

CANADA / JUDGMENT

L.C. v. Y.S.

2023 BCSC 1106

COURT

Supreme Court of British Columbia

DECIDED

27 June 2023

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2023 BCSC 1106 L.C. v. Y.S.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

L.C. v. Y.S.,

2023 BCSC 1106

Date: 20230627

Docket: E193402

Registry: Vancouver

Between:

L.C.

Claimant

And

Y.S.

Respondent

Before: The Honourable Madam Justice Hardwick

Reasons for Judgment

Re Costs

Counsel for the Claimant:

A Grewal

Appearing on his own behalf:

Y.S.

Place and Date of Hearing:

Vancouver, B.C.

June 16, 2023

Place and Date of Judgment:

Vancouver, B.C.

June 27, 2023

- [1] These are my reasons for judgment in respect of the issue of costs arising from the trial of this high-conflict family law litigation which culminated in my final order made March 21, 2023.
- [2] As set out in my reasons for judgment, indexed as 2023 BCSC 422 ("Reasons"), I left open the issue of costs given the circumstances and allowed for submissions and, if necessary, a further hearing. Specifically, I said as follows at paras. 313-318 of my Reasons:
- [313] Costs of an action are in the discretion of the trial judge.
- [314] Rule 16-1(7) of the Supreme Court Family Rules states the general principle that costs are awarded to the successful party:

Costs to follow event

- (7) Subject to subrule (9), costs of a family law case must be awarded to the successful party unless the court otherwise orders.
- [315] The standard of "success" required to be awarded the costs of an action under R. 16-1(7) is "substantial success". The Court of Appeal in *Harras* described the substantial success standard:
- [48] "Success" for the purposes of costs means substantial success. The "substantial success" standard was described by Bouck J. in *Fotheringham v. Fotheringham*, 2001 BCSC 1321 at para. 45, endorsed by this Court in *Marquez v. Zapiola*, 2014 BCCA 35 at para. 16:

Success in the event has been interpreted as "substantial success": see *Fotheringham v. Fotheringham*, 2001 BCSC 1321, 13 C.P.C. (5th) 302, leave to appeal ref'd 2002 BCCA 454. In *Fotheringham*, Mr. Justice Bouck described this standard as follows:

- [45] Gold 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 [looking] at all the disputed matters globally.

- [49] It is important to emphasize that the evaluation of substantial or divided success is not a mechanical, mathematical exercise. It seems apparent – as stated in my reasons on the main appeal – that the judge was not aware of the precise effect of her order on the support issue. Nevertheless, it is clear from her reasons that she considered that enough time was expended on the insurance issue to warrant an order that the parties bear their own costs. In my view, it would not be appropriate to interfere with the judge's order on costs, regardless of whether any misapprehension occurred.
- [316] In this case, neither counsel for Ms. C. or Mr. S. was fulsomely able to make submissions as to costs as neither was obviously aware of what orders I would make on the multiple issues which were before the Court for determination. The number of issues for consideration is reflected in the length of these reasons for judgment.
- [317] In these circumstances, I do not consider it to be fair to exercise my discretion to make an award in respect of costs without allowing the parties the opportunity to make submissions as to substantial success, mixed success and so forth.
- [318] There shall thus be an order that either party shall be at liberty to submit a requisition to appear back before me to a schedule hearing to determine the issue of costs in this proceeding within 30 days of the release of these reasons for judgment. Without further leave of the court, that hearing shall not exceed two hours and the parties will be at liberty to file written submissions not exceeding 10 pages, excluding appendices, if they so choose. The scheduling of the actual hearing will be at the discretion of Supreme Court Scheduling based on the availability of counsel, the parties and the court. However, as ordered, a request to appear back must be filed within 30 days of the release of these reasons for judgment if an oral hearing is sought. If there is no requisition received within 30 days, I will issue supplementary reasons on costs without the benefit of submissions in due course.
- [3] Counsel for the claimant did elect to bring the issue of costs back before me in accordance with para. 33 of the final order. Counsel for the claimant also filed written submissions in accordance with para. 33 of the final order and a hearing was arranged before me on June 16, 2023. The respondent elected not to file written submissions, but did attend in person on June 16, 2023 to make oral submissions on the issue of costs.

