
CANADA / JUDGMENT

K.C.W. v. F.X.L.

2004 BCSC 1521

COURT

Supreme Court of British Columbia

DECIDED

19 November 2004

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IN THE SUPREME COURT OF BRITISH COLUMBIA

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Citation:

K.C.W. v. F.X.L.

2004 BCSC 1521

Date: 20041119

Docket: D108809

Registry: Vancouver

Between:

K.C.W.

Plaintiff

And:

F.X.L.

Defendant

Before: The Honourable Mr. Justice Chamberlist

Reasons for Judgment

Re: Costs

Counsel for J.W.,

Committee/Litigation Guardian of the Estate of the Plaintiff:

D.H. Goodwin

Counsel for the defendant:

S.G. Wright

No appearance on behalf of the plaintiff, K.C.W.

Date and Place of Hearing:

November 3, 2004

Video conference with

Prince George, B.C.

INTRODUCTION

- [1] On April 25, 2003, I delivered reasons (2003 BCSC 636) with respect to this matrimonial litigation. In those reasons I left it open for the parties to address me relative to the issue of costs. I subsequently heard submissions with respect to the personal liability of the committee for costs, and thereafter, ordered that the Public Guardian and Trustee show cause why it should not be ordered by the court to appear on behalf of the patient.
- [2] After hearing submissions from all parties, including counsel for the Public Guardian and Trustee, I delivered reasons on July 30, 2004 (2004 BCSC 1042) wherein I agreed with the Public Guardian and Trustee that I was without jurisdiction to order it to represent the patient in these proceedings.
- [3] In the absence of any representation on the part of the patient, I have heard submissions with respect to the issue of costs.

BACKGROUND

- [4] These proceedings were initially instituted by K.C.W. seeking a divorce from Ms. F.X.L.. Ms. F.X.L. filed an answer and counter-petition seeking a divorce, spousal maintenance, s. 57 declaration, determination and division of family assets, an order restraining disposition of family assets, and costs.
- [5] The action was set to proceed to trial on September 17, 2001, but was adjourned to March 18, 2002. On January 24, 2002, K.C.W. was declared to be incapable of managing his affairs and his son, J.W., Chartered Accountant, was appointed committee of his father's estate.
- [6] On March 13, 2002, some five days before the trial was to commence, J.W., as committee/litigation guardian, applied to the court for release of funds from a Family Compensation settlement, which had been frozen, in order to retain counsel for the patient. At that time the application was opposed by Ms. F.X.L. and the trial was adjourned from the March date to July 15, 2002.

- [7] On May 2, 2002, some ten weeks before the new trial date, Ms. F.X.L. applied to further amend her counter-petition, adding a defendant and expanding on her claims for fraudulent conveyance and fraudulent preferences.
- [8] At the commencement of the trial, J.W., as committee/litigation guardian, appeared in person on behalf of his incompetent father. Neither counsel for Ms. F.X.L. nor myself, as presiding judge, raised the issue that R. 6(4) of the Rules of Court requires "a litigation guardian to act by solicitor unless the litigation guardian is the Public Trustee".
- [9] On the first day of trial, Mr. Wright, on behalf of Ms. F.X.L., abandoned the relief sought relative to the alleged fraudulent conveyance and fraudulent preferences.
- [10] In Mr. Wright's final submissions on behalf of Ms. F.X.L., he suggested, because of the protracted litigation and the desire to have finality to this extensive and costly litigation, that an appropriate judgment would be to have the sum of \$52,000.00, which had been the subject of the May 2002 application, paid to Ms. F.X.L. in full satisfaction of all her claims. In my decision I determined, for various reasons, this was an appropriate remedy in all of the circumstances of their relationship, the assets I had found to be family assets and, because of what I referred to as Mr. K.C.W.'s financial circumstances being murky.
- [11] The issues with respect to costs therefore come down to whether or not there should be an order for costs at all, or whether the order for costs should go only against the estate of the patient, or whether there should be an order for costs against the estate and the committee.

SHOULD THERE BE AN ORDER FOR COSTS?

- [12] The leading authority on costs in matrimonial proceedings in this Province is *Gold v. Gold*, [1993] B.C.J. No. 1792, Vancouver Registry CA014368, CA015454, CA015493 and CA015494. At paras. 19 and 20 of that decision, McEachern C.J.B.C., speaking for a unanimous court panel of five, said this:

19 It is my further view that the rule which should govern the award of costs in matrimonial proceedings should be the same as in other civil litigation, namely, that costs should follow the event unless the Court otherwise orders as specified in Rule 57: *Meneghetti v. Meneghetti* (1979), 17 B.C.L.R. 200 (B.C.S.C.) at p. 201.

