
CANADA / JUDGMENT

K.A.M.R. v. W.H.G.

2014 BCSC 783

COURT

Supreme Court of British Columbia

DECIDED

6 May 2014

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2014 BCSC 783 K.A.M.R. v. W.H.G.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

K.A.M.R. v. W.H.G.,

2014 BCSC 783

Date: 20140506

Docket: 06-0797

Registry: Victoria

K.A.M.R.

Claimant

And

W.H.G.

Respondent

Before: The Honourable Mr. Justice R. Punnnett

Reasons for Judgment

re Costs

Counsel for the Claimant:

R.D. Batchelor

Counsel for the Respondent:

K.L. Simmons, Q.C.

J. Cameron, Articled Student

Place and Date of Trial:

Victoria, B.C.

November 5-7, 2013

Written submissions of the Respondent received March 5, 2014

Written submissions of the Claimant received April 2, 2014

Written reply submissions of the Respondent received April 7, 2014

Place and Date of Judgment:

Victoria B.C.

May 6, 2014

- [1] These reasons on costs arise from an application by the claimant for retroactive child support, retroactive and current special and extraordinary expenses, and a determination of whether or not the parties' eldest child remained a child of the marriage.
- [2] In reasons indexed at K.A.M.R. v. W.H.G., 2014 BCSC 103, I held that the child M.W.G. was no longer a child of the marriage and dismissed the majority of the claims for retroactive child support for the years 2006 to 2013 as well as the claim for retroactive special and extraordinary expenses from 2006 to October 31, 2013. Orders were made relating to ongoing maintenance and financial disclosure.
- [3] The parties requested leave to address the issue of costs. Leave was granted and the parties have now filed their written submissions on costs.

Position of the Respondent

- [4] The respondent submits that he was substantially successful on the application and is entitled to costs of the proceeding from its commencement on April 25, 2012 and double costs from the delivery of his offer to settle on December 7, 2012 or alternatively from his October 25, 2013 offer to settle.

Position of the Claimant

- [5] The claimant concedes that the respondent achieved substantial success when measured by the analysis set out in *Fotheringham v. Fotheringham*, 2001 BCSC 1321. However she submits that there are reasons for the court to order that the winning party be deprived of some of his costs. In her submission costs should be fixed at \$8,000. She points out that her income is approximately 5% of the respondent's and that the respondent was guilty of late financial disclosure. Further, she says a full award of costs (or double costs) would upset the balance achieved by the award itself.

Law and Discussion

- [6] Rule 16-1(7) of the Supreme Court Family Rules, B.C. Reg. 169/2009, states that "costs of a family law case must be awarded to the successful party unless the court otherwise orders."
- [7] Where multiple issues are in dispute the court must determine where substantial success lies: *Hausmann v. Klukas*, 2012 BCSC 277 at para. 5. The term "substantial success" was considered by Mr. Justice Bouck in *Fotheringham*, where he noted that "since success, a passing grade, is around 50% or better, substantial success is about 75% or better." He noted that this definition did not require a "meticulous mathematical examination of the matters in dispute" but instead was meant to serve as a "rough and ready guide when looked at all the disputed matters globally" (para. 45). As a result the determination of whether a person has achieved substantial success requires that the court "[apply] an objective comparison of the relief granted and the results obtained by the parties with the submissions made at trial" (*Hausmann* at para. 7).
- [8] As I have noted, the claimant concedes that the respondent "won the event," as Bouck J. put it in *Fotheringham* (para. 46). The respondent succeeded on the question of which year's annual income, current or prior, should be used to calculate the amount of child support; mainly succeeded in resisting the claim for retroactive special and extraordinary expenses; and succeeded on the issue as to their eldest son's status as a child of the marriage. On the claim for arrears of child support, the claimant sought \$32,290; based on the respondent's success on the income year issue, the final award under this head was \$5,724, an amount that the respondent did not dispute.
- [9] The claimant was successful in arguing that special and extraordinary expenses should be divided between the parties proportionate to their income. However, this issue was of minor importance when compared with the points where the respondent was successful. Objectively viewed, the respondent easily meets the standard for "substantial success". The claimant has rightly conceded this.
- [10] As stated in the Rules, the usual practice is that costs follow the event, subject to the court's discretion to refuse costs to the successful party in certain circumstances. An unsuccessful party who seeks to deviate from the usual practice bears the burden of persuading the court that it should exercise its discretion to do so. (See *Lilley v. Lilley* (1994), 50 R.F.L. (3d) 341 (B.C.S.C.) at para. 17.)
- [11] In *Gold v. Gold* (1993), 106 D.L.R. (4th) 452 at para. 20 (B.C.C.A.), the Court of Appeal considered when a court should exercise its discretion to refuse costs under s. 16-1(7) of the Supreme Court Family Rules. The court held that judges should consider "[f]actors 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".

