

CANADA / JUDGMENT

J.L.L. v. A.J.M.

2024 BCSC 156

COURT

Supreme Court of British Columbia

DECIDED

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2024 BCSC 156 J.L.L. v. A.J.M.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

J.L.L. v. A.J.M.,

2024 BCSC 156

Date: 20240201

Docket: E16889

Registry: Chilliwack

Between:

J.L.L.

Claimant

And

A.J.M.

Respondent

Before: The Honourable Mr. Justice Ball

Reasons for Judgment on Costs

Counsel for the Claimant:

S. Ahuja

Counsel for the Respondent:

M.L. Sagert

Place and Dates of Hearing:

New Westminster, B.C.

September 7, 2023 and

December 18, 2023

Place and Date of Judgment:

New Westminster, B.C.

February 1, 2024

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Introduction

- [1] These are reasons for judgment on an application brought by the respondent for an order for double costs with regard to all steps taken in this litigation from October 28, 2021 onwards, when the respondent delivered an offer to settle which largely reflected the orders made after trial with respect to relocation and parenting time.
- [2] In keeping with the interests of privacy, particularly of the children of the marriage, the parties have been referred to herein as the claimant and the respondent. Any other witnesses have been referred to only by their initials. No disrespect is intended, but the privacy of the children is a paramount interest.
- [3] The respondent seeks an order for double costs payable by the claimant to the respondent from October 28, 2021 onwards based on an offer to settle giving the respondent primary parenting time and that the children not be relocated from Mission. The respondent also seeks an order that the claimant pay all fees charged by Dr. N.A. for the preparation of her expert report, trial preparation and attendance at trial.

- [4] With respect to costs, counsel appearing for the claimant acknowledged that the Court could order double costs. The submission was of the claimant, though, was "when is enough, enough".

Background

- [5] On January 6, 2020, the claimant filed a Notice of Family Claim.
- [6] On November 10, 2020, the respondent filed a Response to Family Claim.
- [7] The principal issue in this case was an application by the claimant to relocate with the two children from Mission, BC to Kamloops, BC. On or about January 8, 2021, the claimant advised the respondent that she intended to move to Kamloops to live with her new partner, M.L., who had located there. The claimant served a formal written notice of her intention to relocate with the children to Kamloops on January 26, 2021.
- [8] Examinations for discovery of the claimant occurred on February 6, 2023, and on February 21, 2023.
- [9] Initially, the claimant advised that she did not intend to attempt to move the children to Kamloops until the trial of this application for relocation was heard by the Court. Notwithstanding that advice, applications were brought by the claimant for an interim relocation order when the trial date was imminent. These applications were brought on August 22, 2022, September 8, 2022 and December 12, 2022. The August date had been set down unilaterally by the claimant, notwithstanding previous advice that the respondent's counsel was engaged in a trial on that date and not available, and had provided alternate dates. The September date was adjourned by Master Elwood (as he then was) due to the proximity of the trial dates. On the December date, Justice Ker again adjourned the application of the claimant for interim relocation because of the proximity of the trial dates. An application, brought by the respondent for a fine and repayment of the respondent's legal expenses, was also adjourned to the trial, without an order being made.
- [10] The trial herein commenced in February 28, 2023 and was heard over 12 days. Judgment was rendered on September 28, 2023, and the application by the claimant for the relocation of the children to Kamloops was dismissed with costs, with reasons indexed at J.L.L. v. A.J.M., 2023 BCSC 1698 [Trial Reasons]. In keeping with the Rule 11-1 of the Supreme Court Family Rules, B.C. Reg. 169/2009, the Court was not, prior to the rendering of judgment, advised of any offer to settle by either party.
- [11] Prior to trial, on February 9, 2023, the respondent delivered a Notice to Admit to the claimant seeking 73 admissions of fact. The claimant admitted 32 of the admissions sought and denied 41 of the admissions sought. Counsel for the respondent cross-examined the claimant for two days and also cross-examined M.L., Ms. M. and S.J., eventually eliciting all of the admissions of fact sought in February. In the result, several trial days were occupied proving the admissions which the claimant had earlier refused to admit. The claimant

should have made the admissions and, as a result of not doing so, several days of trial time were wasted.