Position of the Parties

- [4] The position of the claimant can be summarized as follows:
- a) The claimant was substantially successful on the issues at trial and is at minimum entitled to her costs pursuant to R. 16-1(7) of Supreme Court Family Rules;
 - b) The claimant is entitled to special costs of this proceeding;

- c) In the alternative, if special costs are not awarded then costs shall be ordered to be assessed pursuant to the tariff set forth in the Supreme Court Family Rules on the basis that the matter is of more than ordinary difficulty; and
 - d) The net sale proceeds from the sale of the former family residence which presently remain in trust with counsel for the claimant shall not be distributed until such time as costs in this matter are assessed.
- [5] The position of the respondent is that he was substantially successful on the most significant issue at trial, namely the parenting time of the children, and that the parties should bear their own costs.

Substantial Success - The Law

- [6] I generally set out the framework on determining costs in my Reasons as quoted above.
- [7] I will also reference the helpful instruction of Justice Branch on the issue of determining costs in family law actions in *Wallace v. Pichichero*, 2021 BCSC 2347 at paras. 13-16:
- [13] Supreme Court Family Rules, B.C. Reg. 169/2009 (the "Family Rules"), R. 16-1(7) states "[s]ubject to subrule (9), costs of a family law case must be awarded to the successful party unless the court otherwise orders."
- [14] In *Giles v. Westminster Savings and Credit Union*, 2010 BCCA 282, the Court of Appeal discussed the purpose of costs, stating as follows:
- [74] The purposes for which costs rules exist must be kept in mind in determining whether appellate intervention is warranted. In addition to indemnifying a successful litigant, those purposes have been described as follows by this Court:
- "[D]eterring frivolous actions or defences": *Houweling Nurseries Ltd. v. Fisons Western Corp.* (1988), 37 B.C.L.R. (2d) 2 at 25 (C.A.), leave ref'd, [1988] 1 S.C.R. ix;
 - "[T]o encourage conduct that reduces the duration and expense of litigation and to discourage conduct that has the opposite effect": *Skidmore v. Blackmore* (1995), 2 B.C.L.R. (3d) 201 at para. 28 (C.A.);
 - "[E]ncouraging litigants to settle whenever possible, thus freeing up judicial resources for other cases["]: *Bedwell v. McGill*, 2008 BCCA 526, 86 B.C.L.R. (4th) 343 at para. 33;
 - "[T]o have a winnowing function in the litigation process" by "requir[ing] litigants to make a careful assessment of the strength or lack thereof of their cases at the commencement and throughout the course of the litigation", and by "discourag[ing] the continuance of doubtful cases or defences": *Catalyst Paper Corporation v. Companhia de Navegação Norsul*, 2009 BCCA 16, 88 B.C.L.R. (4th) 17 at para. 16.
- [15] In *Jin v. Cheng*, 2019 BCSC 148, Justice Dardi summarized the principles governing the award of costs in family law proceedings as follows:

- [18] It is well-settled that the term "successful" in Rule 16-1(7) means "substantially successful". In a family law case involving multiple issues and where there has been divided success, a flexible approach to the "substantial success" analysis is required: *Litt v. Gill*, 2016 BCCA 288 at para. 53. The appellate authorities direct that success is to be measured in broad terms and that the court should not finely parse issues: *Stearman v. Powers*, 2017 BCCA 165 at para. 65. In *Reid v. Reid*, 2017 BCCA 191, the Court of Appeal recently affirmed that in assessing whether a party has been substantially successful, the court has a "broad discretion to take into account myriad considerations".
- [19] Substantial success, as defined in the authorities, is when the prevailing party succeeds on 75% or more on the matters in dispute. The trial judge is to measure substantial success in the litigation objectively by considering the disputed matters globally and comparing the results achieved with the submissions made at trial. The weight and importance of all the matters in dispute are to be taken into account together with the parties' corresponding relative success or failure. The 75% success threshold is intended to serve as a "rough and ready guide" and the Court is not required to evaluate the substantial success threshold with mathematical precision: *Gold v. Gold* (1993), 82 B.C.L.R. (2d) 180, 106 D.L.R. (4th) 452 (C.A.), leave to appeal ref'd [1993] S.C.C.A. No. 441 [Gold]; *Fotheringham v. Fotheringham*, 2001 BCSC 1321, leave to appeal ref'd 2002 BCCA 454 [Fotheringham]; *Marquez v. Zapiola*, 2014 BCCA 35 at paras. 15-16 [Marquez]; *D.R. v. E.P.R.*, 2016 BCSC 550 at para. 8, aff'd 2016 BCCA 517 [D.R.].
- [20] In *Fotheringham* at para. 46, Mr. Justice Bouck endorsed a four-step inquiry in assessing whether a party in a family law case has achieved substantial success in the litigation:
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.