- [12] The claimant says that there are reasons in this case to order that the respondent be at least partially deprived of his costs. She relies on the factors noted in Gold in support of her position. The claimant submits that the respondent should receive only a portion of his costs, noting that the draft bill of costs and disbursement presented by the respondent is \$15,516.63. The claimant submits that costs should be fixed at \$8,000, which is roughly the amount of arrears and retroactive support that the respondent was ordered to pay at trial.

Hardship and Earning Capacity

- [13] The claimant submits that to award the costs claimed would result in some financial hardship to her. She asserts that while agreeing to an imputed income of \$30,000 at trial her real income is approximately \$8,400 per annum and that given the respondent earns \$154,000 per annum her income is approximately 5% of his.
- [14] A comparison of the parties' respective incomes alone does not provide a complete picture of their financial circumstances. The claimant for example remarried in 1999 to a high school teacher who is now a police officer. They remain together. They have greater assets than the respondent. The two oldest children are ages 18 and 20 and the claimant has a younger child who is in school. There is no evidence that the claimant is limited in her earning capacity. There is no evidence that she is impecunious.
- [15] The respondent notes that in addition to supporting his older sons he also supports three younger children with his new spouse. As well he has overcome bankruptcy and retrained in order to earn a greater income. He asserts that the litigation has been a considerable financial drain on him.
- [16] As Madam Justice Martinson stated in *S.D.W. v. C.W.W.*, 2006 BCSC 162 at para. 29:
- [29] While financial hardship is one factor to consider, that factor is insufficient on its own to depart from the usual rule that costs follow the event: Nor is sympathy a sound basis for departing from the usual rules:
- [17] The fact that the substantially successful party has a greater income than the party liable for costs does not in itself dictate that the court should exercise its discretion and not award costs in the normal course. (Lilley at para. 25).
- [18] If the award of costs will cause hardship that is out of the ordinary or affects the payor's income earning capacity or has an unacceptable impact on the balance achieved by the award then costs may be denied to the substantially successful party. (See *S.D.W. v. C.W.W.*, 2006 BCSC 752 at para. 6).
- [19] In other words, the financial hardship must be significant enough that it invokes the court's discretion, not because of sympathy, but because it is of such magnitude that it would be significantly unfair when considered in the context of the successful party's right to recover costs. How "out of the ordinary" such financial hardship must be is a question of fact; however, the word "hardship" is telling, given it is defined in the Oxford English Dictionary

as "[a] condition which presses unusually hard upon one who has to endure it; hardness of fate or circumstance; severe toil or suffering; extreme want or privation."

- [20] For example, in *Bird v. Kohl*, 2012 BCSC 1424, the claimant was unemployed and dependent upon his parents for shelter and owned no significant assets other than his interest in the former matrimonial home (which would likely to applied to partially satisfy the claimant's judgement against him), yet the court still awarded costs of \$18,856.54 against him, noting that he had the capacity to restore his former earning power although it would take several years to do so.
- [21] I conclude in these circumstances that the claimant has not established a level of hardship sufficient to invoke the court's discretion to depart from the usual rule that costs follow the event.

Conduct of the Parties in the Litigation

- [22] The claimant submits that some issues relating to the respondent's disclosure (or lack thereof) should be taken into account. However the evidence provided is selective and fails to set out the history of the litigation in a manner sufficient to enable the court to properly consider the issue of conduct of the parties. In any event as noted by the respondent none of the financial disclosure that was eventually ordered by the court was entered at trial.
- [23] As a result I find no evidence of conduct of the respondent that would vitiate his entitlement to costs.

Purpose of the Award and the Importance of Not Upsetting the Balance Achieved by the Award

- [24] The claimant submits that to award costs to the respondent would upset the balance achieved by the award itself. Gold indicated that this was a factor in considering whether to award costs. However, in *Gold* the litigation involved the reapportionment of assets. That context is important as the concept of not upsetting the balance achieved presupposes that there was a comparison or weighing involved in the decision reached. That was not the case here. The issues in dispute related to how to calculate child support, past and future. It was a given that there were arrears as the respondent admitted that was the case.
- [25] As a result this factor has no application in the circumstances of this case.

