that a counteroffer would "prove futile" given the disparity in the parties' settlement positions. The offer was brought to the attention of Mr. Hannon's new counsel on June 13, 2019.
- [71] I start by comparing the relationship between the terms of settlement offered and the final judgment. When doing so, the court should consider whether the party who declined the offer would have been, in a global sense, financially better off having accepted the offer: *H.K. v. W.K.*, 2018 BCSC 1447 at para. 68.
- [72] The offer to settle and the result at trial were similar. The principal differences were that, pursuant to the judgment, Ms. Hopson retained the Toyota truck instead of Mr. Hannon, and the equalization payment to Ms. Hopson was \$72,414.50 as opposed to \$50,000. As I have explained, following the Re-opening Decision the parties agreed that the equalization payment to Ms. Hopson would be reduced to \$14,914. The various outcomes can be summarized as follows:

Party

Offer to Settle

Trial Judgment

Post-Trial Settlement

Mr. Hannon

\$1,099,000

\$1,007,414.50

\$949,914.50

Ms. Hopson

\$990,000

\$1,007,414.50

\$949,914.50

- [73] Although the offer was slightly better than the post-trial settlement from Ms. Hopson's perspective, the relevant consideration is whether Mr. Hannon, the party who refused the offer, would have been better off financially had he accepted the offer. He would have been, although the difference is not great. The sum he would have received had he accepted the offer to settle is higher than both the judgment at trial and the award after the post-trial settlement. In addition, if he accepted the offer he would have avoided paying the costs that

had already been awarded to Ms. Hopson prior to the offer, the costs he incurred to proceed to trial, and the costs he will now owe Ms. Hopson. The relationship between the offer and the final judgment weighs in favour of awarding Ms. Hopson double costs, but not heavily in favour.

[74] As detailed earlier in these reasons, the evidentiary record does not permit me to make findings about Mr. Hopson's current financial circumstances. What is clear is that following the trial the parties' financial circumstances were similar. However, Ms. Hopson bore what were no doubt substantial legal fees to bring this matter to trial. Indeed, Mr. Hannon's decision to self-represent almost certainly resulted in her legal fees being higher than they otherwise would have been because her counsel was put in the position of assisting Mr. Hannon with procedural matters. She spent time helping him identify documents and it fell to her to prepare legal submissions on applications brought by him. In these circumstances, the parties' relative financial circumstances weigh in favour of awarding Ms. Hopson double costs, but not heavily in favour.

[75] In this case, by far the most significant factor is whether the offer to settle was one that ought reasonably to have been accepted. The consideration is not whether the offer was reasonable, but rather whether it was unreasonable to refuse it: *Cottrill v. Utopia Day Spas and Salons Ltd.*, 2019 BCCA 26 at para. 30. The court may take into account the subjective reasons the offeree refused the offer, and whether those reasons were objectively reasonable: *C.P. v. RBC Life Insurance Company*, 2015 BCCA 30 at para. 97. In *Hartshorne v. Hartshorne*, 2011 BCCA 29 at para. 27, the Court of Appeal provided a list of non-exhaustive factors to consider in evaluating this issue:

the reasonableness is to be assessed by considering such factors as the timing of the offer, whether it had some relationship to the claim (as opposed to simply being a "nuisance offer"), whether it could be easily evaluated, and whether some rationale for the offer was provided. We do not intend this to be a comprehensive list, nor do we suggest that each of these factors will necessarily be relevant in a given case.

[76] The timing of the offer in this case was appropriate. It conformed with the timeline the parties had agreed to at the second trial management conference for providing offers to settle. Nineteen days before trial provided Mr. Hannon with sufficient time to consider the offer, and he had considerable information by that time to do so: discoveries and document disclosure were complete, and the Gibsons House and the Yaletown Apartment had been appraised.

[77] The offer was easily evaluated because of its timing and the rationale provided for Ms. Hopson's position. Among other things, Ms. Hopson's counsel pointed out that Mr. Hannon's own admissions on discovery, and substantial documentary evidence, confirmed the parties' relationship as spouses.

- [78] However, the offer reflected complete success for Ms. Hopson on the most significant issue: that is, whether Mr. Hannon would prevail on his excluded property claims. As I have already explained, the excluded property claims involved difficult issues of both fact and law. The treatment of excluded property that has been transferred into the other party's name or into joint names was and remains contentious. If Mr. Hannon had prevailed on that issue, he would have received far more of the property in issue than Ms. Hopson. I accept that these were difficult circumstances in which to assess the likelihood of any particular outcome. It cannot be said that it was unreasonable for Mr. Hannon to refuse the offer.
- [79] Having considered all the factors discussed above, and on balance, I have decided that it would not be just to exercise my discretion to depart from ordinary costs rules as a consequence of Ms. Hopson's offer to settle.

At what amount should costs be fixed?

- [80] As mentioned, the parties agree that it is appropriate for me to fix the quantum of costs, including costs thrown away in relation to the adjournments and disbursements of \$10,000.
- [81] I have reviewed the draft bill of costs provided by Ms. Hopson's counsel which accounts for a scale of more than ordinary difficulty and double costs after the offer to settle. It is in the amount of \$160,640, consisting of tariff items in the amount of \$74,500, double costs in the amount of \$55,000 (accounting for the cost of trial preparation, trial days, and this application), previously awarded costs thrown away in the amount of \$5,000, taxes on costs of \$16,140, and disbursements of \$10,000. The tariff items included are appropriate.
- [82] Subject to what is said in paragraph 83 below, Ms. Hopson shall have her costs in the total amount of \$99,040. This includes:
- \$74,500 in total for the tariff items claimed and \$5,000 for the costs thrown away, for total costs of \$79,500;
 - taxes of \$9,540 on that amount (at 12 percent); and
 - disbursements of \$10,000.
- [83] If either party considers that I have made an accounting or mathematical error, they may contact the registry to arrange for a brief hearing, provided they do so within 30 days of release of this judgment.

"Warren J."

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