
CANADA / JUDGMENT

K.A.C. v. J.D.E.C.

2021 BCSC 526

COURT

Supreme Court of British Columbia

DECIDED

23 March 2021

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2021 BCSC 526 K.A.C. v. J.D.E.C.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

K.A.C. v. J.D.E.C.,

2021 BCSC 526

Date: 20210323

Docket: E103176

Registry: Vancouver

Between:

K.A.C.

Claimant

And

J.D.E.C.

Respondent

Before: The Honourable Mr. Justice Milman

Reasons for Judgment

The Claimant, on her own behalf:

K.A.C.

Counsel for the Respondent:

B.J. Ingram

Written Submissions of the Claimant Received:

January 12, 2021

Written Submissions of the Respondent Received:

December 10, 2020 and

February 26, 2021

Place and Date of Judgment:

Vancouver, B.C.

March 23, 2021

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I. Introduction

- [1] On September 15, 2020, I delivered my judgment following the trial of this family law action. My trial reasons are indexed at 2020 BCSC 1373. The issues addressed at trial included questions of custody, access, child support (prospective and retroactive, including special and extraordinary expenses) and the division of family assets and debts.
- [2] My judgment left it open to the parties to address the issue of costs at a later date if they were unable to agree on the appropriate order. They did not agree. At a subsequent hearing on December 4, 2020, I directed the parties to deliver their submissions on costs in writing for my consideration. They have since done so.
- [3] The claimant, K.A.C., seeks an award of special costs in her favour, covering the entire decade-long litigation. She argues that she was primarily successful in the action and that the conduct of the respondent, J.D.E.C. has been reprehensible in various ways over the life of the litigation.
- [4] J.D.E.C. seeks an order for costs in his favour at the ordinary tariff for the trial only (including the post-trial hearing on December 4, 2020, but excluding the shared cost of the s. 211 report, which was incurred earlier), on the basis that he was the one who was primarily successful at trial and in the post-trial hearings.

[5] The following are my reasons for concluding that the parties should bear their own costs.

II. General Principles

- [6] Rule 16-1(7) of the Supreme Court Family Rules states that the "costs of a family law case must be awarded to the successful party unless the court otherwise orders." The principles to be applied in awarding costs pursuant to that provision were conveniently summarised as follows by *Maisonville J. in Kraft v. Kraft*, 2018 BCSC 1184, at paras. 18-23, rev'd in part on other grounds, 2019 BCCA 204:
- [18] Unless the court otherwise orders, costs in a family law case are awarded to the successful party: SCFR, Rule 16-1(7). A successful party is one who has been substantially successful: *MacLean v. Mio*, 2011 BCSC 148 at para. 30.
- [19] Determining which party has been substantially successful requires an objective comparison of the results obtained by the parties with the parties' submissions at trial: *MacLean* at para. 30.
- [20] In *D.J.D. v. M.L.D.*, 2017 BCSC 1417, Justice Dardi summarized the law on determining substantial success:
- [14] 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. Substantial success in the litigation is measured objectively and is to be determined by the trial judge by considering the disputed matters globally. 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.
- [15] 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.
- [16] It is clear from the appellate decisions 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.).
- [21] 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 the concept of "success" may require a more flexible approach 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. Costs can also be divided among parties where there is divided success. Success does not imply that a successful plaintiff must be successful on every issue in order to recover costs: *Robbins v. Pacific Newspaper Group*, 2006 BCSC 872, 54 B.C.L.R. (4th) 135 at para. 17.
- [22] In *Gold v. Gold*, [1993] B.C.J. No. 1792 (Q.L.), 106 D.L.R. (4th) 452 (C.A.), the Court of Appeal described the trial judge's discretion to deviate from the usual rule that costs are awarded to the successful party:
- [20] The question, then, is: when should the Court order otherwise? With respect, when the court should order otherwise is a matter of discretion, to be exercised judicially by the trial judge, as directed by the Rules of Court. To lay down any strict guidelines or even to attempt to give exhaustive examples is not, I think, helpful because the facts and issues in each family law case vary so greatly. Factors such as 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 are all matters which a trial judge, quite properly, may be asked to take into account. Assessing the importance of such factors within the context of a particular case, however, is a matter best left for determination by the trial judge.
- [23] The onus of persuading the court that it should depart from the usual rule rests on the unsuccessful litigant: *Louie v. Louie*, (1996) 64 A.C.W.S. (3d) 1321 (S.C.) at para. 7.
- [7] The circumstances in which this Court has in the past awarded special costs in the context of matrimonial litigation were conveniently summarized by Warren J. in *Hu v. Dickson*, 2015 BCSC 218, at paras. 46-49, as follows:

- [46] Special costs are awarded where a party's litigation conduct can be characterized as "reprehensible". In this context the word reprehensible encompasses both scandalous and outrageous conduct and also milder forms of misconduct deserving of reproof or rebuke. This does not mean that all forms of misconduct justify a special costs order - rather, the misconduct must be such as to be deserving of reproof or rebuke.
- [47] The purpose for this high level of costs is punitive and intended to express the court's disapproval of the party's conduct. It is not necessary that all aspects of a party's conduct in the litigation be reprehensible in order to make an award of special costs that applies to the entire action. However, pursuant to Rule 16-1(14) of the Supreme Court Family Rules, the court has the discretion to award costs that relate to only certain aspects of a proceeding and may do so where it would be disproportionate to award special costs of the entire proceeding.
- [48] The court must exercise restraint in awarding special costs and as such the party seeking special costs must demonstrate exceptional circumstances to justify a special costs order.
- [49] In *Kim v. Hong* Justice Griffin quoted extensively from the judgment of Justice Williams in *Schwabe v. Dr. Lisinski* where he summarized a number of cases in an effort to discern the kinds of conduct that had been characterized as reprehensible and thus warranting an award of special costs. Justice Griffin also categorized the conduct that had been found to justify an award of special costs in a number of family cases. From her reasons, it is apparent that the kinds of conduct that warrant an award of special costs include the following:
- acting with an improper motive, such as to intimidate, exhaust or financially drain the other party in the hopes that they will give up or soften their position in the litigation;
 - dissipating and/or not disclosing assets;
 - abusing the court's process by, among other things, failing to disclose documents, delaying in disclosing documents, failing to respond to reasonable requests, causing unnecessary interlocutory applications, and breaching the Rules of Court in a manner that prejudices the other party;
 - misleading the court, through outright fabrications or through evasive and/or equivocal responses; and
 - disobeying a court order.

[Citations omitted.]

III. Discussion

A. Should J.D.E.C. be ordered to pay special costs?

- [8] K.A.C. argues that the following conduct by J.D.E.C. over the life of the litigation justifies an award of special costs in her favour:
- (a) taking unreasonable positions, as in *Parton v. Parton*, 2016 BCSC 2205;
 - (b) forcing K.A.C. to respond to court applications unnecessarily when she was in hospital or otherwise vulnerable;
 - (c) pursuing litigation rather than the appropriate therapeutic steps in dealing with K.A.C.'s addiction issues;
 - (d) ignoring expert advice regarding the children and vilifying K.A.C. in front of them;
 - (e) breaching a court order by relocating the children to North Vancouver;
 - (f) refusing to assume his half share of the family debt, leading to a foreclosure order on the former family home and K.A.C.'s having to pursue a consumer proposal; and
 - (g) refusing reasonable settlement offers.
- [9] More generally, K.A.C. says that J.D.E.C. took many steps in the litigation out of spite, with the primary intention of harming her. I am not persuaded that is so. The tragic backdrop to this case, particularly since February 2016, has been K.A.C.'s ongoing struggle with substance abuse and the series of crises it has engendered for this family since then. The steps that J.D.E.C. has taken to deal with that situation appear to me to have been motivated by his genuine belief that what he was doing was necessary for the welfare of the children, rather than to harm K.A.C.
- [10] I appreciate that, as I noted in my trial judgment, the s. 211 report suggested that J.D.E.C. has not always been as respectful of K.A.C. in the presence of the children as he should have been. There were also moments during his trial testimony revealing that he continues to harbour considerable anger and even disdain towards her. But I am not persuaded that such behaviour rises anywhere near the level of being "reprehensible" in the sense contemplated by the authorities cited above, so as to justify an award of special costs against him.
- [11] It has been held that an award of special costs should be imposed in response to a litigant's conduct of the litigation itself, rather than the antecedent dealings between the parties that led to it: *Smithies Holdings Inc. v. RCV Holdings Ltd.*, 2017 BCCA 177.
- [12] Finally, it is only formal settlement offers presented in accordance with the Supreme Court Family Rules that can properly attract cost consequences in this context: *M.S.G. v. S.K.R.*, 2015 BCSC 913. In this case, no such offers have been brought to my attention.
- [13] In summary, I am not persuaded that an award of special costs is warranted in this case.
- B. Is either party entitled to their costs as the successful litigant?