This articulation of the analytical framework survived the enactment of the new Family Rules: *Marquez* at paras. 15-16, 20.

- [21] A trial judge retains the discretion to determine whether there is a sound basis for displacing the usual costs award. Any discretionary exception to the usual costs rules must be made judicially: *Bailey v. Victory* (1995), 4 B.C.L.R. (3d) 389 at para. 13 (C.A.).

- [22] As summarized in *M.S. v. M.M.*, 2016 BCSC 470 at para. 16, the Court of Appeal, in *Gold* at para. 20, identified hardship, earning capacity, the purpose of a particular award, the conduct of the parties in the litigation, and the importance of not upsetting the balance achieved by the award itself as factors which a trial judge may consider in exercising his or her discretion. In *Gold*, the Court of Appeal underscored that the overall assessment of these animating factors in the context of any particular case is best left for determination by the trial judge.
- [16] Substantial success is not determined by tallying the number of issues and evaluating success on each issue, or by comparing dollar amounts. It is determined by evaluating success on the issues of substance. In *Cohen v. Cohen*, (1995), 15 R.F.L. (4th) 84 (B.C.C.A) the Court of Appeal stated:
- [4] There is something to respondent's counsel's argument that there was divided success, however, I disagree with his approach in reflecting that division in costs by counting up the number of issues raised by the appellant and making the costs directly proportional to the ratio of success on those issues. In my view, reapportionment was much the largest issue in the case and occupied most of the time. The appellant was successful in her claim for reapportionment. Many of the other issues were, as appellant's counsel submits, different approaches to achieve the same result. I would award the appellant 75% of her costs.

Analysis of Substantial Success

- [8] The matters in issue in this case can be summarized as follows:
- a) Parenting time;
 - b) Parenting responsibilities;
 - c) Travel;
 - d) Prospective child support;
 - e) Retroactive child support;
 - f) Spousal support;
 - g) Property division;
 - h) Conduct orders; and
 - i) The Get.
- [9] Applying the foregoing law to these issues, I conclude as follows:
- a) Parenting time: This was the primary matter at issue in the trial. The respondent was seeking an equal shared parenting schedule. The claimant was seeking that the respondent be limited to supervised parenting time; albeit for a specified period with a right of review. In my final order, I crafted a parenting schedule that provides for unsupervised parenting

that hovers just on the threshold of 40% parenting time. I say hovers because the flexibility I imbedded to my order means that it does not formally constitute shared parenting for the purposes of s. 9 of the Federal Child Support Guidelines. However, the respondent was substantially successful on this issue as the parenting time he has with the children is significantly greater than the supervised parenting time sought by the claimant and greater than he had prior to the trial;

