
CANADA / JUDGMENT

K.M.F. v. A.S.

2022 BCSC 1878

COURT

Supreme Court of British Columbia

DECIDED

27 October 2022

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2022 BCSC 1878 K.M.F. v. A.S.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

K.M.F. v. A.S.,

2022 BCSC 1878

Date: 20221027

Docket: E108932

Registry: Kelowna

Between:

K.M.F.

Claimant

And

A.S.

Respondent

Before: The Honourable Mr. Justice G.P. Weatherill

Reasons for Judgment on Costs

Counsel for the Claimant:

W.T. Clarke

The Respondent on his own behalf:

Self-represented

Place and Date of Trial/Hearing:

Kelowna, B.C.

October 3, 2022

Place and Date of Judgment:

Kelowna, B.C.

October 27, 2022

INTRODUCTION

- [1] On February 15, 2022, I issued reasons for judgment indexed as 2022 BCSC 238 (the "Reasons") following an 11-day trial concerning parenting responsibilities, guardianship, parenting time and issues of possible parental alienation of the parties' now nearly 10-year-old daughter S.S.
- [2] The claimant and respondent both request an order for costs in their favour.
- [3] For the reasons that follow, I decline to award costs to either party.

BACKGROUND

- [4] The parties moved in together in May 2007, were married in August 2013, separated in August 2015, and were divorced in April 2018. Their only child together, S.S., was born on February 7, 2013.
- [5] This litigation began with the claimant filing a notice of family claim on October 20, 2015. As noted in the Reasons, this has been an acrimonious dispute. At trial, the central issues related to parenting responsibilities, guardianship and parenting time of S.S., who wanted nothing to do with the respondent. The cause of S.S.'s downright refusal to have a relationship with the respondent was disputed at trial, consuming substantial trial time. S.S. was herself unable to articulate the reason for her refusal to her psychologist Dr. Elterman, to various counsellors, or to the Court.
- [6] On June 5, 2017, an order was made by consent (the "Consent Order") granting the claimant sole guardianship of S.S. That order obliged her to advise the respondent of any matters of a significant nature affecting S.S., and to discuss with the respondent any significant decisions concerning S.S.'s health, education, religious instruction and general welfare. If the parties could not agree, the claimant would make the final decision, with liberty to the respondent to apply for review.
- [7] The Reasons detail the issues that arose following the Consent Order with respect to the respondent's parenting time. I concluded that the claimant was largely responsible for S.S.'s refusal to develop her relationship with the respondent. In particular, I noted the following:

- [45] Despite the claimant's statements to the contrary, I agree with Dr. Elterman's opinions and conclude that she and her new family view the respondent as the enemy and whether overtly or subconsciously, those views have been transmitted to S.S. Quite understandably, S.S. has developed a phobia about the respondent that has manifested in a distorted perception of him as a bad person. She has decided that the respondent is a scary person and is not encouraged to have fun with him.
- [46] Dr. Elterman's comments about the claimant are consistent with my observations of the claimant as she testified. I conclude S.S.'s anxiety towards the respondent and deep distrust of him are directly related to and fueled by the negative subliminal messaging she gives S.S. Although she says she is fully supportive of S.S. having a healthy relationship with the respondent and although she states she has done everything in her power to facilitate it, I am not persuaded that she has.
- [47] The claimant's casual parenting style and approach with S.S. is to suggest things and not to give her direction. This has resulted in S.S. being empowered that she can choose what she wishes to do. S.S. believes that it is up to her to decide whether she has to see the respondent and that if she refuses, she won't have to. I conclude the claimant's approach towards S.S. is mostly to blame for her ongoing reluctance towards the respondent.
- [48] S.S. is very loyal to the claimant and looks to her for guidance and support. S.S. wants only to please her mother and does not want to disappoint her. In my view, the claimant must be more assertive and enthusiastic with S.S. She must reassure her that the respondent is her biological father, he is no longer the hot-head that she recalls, he is not someone she is to be fearful of and that she has no reason to feel threatened. She needs to be gentle, but firm with S.S. She cannot let S.S. be in charge of the decision. If the claimant is supportive, encouraging and makes it clear to S.S. that she genuinely supports S.S. having a relationship with her father, I am confident S.S. will come around and a re-building of the relationship can begin and flourish.
- [49] To be clear, enthusiastic and full encouragement by the claimant towards S.S. having a good relationship with the respondent is critical to success. Orders put in place to help repair and improve the relationship between S.S. and the respondent have failed. The claimant's messaging to S.S. will determine the outcome. Anything less than whole-hearted, unconditional support by her towards S.S.'s relationship with the respondent will undoubtedly result in failure.
- [50] Failing the claimant's full participation, there is no realistic hope for improved relations that will promote S.S.'s best interests and more drastic steps will be required. Regrettably, unless the claimant's approach changes, at least until S.S. is old enough to make decisions for herself, ongoing counselling and assistance from the Court will likely be required. The claimant cannot sabotage the positive steps currently being made. She cannot be present during the reintegration of S.S., and the respondent and his new family, M.L. and K.M.

