

CANADA / JUDGMENT

K.G. v. D.G.

2024 BCSC 379

COURT

Supreme Court of British Columbia

DECIDED

16 January 2024

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2024 BCSC 379 K.G. v. D.G.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

K.G. v. D.G.,

2024 BCSC 379

Date: 20240116

Docket: E201110

Registry: Vancouver

Between:

K.G.

Claimant

And

D.G.

Respondent

Before: The Honourable Mr. Justice Giaschi

Oral Reasons for Judgment - Re Costs

In Chambers

Counsel for the Claimant:

M. Sodagar

Counsel for the Respondent:

A.S.K. Wormeli

Place and Date of Trial/Hearing:

Vancouver, B.C.

December 14, 2023

Place and Date of Judgment:

Vancouver, B.C.

January 16, 2024

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Introduction

- [1] THE COURT: We are here today for me to deliver oral reasons. I reserve the right to amend these reasons for grammar and clarity and to provide full citations and quotations. The result will, however, not change as a consequence of any such amendments.
- [2] The parties appear before me in relation to costs.
- [3] The underlying action is a family law action. It was tried in January 2023 together with a related civil action. The total trial time was 15 days. The parties are agreed that 10 of the 15 days can be allocated to this action.
- [4] There were, broadly speaking, three issues in the action.
- [5] The first issue was whether a comprehensive separation agreement between the parties dated July 23, 2019, should be set aside. The respondent argued that it should be set aside and orders be made under the Family Law Act, S.B.C. 2011, c. 25 [FLA] in substitution of its provisions. The claimant opposed the setting aside of the agreement.

- [6] The second issue was whether a s. 211 report should be ordered to address, in particular, alienation between the respondent and the children of the marriage. The third issue was whether the parties and their children should be ordered to attend counselling with the Alyson Jones Agency. The respondent argued in support of orders for a s. 211 report and counselling. The claimant opposed such orders.
- [7] In my reasons dated July 26, 2023, reported at 2023 BCSC 1162, I declined to set aside the separation agreement and declined to order that the family attend counselling. I did, however, order that a s. 211 report be prepared. Accordingly, it can be said that the claimant was successful on the issues of the separation agreement and counselling and that the respondent was successful on the issue of the s. 211 report.

Submissions

- [8] The claimant now submits that she was substantially successful in the action and seeks the costs of the action.
- [9] In contrast, the respondent submits that neither party was substantially successful. He says the parenting and financial issues occupied equal amounts of time that the counselling issue was not "hard-pressed" by him and occupied little time, and that the parenting issues were of "significant importance". He further relies on the offer to settle rule, Rule 11-1. He submits he made an offer to settle on November 24, 2022, which reasonably ought to have been accepted by the claimant but was not. Ultimately, he submits that he should be entitled to costs from the date of the offer.
- [10] The offer to settle relied upon by the respondent was made on November 24, 2022. It addressed only the s. 211 report and counselling issues. In the offer, the respondent gave two proposals, either of which the claimant could accept. In summary, the first proposal was that Dr. Krywaniuk prepare a s. 211 report with the costs of such report to be initially borne by the respondent. The second proposal was that the family participate in the Alyson Jones Family Forward Reunification Program.
- [11] It is common ground that the claimant accepted neither proposal.

Legal Principles

- [12] Costs in family matters are addressed in Rule 16-1 of the Supreme Court Family Rules, B.C. Reg.169/2009 [SCFR]. Rule 16-1(7) provides that costs of a family law case must be awarded to the successful party unless the court otherwise orders.
- (7) Subject to subrule (9) [which addresses costs of applications], costs of a family law case must be awarded to the successful party unless the court otherwise orders.

- [13] In *Harras v. Lhotka*, 2016 BCCA 246, at para. 48, Garson J.A. noted that success under Rule 16-1(7) means substantial success and that to determine the substantially successful party, the trial judge must consider the various issues in dispute and weigh their relative importance. She further adopted, as a rough and ready guide, that substantial success is 75 percent or better. She added that determining substantial success was not a mechanical or mathematical exercise.
- [14] In *Fotheringham v. Fotheringham*, 2001 BCSC 1321, at para. 46, Justice Bouck proposed a frequently cited four step inquiry that might be engaged when deciding whether to award costs.
- [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.
- [15] In *Litt v. Gill*, 2016 BCCA 288, at para. 53, it was recognized that the determination of the substantially successful party in a family law case can be more difficult than in a civil case because of the "panoply of claims advanced by each party, and divided success".
- [16] Importantly, substantial success does not require that a party be successful on all of the issues: *Reid v. Reid*, 2017 BCCA 191, at para. 40.
- [17] Where success is divided and no party can be said to be "substantially successful", the parties can be ordered to pay their own costs or, pursuant to Rule 16-1(14), the court may apportion costs between the parties: *Sandhu v. Sandhu*, 2011 BCSC 853, at paras. 8-10 [*Sandhu*] and *Lee v. Jarvie*, 2013 BCCA 515 at para. 21 [*Lee*]. However, for costs to be apportioned, three criteria must be established: (1) the party seeking apportionment must establish there were separate and distinct issues and the party was successful on one of those issues; (2) the court time attributable to the separate issues must be able to be identified; and (3) the apportionment must effect a just result: *Sandhu* at para. 11; *Lee* at para. 40.