Pre-Trial Positions on Relocation

- [12] Prior to this action being commenced, the parties had agreed to reside with the children in Mission. As noted in the trial judgment, the claimant then formed a new relationship with M.L. and came up with a plan to move with the children to Smithers. This plan was not disclosed by the claimant to the respondent or the claimant's mother, and was opposed by the respondent, the claimant's mother and other family members. An intervention was discussed in the Trial Reasons. No relocation to Smithers occurred at that time.
- [13] Then, as noted above, the claimant in January 2021 announced that she intended to move with the children into a home with M.L. in Kamloops. Later in 2021, Dr. N.A. prepared a first report dated October 5, 2021, which recommended that the children remain in Mission and not be relocated.
- [14] On October 28, 2021, the respondent made an offer to settle which was consistent with the first recommendations of Dr. N.A. The claimant ignored this offer and did not respond.
- [15] The claimant then sought a further report from Dr. N.A. on the basis that the respondent's relationship with S.J. had ended. The claimant also told Dr. N.A. that she was no longer required to take medication for anxiety and that she was participating in ongoing regular counselling. These two statements were found to be untrue. Unfortunately, Dr. N.A. relied on these false statements to prepare a second report which recommended, contrary to the first report, that the children could be relocated to Kamloops with the claimant.
- [16] On January 31, 2023, the claimant delivered her first list of documents. It should also be noted that while the claimant represented herself, she had the assistance of legal counsel prior to the commencement of the trial and, at various times during the course of the trial, legal counsel for the claimant participated in the trial.
- [17] On February 7, 2023, the respondent delivered to the claimant another offer to settle which specified that the parties would have equal and shared parenting time, and that the children would remain living in Mission and not be relocated. The claimant rejected this offer to settle.
- [18] The claimant also made a formal offer to settle in writing which was dated February 15, 2023. The claimant's offer to settle which anticipated the relocation of the children to Kamloops was complex and dealt with issues such as the potential of the relocation of the respondent to Kamloops, decision making, the potential for the respondent to comply with the recommendations in Dr. N.A.'s second report, and other subjects including special occasions and holiday parenting time, communication with the children, maintenance and support of children, and review of child support. It was evident that the contents of the offer to settle made by the claimant were complete and wide ranging, and the claimant was well

aware of the contents of that offer which she prepared and signed personally.

- [19] In the trial judgment, the respondent was awarded primary parenting time and the residence of the children was ordered to remain in Mission and not be relocated to Kamloops.
- [20] As noted, in this application, the respondent seeks costs based on the success of the respondent at trial, and seeks double costs payable from October 28, 2021 together with repayment of all disbursements incurred from October 28, 2021.
- [21] The respondent's submission is that he was substantially successful at trial as he was awarded primary parenting time, the residence of the children remained in Mission and were not permitted to be moved to Kamloops. The respondent says the trial judgment is consistent with the offers to settle made in writing by the respondent prior to trial, including offers to settle dated October 28, 2021 and February 7, 2023, all of which were rejected by the claimant.

Dr. N.A.

- [22] Based on an order of Justice Jenkins dated April 28, 2021, a first report was prepared by Dr. N.A., as an assessor, on October 6, 2021. That order provided that the claimant should pay any retainer or deposit required by the assessor for fees or disbursements and further that the parties were at liberty to apply at the final determination of this matter for a reallocation of the costs of this report.
- [23] An updated report was ordered by Associate Judge Bilawich on February 8, 2022, and in that order the parties were directed to share the initial cost of the report equally with liberty to argue a different apportionment of the costs at a later date. Each of the parties paid Dr. N.A. \$10,000 for this second report which was prepared and dated the May 10, 2022.
- [24] In the claimant's trial brief, the claimant stated that she would be tendering and relying upon both of Dr. N.A.'s reports at trial. The respondent required the attendance of Dr. N.A. at trial. Notwithstanding this advice and reliance upon these reports at trial, the claimant refused to contribute to the cost of Dr. N.A.'s attendance at trial. As a result, the respondent paid the entirety of the fees charged by Dr. N.A. to attend the trial. The respondent seeks recovery of the entirety of the fees which he paid to Dr. N.A.
- [25] At trial, the respondent objected to the admissibility and potential weight, if any, to be given to Dr. N.A.'s reports, and cross-examined Dr. N.A. at length for that purpose. The respondent was successful in having both of Dr. N.A.'s reports excluded from the evidence at trial. The respondent submits that he is entitled to double costs for the trial time spent arguing for the exclusion of these reports from the evidence as well as the need to cross-examine Dr. N.A. The respondent also seeks the repayment of the amounts he paid to Dr. N.A. for reports and to obtain Dr. N.A.'s trial appearance.