Partial Costs

[26] Finally the claimant submits that only partial costs only should be awarded. She relies on *Cohen v. Cohen* (1995), 15 R.F.L. (4th) 84 (B.C.C.A.), and *Rolls v. Rolls* (1996), 20 R.F.L. (4th) 232 (B.C.C.A.), for the principle that the court may limit a successful party's costs. Cohen does not provide sufficient information respecting the relative circumstances of the parties to assist and in *Rolls* issues of division of assets were at play. It is therefore of limited assistance.

Conclusion on Costs at Scale B

[27] I conclude there is no basis to depart from the ordinary rule that the respondent, as the successful party, should receive his costs. As a result the respondent is entitled to his costs at Scale B.

[28] However, the matter does not end there. As indicated earlier the respondent seeks double costs as a result of offers made. In addition, I must again address the application of the court's discretion to deny or limit double costs.

Law Respecting Costs and Offers to Settle

[29] Rule 11-1(4) and 11-1(5)(b) provide:

11-1 (4) The court may consider an offer to settle when exercising the court's discretion in relation to costs.

11-1 (5) In a family law case in which an offer to settle has been made, the court may do one or more of the following:

(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;

[30] In making an order under Rule 11-1(5) the court may consider, under Rule 11-1(6):

11-1 (6)

(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.

[31] In *Hartshorne v. Hartshorne*, 2011 BCCA 29, the court noted that an award of double costs "is a punitive measure against a litigant for that party's failure, in all of the circumstances, to have accepted an offer to settle that should have been accepted" (para. 25). As was noted by Mr. Justice Warren in *Crick v. Crick* (1997), 43 B.C.L.R. (3d) 251 at para. 8 (S.C.), "where there

has been an accurate and timely offer to settle such important and potentially destructive litigation, double costs ought to be the rule rather than the exception, subject always to the judicially exercised discretion of the Court."

The Offers

- [32] The respondent made two offers, the first on December 7, 2012 and the second on October 25, 2013. The offers comply with the requirements of Rule 11-1(1)(c): that is, they were in writing, were served on all parties and contained the requisite wording respecting reserving the right to bring the offer to the attention of the court when costs were considered.
- [33] In the letter of December 7, 2012 the respondent offered to settle the matter on the following terms:
- a. a payment of \$8,500 to [the claimant] for the table amount of child support arrears although the actual amount of arrears calculated by [the respondent] was \$4,805;
 - b. nothing would be paid towards past special expenses; and
 - c. the "previous year" method would be used for future child support calculations and WCB income would not be included;
 - d. the adjustment date for child support would be in June annually;
 - e. special expenses would be shared in accordance with the separation agreement (in proportion to the parties actual annual incomes);
 - f. the parties would mutually exchange their income tax returns for the purpose of determining both the table amount and a proportionate share of special expenses; and
 - g. each party would bear their own costs.
- [34] The total amount that the respondent was in fact ordered to pay was \$7,989.27 and it was ordered that the previous year method should be used for all future child support calculations.
- [35] The December 7, 2012 offer and the decision, not surprisingly, do not directly coincide. However, it is the overall result as compared to the offer as well as the various additional factors noted earlier that must be considered.
- [36] The December 7, 2012 offer addressed all of the issues dealt with at trial with the exception of the child of the marriage issue which arose later. The offer was consistent with the trial result with respect to the issues of past or current year income calculations, the proportionate division of special expenses and the arrears of child support. It was not equal to or better with respect to past special expenses. Overall the amount recovered by the claimant was less than the offer. However, I find that the December 7, 2012 offer was sufficiently similar to the outcome of the trial such that it should not form the basis for an award of double costs.

[37] The offer of October 25, 2013 offered to settle the matter on the following terms:

a. a total payment of \$24,500 in arrears allocated as follows:

i. \$11,271 for arrears in the table amount of child support;

ii. \$7,000 for arrears in payment of special expenses;

iii. \$6,229 as an incentive to settle to avoid risks and costs at trial;

to be paid by a lump sum payment of \$7,000 and \$200 per month thereafter until the youngest child ceases to be a child of the marriage at which time the payments would increase to \$1000 per month;

b. the "previous year" method would be used for future child support calculations and WCB income would be included;

c. [the claimant's] annual income for the purpose of calculating child support would be \$20,000;

d. [the respondent] would pay the sum of \$100 per month for special expenses for M.J.G. regardless of whether or not such sum was in fact incurred or whether it was in fact sharing in proportion to the parties' incomes;

e. the adjustment date for child support would be in January;

f. the parties would mutually exchange their income tax returns for the purpose of determining both the table amount and a proportionate share of special expenses; and

g. each party would bear their own costs.