- b) Parenting responsibilities: Both parties were presumptively guardians of the children, pursuant to s. 39 of the Family Law Act, S.B.C. 2011, c. 25 [FLA] and it was never proposed that the respondent be removed as a guardian. I did, however, conclude that the claimant should have final decision-making authority, after consultation with the respondent, and that the respondent retain his right of review under s. 49 of the FLA. This issue was not strongly contested by the respondent at trial as his greatest focus was on parenting time. The respondent also acknowledged the serious communication issues between the parties which underpinned my order. Thus, I find the claimant was substantially successful but that this was somewhat of an ancillary issue;
- c) Travel: I made quite detailed orders with respect to facilitating travel with the children. These orders are connected to the issue of exercising parenting time but somewhat distinct since the respondent does not have final decision-making authority. I do not consider either of the parties to have been substantially successful on this issue and consider it a neutral factor in the assessment of costs.
- d) Prospective child support: The respondent did not oppose paying child support, per se. However, as I set out in my Reasons, the respondent was not employed at the time of the trial save and except for his recycling efforts. He tendered no expert evidence as to his inability to work other than a letter from his physician, portions of which I allowed in over the objection of the claimant subject to weight. I then imputed the respondent an income pursuant to s. 19 of the Federal Child Support Guidelines consistent with his historical income-earning capacity. I also made an order as to the form of payment to address a prior practice which I considered inappropriate. The claimant was, I find, substantially successful on the issue of prospective child support;
- e) Retroactive child support: I did not order retroactive child support, notwithstanding that the claimant only voluntarily made one child support payment prior to the interim order of Justice Wilkinson. I did so on the basis that there was a delay in seeking child support and that the only blameworthy conduct was the failure to pay. The children were, however, primarily resident with the claimant for substantially all of the material time for which retroactive support was being sought and child support would have otherwise been presumptively payable. In my view, neither party was substantially successful on this issue in these particular circumstances;

- f) Spousal support: On the basis of my determination of Guidelines incomes for both parties, I awarded the claimant \$25,000 in lump-sum spousal support. The claim for spousal support was opposed by the respondent. The claimant was thus substantially successful on this issue;
 - g) Property division: The issue of the division of family property played a fairly minor role in the trial. Subject to adjustments to account for support, it was conceded that the net sale proceeds of the family home would be divided equally. Both parties made allegations about the other having some form of ownership of property in Israel which I summarily rejected. The only other family property issue pertained to a family heirloom which I ordered to be returned to the respondent, but the evidence on this issue took mere minutes in the course of a lengthy trial. In my view, neither party was substantially successful on this issue and it is a neutral factor in the assessment of costs;
 - h) Conduct orders: I made a variety of conduct orders pursuant to s. 222 of the FLA in order to manage communication between the parties and attempt to de-escalate the tension between the parties. The orders are all mutual, but the driving force underlying these orders was the inappropriate conduct of the respondent, primarily in the initial post-separation period, which I found constituted family violence as defined in the FLA. The conduct of the claimant was not perfect at times but would not, in and of itself, have warranted the imposition of conduct orders. In my view the claimant was substantially successful on this issue despite the fact that the orders apply to both parties; and
 - i) The Get: I allowed an amendment to the pleadings in the course of the trial to allow the claimant to seek orders related to obtaining the Get. The respondent indicated at times he was supportive of facilitating this process, but at other times made statements which clearly contradicted this. As set out in my Reasons, I ultimately made the orders sought by the claimant in respect of obtaining the Get. The claimant was substantially successful on this issue.
- [10] On balance, I conclude that the claimant was substantially successful on all material matters in dispute other than the issue of parenting time with the children. The respondent was substantially successful on the issue of parenting time. There were, as noted, certain issues where neither party was substantially successful and those are neutral factors in my analysis.

Special Costs

- [11] The court has jurisdiction to order special costs in a family law case pursuant to R. 16-1(1)(b) (i) of the Supreme Court Family Rules.
- [12] In *Kim v. Choi*, 2019 BCSC 1792, Justice Dley set out the following overview as to the appropriateness of special costs in a family law proceeding at paras. 22-25:

- [22] Special costs may be awarded where the conduct of a party is reprehensible. Reprehensible conduct includes conduct that is scandalous or outrageous, or milder forms of misconduct that are deserving of reproof or rebuke: *Garcia v. Crestbrook Forest Industries Ltd.* (1994), 119 D.L.R. (4th) 740 at 747 (B.C.C.A.).
- [23] In *Mayer v. Osborne Contracting Ltd.*, 2011 BCSC 914 at para. 11, Walker, J. set out those circumstances that warranted the attraction of special costs:
- (a) where a party pursues a meritless claim and is reckless with regard to the truth;
 - (b) where a party makes improper allegations of fraud, conspiracy, fraudulent misrepresentation, or breach of fiduciary duty;
 - (c) where a party has displayed "reckless indifference" by not recognizing early on that its claim was manifestly deficient;
 - (d) where a party made the resolution of an issue far more difficult than it should have been;
 - (e) where a party who is in a financially superior position to the other brings proceedings, not with the reasonable expectation of a favourable outcome, but in the absence of merit in order to impose a financial burden on the opposing party;
 - (f) where a party presents a case so weak that it is bound to fail, and continues to pursue its meritless claim after it is drawn to its attention that the claim is without merit;
 - (g) where a party brings a proceeding for an improper motive;
 - (h) where a party maintains unfounded allegations of fraud or dishonesty; and
 - (i) where a party pursues claims frivolously or without foundation.
- [24] Special costs are punitive and serve to chastise the offending party: *Ip v. Insurance Corp of British Columbia* (1994), 89 B.C.L.R. (2d) 251 at para. 7.
- [25] Special costs are the exception. Special costs should not be awarded where the only issue is a party's credibility: *Schwabe v. Dr. Lisinski*, 2005 BCSC 1284 at para. 26; *Grewal v. Sandhu*, 2012 BCCA 26 at para. 107, leave to appeal ref'd [2012] S.C.C.A. No. 120. However, a party who lies, falsifies evidence and attempts to deceive the court can be subjected to special costs: *Hoffman v. Percheson*, 2011 BCSC 1175 at paras. 19-23.
- [13] The claimant advances various arguments as to why special costs should be ordered in accordance with these factors. These are articulated in the written submissions prepared by her counsel. In my view, most of submissions are more appropriately directed at establishing that the claimant was substantially successful and do not reach the threshold of deserving of rebuke as defined above.

- [14] To use one example, I did impute income to the respondent pursuant to s. 19 of the Federal Child Support Guidelines. However, the respondent provided his required income disclosure and acknowledged that he had additional unreported income from his recycling efforts. His argument was thus unsuccessful but not scandalous.
- [15] To use another example, the position of the respondent regarding the Get is frustrating. His decision to disobey my direction not to speak to anyone about the case whilst under cross-examination was concerning and I specifically noted that in my Reasons. However, the relief related to the Get was not even plead until I allowed an amendment to the pleadings in the course of trial. Again, I have determined that the claimant was substantially successful on this issue but I cannot conclude that the respondent was advancing a meritless defence warranting special costs to a claim that had not actually been plead.
- [16] Document disclosure is the one issue where the conduct of the respondent was clearly lacking. As stated in *Michel v. Graydon*, 2020 SCC 24, at para. 33:
- [33] Failure to disclose material information is the cancer of family law litigation (*Cunha v. Cunha* (1994), 99 B.C.L.R. (2d) 93 (S.C.), at para. 9, quoted in *Leskun v. Leskun*, 2006 SCC 25, [2006] 1 S.C.R. 920, at para. 34). And yet, payor parents are typically well aware of their obligation as a parent to support their children, and are subject to a duty of full and honest disclosure -- a duty comparable to that arising in matrimonial negotiations (*Brandsema*, at paras. 47-49). The payor parent's obligation to disclose changes in income protects the integrity and certainty afforded by an existing order or agreement respecting child support. Absent full and honest disclosure, the recipient parent -- and the child -- are vulnerable to the payor parent's non-disclosure.
- [17] The respondent was also not cooperative in the efforts by counsel for the claimant to obtain certain agreed admissions on what were substantially non-controversial matters.
- [18] The distinguishing feature of this case is that the respondent's failure to disclose or agree to certain basic admissions was adverse to his own interests. He apparently had relevant documents in his possession or control that he elected not to disclose. He also adduced the most marginal documentation regarding his medical circumstances to support his argument that he was not intentionally underemployed. I proceeded to find the necessary facts notwithstanding the less than satisfactory disclosure.
- [19] In conclusion, upon a fulsome consideration of the factors summarized in *Kim*, I find that the conduct of the of the respondent was not without blemish but does not meet the high threshold required for the imposition of an award of special costs.