- [14] Both parties argue that they are entitled to an award of costs in their favour on the grounds that they were substantially successful at trial.
- [15] With respect to the financial issues, I have concluded that the result at trial was mixed. K.A.C. prevailed in resisting J.D.E.C.'s largest claim against her, namely that for retroactive child support. Among the reasons I gave for rejecting that claim was the fact that K.A.C. had assumed most of the parties' joint family debts alone following their separation, as she had asserted.
- [16] On the other hand, I did not accept K.A.C.'s allegation that J.D.E.C. had significantly understated his income. Although I did accept her allegation that his business expenses were inflated to some extent, the adjustment that I ultimately made in response was much smaller than that which K.A.C. had been seeking. Moreover, I found no basis in the evidence to support her more serious allegation that he had been receiving significant amounts of undeclared income.
- [17] The question of success on the parenting and guardianship issues is more complex. I accept that those issues were the most important to the parties and that they occupied a large part of the trial time. There is also no doubt that the orders I made on those issues after the trial were not favourable to K.A.C.
- [18] The question that arises is whether J.D.E.C., as the more successful party on those issues, can fairly claim to have achieved something like a 75% success level overall, and if so, whether he should be awarded his trial costs on that basis.
- [19] There are a number of factors that lead me to conclude that he should not.
- [20] First, K.A.C.'s lack of success on the parenting and guardianship issues was not attributable to her conduct in the litigation or to unreasonable positions she may have taken before, during or since the trial. Rather, it is attributable entirely to the ongoing impact of her substance abuse. Had it not been for her post-trial relapse on August 2, 2020, the outcome on those issues would certainly have been very different.
- [21] Given the positions advanced by the parties during their closing arguments at the end of the trial proper in June 2020, it is more likely that their relative levels of success, had the trial actually concluded then, would have been more evenly balanced than they appear now. For that reason, I am not prepared to conclude that J.D.E.C. achieved an overall level of success at trial that was greater than 75%.
- [22] The hearings that have taken place since then were acknowledged by both sides to be necessary and have, more recently, led to some easing of the restrictions that I imposed on K.A.C.'s parenting time initially. In those circumstances, I am not persuaded that success at those hearings can be attributed to either side exclusively.

- [23] I appreciate that the sequence of events that has drawn out the litigation in this way has not made it any less expensive for J.D.E.C. On the contrary, he has had to continue paying his lawyer to attend a series of post-trial hearings, with more still to come. But given that this state of affairs flows directly from a mental health challenge with which K.A.C. is trying hard to cope, I am not persuaded that an award of costs against her is the appropriate response.
- [24] In light of what I have found to be the mixed results at trial, and, with respect to the parenting and guardianship issues where success was less evenly divided, the role played by K.A.C.'s substance abuse challenges in driving the unfavourable outcome from her perspective, I have concluded that the appropriate order is for each party to bear their own costs.

IV. Summary and Conclusion

- [25] In summary, I am ordering that the parties bear their own costs of this action and all subsequent hearings that have occurred to date.

"Milman J."

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Prepared on 27 October 2026 · Esheria