- [8] In sum, I concluded that the claimant bears the lion's share of the blame for S.S.'s stubborn refusal to have a relationship with the respondent. The claimant's efforts to encourage S.S. to foster a relationship with her father were insincere.

THE GOVERNING LAW IN RELATION TO COSTS

- [9] Rule 16-1 of the Supreme Court Family Rules [Rules] governs costs. Rule 16-1(7) states that costs must be awarded to the successful party unless the Court otherwise orders. While the Court has wide discretion when considering costs, there is a four-step approach that the Court must consider:
- What were the matters in dispute in the case? These may or may not include the issues set out in the pleadings;
 - What weight or importance did the parties ascribe to the matters in dispute;
 - Respecting all matters in dispute, and from a global perspective, which party was substantially successful in the matters in dispute; and
 - Where one party was the substantially successful party, are there reasons to otherwise order that that party be deprived of his or her costs,

(Fotheringham v. Fotheringham, 2001 BCSC 1321 at para. 46, leave to appeal ref'd 2002 BCCA 454).

- [10] "Substantial success" of one party over the other occurs when one party's success is seventy-five percent or better: Visser v. Visser, 2020 BCSC 161 at para. 7. The question for consideration is: What was the real measure of success of one party when measured against the other party's position? Laxton v. Coglon, 2017 BCSC 2170 at paras. 21-25. This requires an objective comparison of the relief granted and results obtained by the parties with the parties' submissions at trial: MacLean v. Mio, 2011 BCSC 148 at para. 30.
- [11] While offers to settle are a consideration, they are not to be considered when determining which party was the substantially successful party: Walburger v. Lindsay 2015 BCSC 959 at para. 24.

DISCUSSION

- Offers and Counteroffers
- [12] In the years leading up to trial, the parties made proposals, counter-proposals and formal offers in an attempt to resolve the parenting time issue.
- [13] For example, on May 22, 2019, the respondent's former counsel, Mr. Chiu, "queried" the claimant's counsel, Mr. Clarke, on a proposal to resolve the issue of the respondent's parenting time. His letter concludes:

If the above schedule approximates "something" that your client is able to "live with", then I expect that I may receive instructions to send an offer to settle the parenting on an interim or on a final basis.

[14] At 10:58 a.m. on March 30, 2021, Mr. Chui forwarded a formal offer to settle pursuant to R. 11-1 of the Rules, proposing that the parties share custody, guardianship and parental responsibilities for S.S., with principal residence with the claimant. The offer included a detailed parenting time proposal, with four sessions of supervised parenting time to be followed by gradually increasing unsupervised parenting time. That offer was open for acceptance until April 9, 2021.

