
CANADA / JUDGMENT

Kopan v. Hamilton

2013 BCSC 403

COURT

Supreme Court of British Columbia

DECIDED

11 March 2013

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2013 BCSC 403 Kopan v. Hamilton

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Kopan v. Hamilton,

2013 BCSC 403

Date: 20130311

Docket: 00-2189

Registry: Victoria

Between:

Ron Kopan

Claimant

And:

Wendy Hamilton

Respondent

Before: The Honourable Mr. Justice Macaulay

Reasons for Judgment

On Costs

(In Chambers)

Counsel for the Claimant:

W. Murphy-Dyson

Counsel for the Respondent:

N. McKay

Place and Date of Hearing:

Victoria, B.C.

March 1, 2013

Place and Date of Judgment:

Victoria, B.C.

March 11, 2013

[1] In unreported reasons for judgment (December 5, 2011), I granted Mr. Kopan's application to vary a 2002 order for joint custody and joint guardianship of his son, Roman, so that Roman could primarily reside in Victoria with his father rather than with Ms. Hamilton, the respondent mother, in Richmond. I did not deal with costs at the time but stated the following:

[40] The parties may speak to the matter of costs, including the disbursements for Dr. Burima's reports at a future time, if they cannot agree. I do not recall if I have the full detail of Dr. Burima's expenses before me. It may be that I just have the expenses for the most recent reports, but I make the observation that it may be preferable that the parties simply agree to split the entire cost of Dr. Burima's reports, in order to provide a base for moving effectively forward.

Dr. Burima prepared three reports (the "Burima reports"): a custody and access report in May 2008; a Views of the Child report in October 2011; and finally, on my direction during the course of the trial, a further Views of the Child Report respecting the timing of Roman's proposed move to Victoria to live with his father.

[2] Mr. Kopan now applies for an order that Ms. Hamilton pay costs of the application, including double costs for trial. I will deal with the father's application and the issues it raises momentarily but first, I must address two specific issues, or more properly described, two applications that Ms. Hamilton appears to make.

[3] Ms. Hamilton, who was self-represented by the time of trial and continuing until shortly before the final costs hearing, opposes Mr. Kopan's application. In her Response, she refers to borrowing money from her parents during the litigation and states: "Because the Respondent's financial burden was mainly created by the Claimant, we are seeking \$50,000 in order to repay the Respondent's parents." This is the first apparent claim.

- [4] Ms. Hamilton further deposes in an affidavit that she, rather than Mr. Kopan, is entitled to double costs "to compensate [her] for unnecessary legal costs, unpaid extraordinary expenses, and missed work due to multiple court appearances." Neither the mother's debt obligation to her parents nor her loss of income from missed work offer any direct lawful basis for ordering costs in her favour and, in any event, she is the unsuccessful party in the litigation. I will set out below the basis on which a successful party is entitled to costs.
- [5] Later, in her affidavit, Ms. Hamilton sets out an apparent claim for extraordinary expenses for each year that Roman resided primarily with her. According to her math, as I understand it, the total is about \$73,800.
- [6] Ms. Hamilton appears not to have ever applied for unpaid extraordinary expenses. Accordingly, I decline to address that issue. While I have pointed out these apparent claims, I observe that counsel never referred to them at the costs hearing.
- [7] The matter of costs was originally set for hearing on February 1, 2013, but was adjourned after I suggested to Ms. Hamilton that it would be advisable for her to retain counsel, in part, because the range of costs outcomes in the case is, according to counsel for the father, about \$22,000 - \$33,000. Ms. Hamilton then retained counsel who argued the costs issues before me.
- [8] All litigants, whether self-represented or represented by counsel, are bound by the applicable rules governing the pre-trial and trial process. The concept of fairness, as it relates to the conduct of a hearing or trial, underpins most procedural rules. While I have some latitude, or discretion, in applying certain rules, for example, by granting the mother an adjournment to attempt to retain counsel to deal with the costs issue, which is an issue that is both important and difficult for her to address on her own, it would be unfair to Mr. Kopan to put the matter off further. Accordingly, I denied Ms. Hamilton's further application for adjournment after she retained counsel for the hearing.
- [9] It would also be unfair to permit Ms. Hamilton to, in effect, make an application for payment of extraordinary expenses simply by referring to it in her Response or affidavit rather than by filing a separate application as required by the Rules of Court. As the Alberta Court of Appeal observed in *P.E.K. v. B.W.K.*, 2004 ABCA 135 at para. 7:

there are not two sets of procedures, that is, one for lawyers and one for self-represented parties. In the absence of special provisions, our courts will apply the same legal principles, rules of evidence and standards of procedure regardless of whether litigants are represented by counsel or are self-represented.