Child Support

[26] As a result of this Court's order that the children shall remain principally residing with the respondent in Mission, and the fact that the claimant failed to pay child support from September 1, 2023 to the respondent, an application was heard by Justice Baker. On December 11, 2023, Baker J. ordered, by consent, the following:

- a) that the claimant pay to the respondent monthly child support based on the claimant's income as determined by the Federal Child Support Guidelines, SOR/97-175, commencing September 1, 2023 and continuing thereafter for so long as the children are "Children of the Marriage";
- b) that child support income shall be adjusted on January 1, 2024, based on the Guidelines income of the parties; and
- c) that section 7 expenses be shared.

[27] Justice Baker also ordered the claimant to pay the respondent's costs for the application, and those costs were to be assessed by this Court. The respondent submits that the costs of the hearing in Chilliwack should be fixed at \$1,000. No submission was made by the claimant's counsel but \$1,000 is a reasonable amount for costs of a contested application for one half-day. The costs of the Chilliwack application are hereby fixed at \$1,000 payable forthwith by the claimant to the respondent.

Legal Basis for Costs and Double Costs

[28] Rule 16-1(7) of the Supreme Court Family Rules states:

- (7) Subject to subrule (9), costs of a family law case must be awarded to the successful party unless the court otherwise orders.

[29] Rule 11-1 of the Supreme Court Family Rules concerns family law actions in which a party delivered a formal offer to settle. Under Rule 11-1, in exercising its discretion with respect to costs, the court may consider an offer to settle. If a formal offer was delivered, Rule 11-1(5) provides that 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.
- [30] In particular, under Rule 11-1(5)(b), as stated above, the court may award double costs. Doing so is "a punitive measure against a litigant for that party's failure, in all of the circumstances, to have accepted an offer that should have been accepted": *Hartshorne v. Hartshorne*, 2011 BCCA 29 at para. 25.
- [31] The court must consider the factors set out in Rule 11-1(6) when deciding to make an order under Rule 11-1(5):
- (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.
- [32] To determine which party was the "successful party", the court must determine which party was substantially successful, based on the four-part analysis set forth in *Fotheringham v. Fotheringham*, 2001 BCSC 1321 at para. 46, leave to appeal ref'd 2002 BCCA 454:
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.

Analysis

- [33] Applying the *Fotheringham* steps to this case, I find the following. First, the principal matter in dispute was the relocation of the claimant and the children to Kamloops from Mission. The respondent was successful in relation to that dispute. Second, the potential relocation of the claimant and the children to Kamloops was of sufficient weight and importance to the parties to warrant a trial which occupied approximately 11 days. Third, with respect to all matters in dispute, the respondent substantially succeeded and therefore won the event. Fourth, given the respondent "substantially succeeded," there are no other reasons to

"otherwise order" that the respondent should be deprived of his costs such that each side should bear their own costs.

[34] The respondent also relied upon *S.A.M. v. J.A.M.*, 2017 BCSC 2348 at para. 7, where Justice Bernard summarized the principles applicable to costs awards in family cases:

[7] The governing legal principles are not in contention. They are as follows:

- (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);
- (g) 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,
- (h) 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).