[38] The amount in the offer of October 25, 2013 substantially exceeds the monetary amount awarded at trial, includes an award for past special expenses, proposes the child support calculation methodology ordered at trial and the same adjustment date as was determined at trial. There was clearly time for the claimant to consider the offer as the trial did not commence until November 5, 2013.

[39] Had the claimant accepted the offer the parties would have avoided the significant financial costs of trial and the negative impact of the litigation on their ongoing relationship as parents.

[40] In Hartshorne, the Court of Appeal at para. 27 discussed the question of when an offer is one that ought reasonably to have been accepted, noting that it "is not determined by reference to the award that was ultimately made." Instead, the court must ask whether, "at the time the offer was open for acceptance, it would have been reasonable for it to have been accepted." Factors to consider include the timing of the offer; whether the offer had some relationship to the claim, or, conversely, whether it was a "nuisance offer"; whether it could be easily evaluated; and whether some rationale for the offer was provided. The court noted that this is not an exhaustive list and that not all of the factors will necessarily be relevant in a

particular case.

- [41] In my view given the knowledge of the parties at the time of the October 25, 2013 offer the claimant acting reasonably ought to have accepted the offer within 7 days of its receipt. Doing so would have eliminated escalating legal costs (particularly in light of the amounts in dispute), provided certainty to the parties, settled and made certain the method of calculation of child support in the future and avoided the uncertainty of trial. It was not a nuisance offer -- it is comprehensive, in that each of the points in contention is clearly addressed -- and it could easily be evaluated. With regards to the timing, in Hartshorne the court affirmed Mr. Justice Leask's decision where he found that the offer, presented 12 days before trial, was made in a timely manner. The offer in this case was also presented 12 days before trial.

The Exercise of the Court's Discretion

- [42] In *Kawana v. Shemal*, 2011 BCSC 1267, Mr. Justice Pearlman determined that the fact that an award of double costs would cause some financial hardship is not a factor which "militates against an award of double costs" (para. 60).
- [43] The purpose of offers is to encourage settlement. If some financial hardship were the sole criteria on which the court based its discretion that purpose would be undermined as a party with fewer financial resources could force the other side through to trial without fear of the financial costs of doing so. Family litigation is particularly harmful by its very nature. Reasonable behaviour and reasonable consideration of offers to settle are to be encouraged.
- [44] The thrust of the claimant's submissions really emphasizes the element of sympathy for the position she now finds herself in. As noted earlier sympathy is not a valid reason to depart from the usual rule.
- [45] The respondent is entitled to double costs from seven days after the October 25, 2013 offer to settle.

Lump Sum Award of Costs

- [46] Both parties seek summary assessment of the award of costs in order to avoid further expense and to bring matters to a close.
- [47] Rule 16-1(14) of the Supreme Court Family Rules permits the fixing of the amount of costs and disbursements. The respondent has filed a draft bill of costs of \$13,500 at Scale B plus disbursements of \$1,341.53.
- [48] The claimant does not dispute the calculation of the costs claimed simply asserting that the court should fix them at \$8,000 including disbursements.
- [49] The costs claimed at Scale B are reasonable and properly incurred to defend the claim and therefore are, with two exceptions relating to disbursements, recoverable. The file administration fee of \$35 while chargeable to the respondent is not one to be passed on to

the claimant. It is unclear what the Access File Retrieval Charge of \$40 relates to and its inclusion in the costs claims has not been justified. The claim for taxable disbursements is reduced by \$75 to \$1,012.17 resulting in tax of \$50.60 instead of the \$56.36 claimed for total disbursements (non-taxable and taxable) of \$1,262.77.

[50] Given the date of the October 2013 offer and the trial date double costs are limited to Item 7 -- Attendance at Trial -- November 5, 6 and 7 for a total of \$6000 additional to the Scale B costs.

[51] The issue of hearing fees is currently before the Supreme Court of Canada: Trial Lawyers Association of British Columbia v. British Columbia (Attorney General), [2013] S.C.C.A. No. 137. If such fees are upheld and due to the Crown they shall be the claimant's responsibility.

[52] As a result I fix the respondent's costs at the lump sum of \$20,762.77.

"Punnett J."

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