[15] At 11:15 a.m. of the same day, March 30, 2021, Mr. Clarke countered with the claimant's formal offer pursuant to R. 11-1, proposing that the claimant have sole custody, guardianship and primary residence of S.S., with the respondent having parenting time as recommended by S.S.'s counsellor. The offer was open until 9:59 a.m. the following day, allowing the respondent less than 24 hours to consider it.

[16] Mr. Clarke proposed to Mr. Chiu that the respondent's parenting time remain supervised and only as frequent as counsellors recommended.

b. Claimant's and Respondent's Positions

[17] As earlier noted, the general rule is that costs must be awarded to the successful party. Both parties claim to have been the successful party.

[18] The claimant says that my orders at the trial's conclusion were similar to those she proposed throughout the litigation, including at trial management conferences, in letters to the respondent's former counsel, and during opening remarks and closing submissions. She asserts that her consistent position has been that only counselling could repair the respondent's relationship with S.S., and reminds the Court that she took the initiative to commence counselling. She maintains that the respondent's actions estranged S.S. from him, not her own, and that she has always wanted S.S. to have a good relationship with the respondent.

[19] The claimant argues that her position from the outset of trial was that the parties would leave the litigation exactly as they entered it, namely with an order for reconciliation counselling. She argues that the Reasons changed nothing of substance because I did in fact order reconciliation counselling in the end.

[20] The claimant notes the similarity of the parenting time ordered to the proposal in her September 24, 2020 trial brief that:

the Respondent have parenting time in coordination with the recommendations of the child's counsellor, such parenting time to be supervised until such recommendation has been made.

- [21] The Reasons ordered the pre-existing supervised parenting time regime to continue for two months, with parenting time afterwards subject to the recommendations of the counsellor.
- [22] In short, the claimant argues that the trial accomplished nothing but to impose a crushing financial burden on the parties. In the end, the Consent Order stood unchanged in that the claimant remains S.S.'s guardian and is responsible for her parenting.
- [23] The respondent replies that he was the clear winner of the central issue at trial, namely whether the claimant and her new family were discouraging S.S. from having a relationship with him.
- [24] In my view, the "matter in dispute" throughout the litigation and trial was S.S.'s attitude towards the respondent. The trial focused on determining why S.S., a young girl with a strong and stubborn personality, refused to even entertain the idea of a relationship with the respondent. That was the matter of most importance to the parties.
- [25] I concluded that the claimant's contempt for the respondent rubbed off on S.S., as did her lack of enthusiasm towards his parenting time with S.S. Despite her statements to the contrary, the claimant was insincere and disingenuous about her attitude towards the respondent's parenting. In short, I concluded that she was paying lip-service to the idea of reconciliation and did not sincerely wish S.S. to have any relationship with the respondent.
- [26] In my view, and regrettably so, the trial was necessary for the parties to explain their sides of the story and provide the Court with their perspectives on why S.S. was contemptuous of the respondent. The trial provided the parties, and S.S., with the Court's assessment of the matters in issue, as well as guidance, directions and solutions moving forward. Without a trial and the orders made in the Reasons, S.S.'s relationship with the respondent would have inevitably continued to flounder.

DECISION

- [27] In this case, trial was necessary to put the parties and their daughter on a path towards reunification. In one sense, the claimant was successful: she continues to be S.S.'s guardian with full parenting responsibilities. In another, she was unsuccessful: she did not persuade me that she was not a major cause of S.S.'s distrust towards her father. She was not acting in S.S.'s best interests by being less than whole-hearted in her encouragement and enthusiasm towards the respondent's parenting time and by failing to put the past behind her in favour of fostering S.S.'s relationship with the respondent. She needed to hear this, not only from Dr. Elterman and the counsellors involved, but from the Court.
- [28] In my view, neither party was substantially successful.
- [29] In the result, I decline to order costs in favour of either party. Each party will bear their own costs.

G.P. Weatherill J.

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