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.

[13] In *Fotheringham v. Fotheringham*, [2001] B.C.J. No. 2083 (B.C.S.C.), Bouck J. stated at paras. 45 and 46:

45 Gold[1] now seems to say that substantial success in an action should be decided by the trial judge looking at the various matters in dispute and weighing their relative importance. The words "substantial success" are not defined. For want of a better measure, since success, a passing grade, is around 50% or better, substantial success is about 75% or better. That does not mean a court must descend into a meticulous mathematical examination of the matters in dispute and assign a percentage to each matter. Rather, it is meant to serve as a rough and ready guide when looked at all the disputed matters globally.

...

46 Based on the above interpretation of Rules 57(9), 57(15) and Gold, a decision to award or not award costs after a trial might follow a four step inquiry.

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.

[14] Applying those inquiries, this trial initially involved four contested matters. First was the issue of arrears and the submissions by the plaintiff that they should be reduced or eliminated; second was the identification and determination of family assets; third was the re-apportionment of those family assets. The issue of fraudulent preference and fraudulent conveyance was not an issue at the trial of this matter; these issues having been abandoned on the first day of trial.

[15] There is no doubt that Ms. F.X.L. succeeded in having me determine that the principal assets which could be identified; namely, the former matrimonial home, bank accounts, and proceeds of the Family Compensation action, were indeed family assets. From that perspective, I am of the opinion that she succeeded substantially on all issues that were tried. The weight or importance of these issues were important and the determination of those issues "won the event" as far as my ordering a 100% re-apportionment, in Ms. F.X.L.'s favour, of the only unencumbered family asset, being the \$52,000.00 proceeds of the Family Compensation action.

[16] I therefore find, generally, the disputed matters globally were determined in Ms. F.X.L.'s favour.

- [17] The litigation was expensive litigation and required the attendance, on a daily basis, of an interpreter for Ms. F.X.L.. Legal Services Society have taken an assignment of any costs that she will be awarded. If she does not recover costs she will not be out of pocket as it would appear that the Legal Services Society would not be in a position to attach the fruits of her litigation to satisfy any indebtedness she has to the Society.
- [18] The fact that the Legal Services Society will ultimately be the benefactor of any costs awarded and collected is, in my view, a neutral factor in this determination. I therefore do not think that there should be any consideration of whether there are reasons to "otherwise order" that Ms. F.X.L. be deprived of her costs, and instead order that each side bear their own costs because she does not have to pay costs in any event. The fact is that without the Legal Services Society acting on her behalf she would not have been able to obtain audience in this court. Likewise, had the committee been successful in his May 2002 application to have funds released from the Family Compensation action proceeds, there would have been little to award her globally given the circumstances of the estate.
- [19] Finally, the committee submits that to award costs against the patient would be to undo the balance that was obtained by my decision in the matrimonial proceedings at trial. He submits that each of the parties have little in terms of assets, that both are in poor health, and that, in any event, as mentioned earlier, there would be no costs borne by Ms. F.X.L. as she would not be called upon to reimburse the Legal Services Society for their costs.
- [20] In the case at bar, the Legal Services Society, acting on its assignment of costs, may, in fact, have the equivalent of "a hollow judgment". That fact however should not, as indicated earlier, deter from the application of *Gold v. Gold* to the circumstances of this case.
- [21] This was hard fought litigation where Ms. F.X.L. was confronted with an apparent dichotomy in the circumstances of her husband. While she lived with him, he appeared to have access to unlimited funds. He represented to her that he was financially "very comfortable" and made the same representations to the Chinese government and the Canadian government, when he agreed to sponsor her. She relocated to Canada and gave up the comforts she had enjoyed in China, and would have continued to enjoy had she not met Mr. K.C.W.. The litigation was about getting her some kind of financial compensation for her present and future needs. There simply is no need to consider any balancing of interests or the circumstances of the parties.
- [22] I therefore conclude that there will be an order for costs in Ms. F.X.L.'s favour.

SHOULD COSTS BE AWARDED AGAINST THE COMMITTEE?

- [23] Throughout my earlier released reasons I alluded to the fact that J.W. had, for many years, been involved in his father's financial affairs. I also opined that because he was a creditor of the estate, he was not an unbiased representative. Yet, I have also concluded that his involvement in his father's estate, his appearing as committee/litigation guardian to defend Ms. F.X.L.'s claims, although he would certainly be in conflict because of his creditor/debtor

relationship with his father, are not compelling reasons to have him personally responsible for costs in this litigation for the following reasons.