Apportionment of Ordinary Costs and Scale of Costs

- [20] As confirmed by our Court of Appeal in Cohen, even in cases where one party is substantially successful on certain issues, the trial judge retains the discretion to craft a costs order that takes into consideration the substantial success of the parties on other issues.
- [21] In this case, as I have outlined above, the respondent was substantially successful on the issue of parenting time. That, in and of itself, does not justify an order that the parties bear their own costs given the claimant's substantial success on various other issues. However, it cannot be overlooked.
- [22] In my view, the appropriate exercise of my discretion is to award the claimant 60 percent of her costs of the action on the basis of it being a matter of ordinary difficulty pursuant to Appendix B of the Supreme Court Family Rules.
- [23] In reaching the above conclusion, I am rejecting the argument advanced by the claimant that this matter was above ordinary difficulty and additional tariff costs are appropriate. This matter is a high conflict family matter which is challenging for the parties but does not, in my view, reach the threshold of being beyond ordinary difficulty. I specially refer to the factors referred to in *Slocan Forest Products Ltd. v. Trapper Enterprises Ltd.*, 2010 BCSC 1494 at para. 6. Although *Slocan* was a civil matter, I conclude that the considerations set out therein in determining the appropriate scale of costs remain applicable.
- [24] The proposed bill of costs shall be prepared accordingly and presented to the respondent for his review in a timely way. The respondent shall have two weeks to provide his comments on the proposed bill of costs, at which time the claimant shall be at liberty to file an appointment to have the costs assessed by the registrar under the Supreme Court Family Rules if the parties have not been able to reach an agreement.

Payment of Costs from Trust Funds

- [25] As noted, the claimant seeks to have costs assessed prior to the distribution of the funds held in trust by her counsel from the sale of the former family residence ("Trust Funds").
- [26] Generally speaking, I accept the claimant's position that the release of the Trust Funds prior to the assessment of costs will quite likely result in further acrimony and potential court applications/hearings between the parties. This should be avoided as the litigation is clearly taking an emotional toll on this family and especially the children.
- [27] That said, there are two exigent applications which I have agreed to hear during the week of July 24, 2023. The relief sought includes orders that I find the respondent in contempt of my order made March 21, 2023 and the imposition of sanctions, including fines and/or committal. The respondent has indicated he wishes to avail himself of the opportunity to obtain legal advice and potentially have counsel for those applications.

- [28] Having regard to the serious nature of contempt proceedings, which are quasi-criminal in nature, I think it is appropriate that the respondent have access to a sufficient portion of his presumptive share of the Trust Funds in advance of the final assessment of costs to allow him to avail himself of the opportunity to seek counsel. I am satisfied that such an order, which I make on a discretionary basis and pursuant to my inherent jurisdiction given that s. 89 of the FLA no longer applies given there has been a final order and any distribution would not be interim, is appropriate in these unique circumstances.
- [29] I reach this conclusion on the basis that it is obvious upon a review of the tariff set forth in the Supreme Court Family Rules that the costs to be assessed as against the respondent pursuant to my order will not consume the entirety of his share of the Trust Funds. Further, any prejudice to the claimant can be mitigated by exercising my discretion to similarly advance her an equivalent share of the Trust Funds.
- [30] Practically speaking, I recognize that the Trust Funds are held in an interest-bearing trust account. This will require counsel for the claimant to collapse that guaranteed investment account and then hold the funds for a designated period of time in accordance with his obligations to the Law Society of British Columbia prior to distribution.
- [31] I thus order that the claimant and the respondent shall each receive a distribution of \$25,000 from the Trust Funds within seven business days of the date of issuance of my reasons for judgment. The remainder of the Trust Funds shall continue to be held by counsel for the claimant pending agreement or assessment of costs pursuant to this order and then distributed, after accounting for the costs payable, in accordance with my order made March 21, 2023.

"Hardwick J."

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