- [18] Rule 11-1 of the SCFR addresses offers to settle. Pursuant to Rule 11-1(4), such offers may be considered by the court when exercising its discretion in relation to costs. The factors to consider in exercising such discretion include whether the offer ought reasonably to have been accepted, the relationship between the offer and the final result, the relative financial circumstances of the parties, and any other appropriate factor. Rules 11-1(5) and (6) provide:
- (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:
 - (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.
 - (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.

Analysis

- [19] I will first address whether the claimant can be said to have been substantially successful in the action. If it is determined she was substantially successful, she is *prima facie* entitled to costs. If the threshold of substantial success is not met, I may decline to award costs to either party or I may apportion the costs provided the criteria in *Sandhu and Lee* are established. Finally, I will address what effect, if any, should be given to the offer to settle.

Substantial Success

- [20] The respondent characterizes the issues decided at trial as being "financial issues" and "parenting issues", and submits that the parenting issues were of significant importance. I do not consider that it is helpful to recharacterize the issues as financial and parenting issues and also do not consider that it assists the respondent to say that the parenting issues were of significant importance. Although the s. 211 report and counselling issues were undoubtedly parenting issues, the issue of the validity of the separation agreement also concerned parenting issues, since the agreement dealt extensively with parenting, something which the respondent acknowledges at para. 5 of his affidavit sworn December 6, 2023.
- [21] What the authorities require me to do is to weigh the relative importance to the parties of the issues decided at trial. The determination of "substantial success" requires a consideration of the importance of the issues to the parties and a global assessment of all matters in dispute.
- [22] As indicated, there were three issues: should the separation agreement be set aside; should a s. 211 report be ordered; and should there be an order the family attend counselling. The claimant was successful on the first issue as the separation agreement was not set aside, and on the third issue, as no counselling was ordered. The respondent was successful on the second issue as a s. 211 report was ordered.
- [23] Despite the arguments of the respondent, I agree with the claimant that she has been substantially successful in the action. In my view, the respondent is being somewhat disingenuous in now implying that the issues revolving around the validity of the separation agreement were somehow of minor or lesser significance.
- [24] The issue of the validity of the separation agreement was of extreme importance to both parties. The issue did not simply involve a consideration of the validity of the agreement. It had huge implications for the parties. This issue concerned, indirectly, how family property and debt was to be divided between the parties and the amount and duration of the respondent's ongoing support payments.
- [25] An indication of the great importance of the separation agreement to the parties is reflected in the respondent's affidavit filed on October 20, 2022. In that affidavit he deposes:
4. [K.G.] received over a million dollars from the matrimonial home and I got nothing. She received the vast majority of the family assets. She receives \$12,000 dollars in supports ongoing since Sept 2019.
- [26] The respondent's written submissions are also indicative of the relative importance of the issues. The respondent provided two written submissions. The first submission addressed the civil action, the setting aside of the separation agreement and the orders that should be made in substitution of the terms of the settlement agreement, if it was set aside. More specifically, his submissions addressed property division, the incomes of the parties to be

used for support, and spousal support. He specifically requested that income be imputed to the claimant and that a termination date be set for spousal support. His submissions in relation to the financial issues comprised approximately 26 pages. His submissions in relation to the s. 211 report comprised approximately 13 pages. His submissions in relation to counselling comprised approximately eight pages. In other words, approximately 72 percent of his written submissions were in relation to the two issues he lost.