I turn next to the basis on which the court orders costs in favour of a successful party in a family law proceeding.

- [10] Supreme Court Family Rule 16-1(7) mandates an award of trial costs to the successful party unless the court otherwise orders. As I have earlier stated, Mr. Kopan is the successful party here. As he does not seek costs respecting anything other than in relation to the trial proper, I need only address whether there is any judicial basis for exercising my discretion to deny him some or all of the trial-related costs.
- [11] Immediately before the trial commenced, counsel for Mr. Kopan sought and obtained my order that Dr. Burima re-interview the child focusing on when Roman wanted to move to Victoria and change schools. Upon receiving the report, Ms. Hamilton immediately consented to orders to address Roman living with his father during the week and attending school in Victoria effective November 28, 2011. As I set out in my reasons for judgment, the remaining issues for trial primarily related to the decision-making process respecting Roman's best interests and Ms. Hamilton's access pending the outcome of her then plan to eventually relocate to Victoria.
- [12] Although Ms. Hamilton's agreement certainly shortened the trial, Dr. Burima's first Views of the Child Report was largely to the same effect and available before trial. In her earlier report, Dr. Burima addressed Roman's unhappiness at his Lower Mainland school and that his wish was to move immediately to Victoria so that there could be an equal shared parenting regime. Dr. Burima recommended the change of schools occur as soon as practically feasible.
- [13] Ultimately, I accepted Dr. Burima's recommendations as reasonable. Ms. Hamilton resisted accepting them until Dr. Burima delivered her final report.
- [14] Even then, agreeing to the immediate move did not remove the necessity for a trial because other issues still had to be resolved.
- [15] I find nothing to criticize in the conduct of Mr. Kopan relating to the above events. The expert evidence of Dr. Burima and the Views of the Child Report supported the father's position immediately before and throughout the trial process. I find no basis for denying Mr. Kopan his costs relating to the trial. Even if Ms. Hamilton is now in financial straits, that is not a sufficient basis on its own for disentitling the father to costs as the successful party: (see *W. (S.D.) v. W. (C.W.)*, 2006 BCSC 162, at para. 29).
- [16] About ten days before the commencement of the trial, counsel for Mr. Kopan sent a written settlement proposal to then counsel for Ms. Hamilton. This led to a series of written counterproposals, none of which were accepted. Each side expressly reserved the right to bring the offer to the attention of the court for consideration in relation to costs after the court had pronounced judgment on all other issues in the proceeding. Supreme Court Family Rule 11-1 governs offers to settle and expressly requires the inclusion of the above sentence in an offer.

[17] Family Rule 11-1(4) allows me to consider an offer to settle when exercising my discretion as to costs. Family Rule 11-1(5) allows me to award double costs for all or some of the steps taken in the proceeding after the delivery of an offer to settle. Finally, of significance, sub-rule (6) permits me to consider:

- (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.

Finally, I note that an offer to settle does not expire by reason that a counter-offer is made (Family Rule 11-1(7)).

[18] It is apparent, from a review of the proposals and counterproposals, that the parties had enough information available to them, including the first two Burima reports, to assess the potential outcomes in the event of proceeding to trial. The principal matter that remained in dispute at the conclusion of the exchange of proposals was whether Roman would move to Victoria effective November 28, 2011 or January 3, 2012.

[19] In my reasons for judgment, I set out Ms. Hamilton's basis for seeking the later date and stated that I did not fault her for failing to agree to the earlier one. Nonetheless, I agreed with Mr. Kopan that it was in the child's best interests that the move occur sooner. Upon receipt of Dr. Burima's final report at the beginning of the trial, Ms. Hamilton then agreed to the earlier date. If the parties had sought that further report on their own immediately before trial, and I note that it was available within less than a day of ordering it, the timing of the proposed move might well have resolved. If that had happened, the balance of the trial issues would have probably resolved as well.

[20] The final order after trial is not a mirror image of Mr. Kopan's offer. For example, access pending Ms. Hamilton's proposed move to Victoria is close to but not exactly the same. As well, his offer expressly left the question of principal or shared residence to be decided after any move by Ms. Hamilton to Victoria. In that regard, the final order provides:

- 7. If and when the Respondent moves her residence to Greater Victoria and so long as it does not interfere with the child's place of school, the care arrangements for the child shall be one week on/one week off with each parent.
- 8. In the event that the child objects to the shared parenting if and when instituted, either party shall be at liberty to apply to the Court for an Order.