- [35] At sub-para. 7(e), Bernard J. articulated the principle that a claim of financial hardship, without more, will not permit the court to depart from its usual practice in awarding successful parties their costs. The current financial status of the claimant has not been detailed and she is likely sharing expenses in a smaller town with her new partner, while apparently continuing to earn at the same level she did in Kamloops. The lack of detail is telling against the claimant.
- [36] In her Financial Statement dated December 11, 2023, the claimant declared that she had to sell her home in Kamloops "recently", apparently on November 30, 2023. There is not a single factual detail about the reason for sale of the home in Kamloops, nor about why she had to relocate to Smithers. In the same statement, the claimant asserted three unsecured debts of \$1,500, \$19,000, and \$13,500, which total \$34,000, all acquired on or before October 2022. She asserts, at p. 27, that she used all of the net equity of \$78,686.30 from the sale of the home to pay her "Line of Credits". However, if the claimant's Financial Statement entries are correct, her debts total \$34,000, which ought to leave equity of \$44,686.30. No details of other debts, lines of credit, nor legal bills have been provided by the claimant.
- [37] In July 2022, the claimant acquired a trailer, "jointly owned with [her] partner", which she claimed was valued at \$50,000. It is not clear, from the contents of the Financial Statement, if the trailer is actually valued at a total of \$100,000 (that is, two shares of \$50,000) or \$50,000 in total. Regardless, while in a state of apparently considerable debt, the claimant bought a trailer, the cost of which was apparently beyond her means.
- [38] Further, the claimant asserted that she attended the trial by herself and could not afford legal representation. These statements are simply untrue because legal counsel, Ms. A., did attend and on several occasions conducted examination of witnesses on the claimant's behalf.
- [39] There are no reasons known to this court which would support an exercise of the discretion of this court to "otherwise order" that the respondent be deprived of his costs. The respondent is entitled to costs payable by the claimant for this family law proceeding.
- [40] Further, as noted above, the respondent delivered an offer to settle to the claimant on October 28, 2021, which largely reflected the orders made at trial and ought to have been accepted by the claimant.
- [41] Counsel appeared for the claimant on the issue of costs and the issue of double costs. The children of the marriage are 6 and 9 years old. As a result of the claimant choosing a location farther from the children's home, she is obliged to pay child support and special expenses for the children.
- [42] The significant issue at trial was relocation, and the claimant submits there was little middle ground in relation to an offer to settle. The first report of Dr. N.A. did not support the move of the children to Kamloops, while the second report recommended the move. However, the second report's recommendation for the move was underpinned by the claimant's dishonest

answers to two significant questions: whether the claimant was taking medication and whether the claimant was receiving counselling. Contrary to her responses, she was not taking medication and she was not receiving counselling. She should have known that a dishonest answer would not assist her cause.

- [43] The claimant submitted through counsel that she was broke and could not afford to pay costs, particularly double costs. However, as noted above, in the case of S.A.M., Bernard J. noted that a claim of financial hardship is insufficient on its own for the court to choose not to award the successful party their costs.
- [44] In *Reid v. Reid*, 2017 BCCA 191 at para. 16, the Court of Appeal affirmed the trial judge's award of double costs. In choosing not to interfere with the trial judge's order, the Court of Appeal stated:
- [17] Mr. Reid's offer was substantially more generous than the amount Ms. Reid was ultimately awarded on appeal. In the circumstances, we see no reason to depart from the trial judge's conclusion that Mr. Reid should receive double costs for the trial proceedings from the first day of trial onward. As the trial judge found, the issues at trial were of more than ordinary difficulty, and we would not interfere with his view that trial costs should be assessed on that basis.

Conclusion

- [45] Based on the facts found and cases cited above, the respondent is entitled to costs of this family law action and to double costs from October 28, 2021 until the completion of this trial payable forthwith after assessment by the Registrar of this Court, and including all payments for fees or disbursements paid to Dr. N.A. for both of the Dr. N.A.'s two reports and the attendance of Dr. N.A. to testify during the trial.
- [46] I find that the respondent was the substantially successful party and there are no reasons which would support an exercise of the Court's discretion to otherwise deprive the respondent from his costs. I find that double costs from October 28, 2021 until the completion of the trial are appropriate as a result of the offer to settle which was delivered by the respondent to the claimant on October 28, 2021. The offer to settle was one that ought reasonably to have been accepted and largely accorded with the final judgment of this Court. Further, the relative financial circumstances of the parties did not provide sufficient reason for claimant to ignore or refuse to accept the offer, and any financial hardship is insufficient on its own for the Court to choose not to award costs to the respondent.
- [47] For the sake of completeness, the claimant is also required to pay costs fixed at \$1,000 as noted in para. 27 above. The respondent is also entitled to costs for the hearing of this application which are fixed in the amount of \$1,000 payable forthwith by the claimant to the respondent.

[48] The respondent may take out an appointment with the Registrar to have costs assessed. The Registrar is authorized to hold a pre-assessment conference to ensure that the parties have assembled documents necessary in the opinion of the Registrar to conduct the assessment of costs including double costs.

"Ball J."

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