- [27] Another indication of the importance of the issues is the amount of trial time devoted to them. The respondent submits that equal amounts of time were spent on the financial issues and the parenting issues. I do not agree. In my view, considerably more time was spent on the issues related to the separation agreement than was spent on the parenting issues generally, and the s. 211 issue in particular. Moreover, it is my view that some of the time spent on the s. 211 issue was unnecessary. In particular, the respondent called Dr. Krywaniuk, a psychologist and s. 211 report writer, who gave evidence about the process of writing s. 211 reports. Although I referred to his evidence in my reasons, his evidence was largely unnecessary and unhelpful. The same can also be said of the evidence of Alyson Jones who was called by the respondent in relation to the counselling issue.
- [28] An additional factor that suggests the s. 211 issue was of lesser importance is the fact that the need for a s. 211 report has been known since at least October 2020 but was not diligently pursued. The respondent filed a notice of application on October 14, 2020, for, inter alia, a s. 211 report. He next brought an application for a s. 211 report in June of 2022, and did not bring the current application until December 16, 2022. No explanation was provided as to why the request for a s. 211 report was not pursued with more diligence after October 2020. If it was of such significant importance to the respondent, one would expect that the October 2020 application would have been pursued with more diligence.
- [29] Finally, in assessing the relative importance of the issues to the parties, I note that the claimant opposed a s. 211 report because she did not believe it would be fruitful, did not believe the children would participate and had concerns that it would interfere with the ongoing counselling the children were receiving. These concerns were not unwarranted. In my reasons, I recognized that there was uncertainty as to whether the children would cooperate but decided it was important to at least make the effort.
- [30] Accordingly, in my view, the setting aside of the separation agreement was by far the most important issue for the parties. The claimant was successful on this issue and was also successful on the issue of whether the family should attend counselling. She was substantially successful in the action.

The Settlement Offer

- [31] As indicated, the respondent relies on the settlement offer made November 24, 2022, and Rule 11-1 of the SCFR.
- [32] I decline to take the offer to settle into consideration for the following reasons.

- [33] First, the offer to settle did not address the main issue of importance to the parties, namely, the validity of the separation agreement.
- [34] Second, the offer to settle specifically identified that Dr. Krywaniuk was to be the s. 211 report author, something which was not part of the order made at trial. It was, in my view, not unreasonable for the claimant to refuse the appointment of Dr. Krywaniuk.
- [35] Third, the offer was made somewhat late in the day. It was not made until November 24, 2022, and the trial was set to commence on January 9, 2023. The claimant had only about six weeks to evaluate an offer which would involve the children who were then disinclined to participate and who, at the time, were under distress.

Order

- [36] Accordingly, I order that the claimant shall have her costs of the action to be assessed as a matter of ordinary difficulty under Appendix B. The number of days of trial to be used in the assessment shall be 10.
- [37] Anything else, counsel?
- [38] CNSL A. WORMELI: I think that's it. On the issue of days of trial, I'm aware that the first five days of trial have a different tariff rate. I suspect that it would be appropriate to use two-thirds of the lower tariff rate for the first five days and apply it to the 10-day portion.
- [39] THE COURT: Ms. Sodagar?
- [40] CNSL M. SODAGAR: Justice, the -- I dis -- well, I'm not sure when the civil case was heard. It may have been in the middle.
- [41] THE COURT: Well, it was at the commencement, but also the evidence was throughout applied to both, so I do not know that you can say the first five days were the civil trial. It is my view that this matter should be approached as though it was intended to be a 10-day trial and was a 10-day family trial.
- [42] CNSL M. SODAGAR: And then, Justice, also costs -- the claimant is seeking costs for the hearing that we had before you in December.
- [43] THE COURT: The hearing -- what?
- [44] CNSL M. SODAGAR: The full-day hearing that we had before you, the costs hearing.
- [45] THE COURT: Well, I am sorry, she has got the costs of the action.
- [46] CNSL M. SODAGAR: Okay.
- [47] THE COURT: Would that not fall under the costs of the action?
- [48] CNSL M. SODAGAR: Well, then it would be 11 days, because it was 10 days for the trial.
- [49] THE COURT: Well, no, no, but I am only -- I was only addressing the trial.

[50] CNSL M. SODAGAR: I see.

[51] THE COURT: I was addressing the -- for purposes of the tariff, it must be known how many days of trial there were.

[52] CNSL M. SODAGAR: Yes.

[53] THE COURT: So that is -- there were 10 days of trial. Any other applications, the costs of those applications will fall either to the party who was awarded the costs of the application or, in accordance with the rules, to the party who receives the costs of the action, which is the claimant.

[54] CNSL M. SODAGAR: Thank you, Justice.

[55] THE COURT: All right. Thank you, we are concluded.

"Giaschi J."

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