This was an important issue for Ms. Hamilton as her plan then, although not since realized, was to move quickly to the Greater Victoria area.

[21] There is some evidence as to the relative financial circumstances of the parties. Ms. Hamilton attached, as an exhibit to her affidavit, an unsworn Financial Statement dated August 25, 2012, in which she declares the following:

Employment income

\$56,793.80

Employment expenses

8,117.70

Total annual expenses

61,812.96

Total assets

12,000.00

Unsecured debt

74,611.23

According to Ms. Hamilton's statement, she does not own any real estate. The unsecured debt includes a total of \$50,000 said to be owing to her mother.

[22] In November 2012, the court determined that Ms. Hamilton's annual guideline income for child support purposes is \$58,000 and ordered that she pay basic child support of \$537 per month and also contribute \$63 per month to extraordinary expenses, both retroactively effective January 1, 2012. The order also requires a partial payment of \$2,100 towards arrears by December 2012. Finally, Ms. Hamilton is liable for \$750 in costs relating to the application for child support.

[23] Mr. Kopan swore a Financial Statement on October 3, 2012 showing:

Employment income

\$48,831.00

Total annual expenses

71,923.20

Total assets

368,600.00

Secured debt

204,000.00

Unsecured debt

45,000.00

His assets include a home in which he has significant equity. Based on the Financial Statements, Mr. Kopan's financial circumstances appear better than Ms. Hamilton's, but there is a further aspect of her financial circumstances to take into account.

- [24] Mr. Kopan deposed that Ms. Hamilton transferred her condominium into the names of her parents, a transfer that Mr. Kopan alleges is a fraudulent conveyance, although it appears that he has not commenced an action to overturn it. In any event, there has been no judicial determination that the transfer was fraudulent.
- [25] Ms. Hamilton denies the allegation. She deposed that she and her parents originally owned the condominium jointly. When the mortgage came up for renewal, they agreed to register title solely in Ms. Hamilton's name to improve her credit rating but, as it turned out, Ms. Hamilton could not afford the payments. She further deposed that, immediately before the trial, she re-transferred title solely into the names of her parents.
- [26] Ms. Hamilton's mother deposed that the original purchase of the condominium was joint but that when their daughter had to go back to court again, they became concerned that she would not be able to pay the mortgage so the property was transferred to the parents. The mother further deposed that there is little equity in the property. There is no evidence to contradict the latter statement.
- [27] The two explanations for the state of the title to the condominium do not make much sense. Neither Ms. Hamilton nor her mother properly explained why Ms. Hamilton no longer has any registered interest at all in the condominium, yet apparently still owes her mother a significant amount of money.
- [28] Nonetheless, on the overall evidence before me, I conclude that Ms. Hamilton's financial circumstances are worse than Mr. Kopan's. Even if she is entitled to all the interest in the condominium, there appears to be significantly more equity in his home.
- [29] The only other factor requiring consideration in my view relates to the cost of the Burima reports. The Burima account for the initial Custody and Access Report totaled \$9,957. Ms. Hamilton paid that account. I assume that the total costs of the two Views of the Child Reports were somewhat less. Mr. Kopan paid for those reports.
- [30] All of the reports were necessary and helpful. In the overall circumstances, justice is achieved by requiring the parties to share the cost of the final Views of the Child Report, but otherwise the costs of the Custody and Access Report will be allocated to Ms. Hamilton and the first Views of the Child Report to Mr. Kopan.
- [31] My conclusion is that I should not order any double costs having regard to the factors set out in Family Rule 11-1(6). Subject to the direction above respecting the shared cost of the final Burima report, I award Mr. Kopan the costs of preparation for and conduct of the trial to be assessed on Scale B.

[32] Counsel for Ms. Hamilton advised that she delivered an Offer to Settle regarding costs. If the parties agree as to the outcome of the costs hearing, they may include it in the final order. Failing agreement, the parties shall file, in such order as they agree, and exchange, written submissions, not to exceed five pages each, respecting the costs outcome. After the exchange is complete, the submissions may be forwarded to my attention through the Scheduler's Office.

The Honourable Mr. Justice Macaulay

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Prepared on 28 October 2026 · Esheria