- [24] Firstly, if a committee is to be personally liable for costs, he will only be responsible for costs after his appointment (*Cameron (Public Guardian and Trustee of) v. Loudon*, [2002] O.J. No. 2184). Secondly, the decision of our Court of Appeal in *White v. Rutter*, [19888] B.C.J. No. 871, Vancouver Registry No. CA007910, is authority for the proposition that a person other than the Public Trustee who brings an action on behalf of an infant as guardian ad litem does so as a volunteer and will be liable for costs.
- [25] The same however is not true where the guardian ad litem or litigation guardian defends the interests of a person under a disability, be it an infant or a patient under the Patients Property Act. The distinction was succinctly set out by Coady J. in *Lopaschuk v. Henderson and Houston*, 3 W.W.R. (NS) 327 (B.C.S.C.), where his Lordship said that, at p. 327:

The point does not seem to have arisen in our courts. There is some conflict of judicial opinion in the cases referred to. An infant cannot appear by himself in an action. If he appears it must be by his guardian. On default of appearance by the guardian on behalf of an infant, the plaintiff is required by the rules to apply for the appointment of a guardian by whom the infant may appear and defend the action. Certainly, it seems to me, if a guardian is so appointed, and an appearance is entered and the action defended by him on behalf of the infant, no order for costs would ordinarily be made against such guardian personally. The same rule should apply to a guardian who in good faith voluntarily comes forward and undertakes to perform a duty which he considers is imposed upon by him by reason of his relationship to the infant. To hold that a guardian, who undertakes properly and in good faith to protect the interests of the infant, does so at the risk of costs against himself personally, might well be to discourage defences on behalf of infants where legitimate defences might well be advanced and to thus perhaps sacrifice infants' interests. Where an action is brought by a next friend on behalf of an infant the case is different.

[Emphasis added]

- [26] In this matrimonial litigation, all the efforts of J.W. as committee were to defend the allegations made in the answer and counter-petition. He was duty bound to defend the proceedings as legal representative of the patient and gave evidence as a witness regarding his father's one-half interest in the former family home, and the funeral expenses. I rejected J.W.'s evidence with respect to both family assets, but I have concluded that the rejection of his evidence does not provide the basis for an award of costs against him personally as litigation guardian. Neither Ms. F.X.L.'s counsel, Mr. Wright, nor myself have ever indicated that J.W.'s conduct was scandalous or reprehensible.

[27] I have also considered whether or not these are circumstances in which J.W., as a non-party, could be held responsible for costs. Costs awarded against a non-party are rare. In *Lawson v. British Columbia (Solicitor General)*, [1992] B.C.J. No. 112 (B.C.C.A.); 63 B.C.L.R.(2d) 334, Goldie J.A., speaking for the court, quoted, with approval, Mr. Justice Cumming's decision in *Young v. Young* (1990), 50 B.C.L.R. (2d) 1. At p. 85 of *Young*, the court said:

I do not propose to review in detail the remainder of these cases. It is sufficient to say that a reading of them reveals that in each case where a non-party was ordered to pay costs that party was either the "real litigant", as that term is used in *Re Sturmer*, or had promoted the litigation improperly in such a way as to make him guilty of maintenance. None of them support the proposition that mere commonality of interest is a sufficient basis for the award of costs against a non-party who has provided assistance to a litigant. Such an award can only be made if the non-party has been guilty of maintenance and that is not the case here.

[28] As previously indicated, J.W. did not prosecute this action after he was appointed committee and litigation guardian. He attempted to have monies released from trust to have counsel act for the estate. Two doctors certified that his father, the plaintiff in this action, was incapable of managing his affairs. J.W., as committee, was statutorily obliged to act as litigation guardian pursuant to Supreme Court Rule 6, and his father required a litigation guardian for this divorce proceeding to advance to trial.

[29] I agree with Mr. Goodwin, on behalf of J.W., that although J.W. was personally involved as a creditor of his father's estate, that in itself does not establish an exception to the general rule that where a litigation guardian is merely defending an action that, in that case, costs should not be awarded against him personally. There simply was a commonality of interest in him attempting to preserve the estate assets.

[30] I have therefore concluded that the defendant shall have its costs against the estate of the patient, K.C.W., on Scale 3 only, and no costs shall be awarded against the committee J.W. in these proceedings.

"E.G. Chamberlist, J."

The Honourable Mr. Justice E.G. Chamberlist

March 22, 2005 - Revised Judgment

Corrigendum is issued advising that the date of the hearing was incorrectly stated as being November 3, 2003, and was, in fact, November 3, 2004. This change is noted and applied.

[1] *Gold v. Gold* (1993), 82 B.C.L.R. (2d) 180 (B.C.C.A.)

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