
CANADA / JUDGMENT

M.N. v. C.G.F.

2020 BCSC 2071

COURT

Supreme Court of British Columbia

DECIDED

7 February 2020

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2020 BCSC 2071 M.N. v. C.G.F.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

M.N. v. C.G.F.,

2020 BCSC 2071

Date: 20200207

Docket: E162511

Registry: Vancouver

Between:

T.M.L.N. aka M.N.

Claimant

And

C.G.F.

Respondent

Before: The Honourable Mr. Justice Basran

Oral Ruling Re Applications for Costs

In Chambers

Counsel for the Claimant:

A.M. Ouellet

Counsel for the Respondent:

L. Spencer

Place and Date of Hearing:

Vancouver, B.C.

January 17, 2020

Place and Date of Ruling:

Vancouver, B.C.

February 7, 2020

- [1] THE COURT: This is a ruling on costs arising from a family trial that took place over 12 days from January to March 2019.
- [2] The trial judgment was released on August 21, 2019, and after hearing further submissions, corrected reasons were issued on October 31, 2019. In those reasons I concluded that: "This was hard-fought and acrimonious litigation. Both parties were unwilling to concede any ground, and both were seemingly determined to litigate every conceivable issue." (M.N. v. C.G.F., 2019 BCSC 1406 para. 136). I concluded that "Success was divided in this matter and so each party shall bear their own costs." (M.N. para. 137)
- [3] Counsel for the respondent asked to make submissions on costs on the basis that the parties had exchanged offers prior to trial. He provided his submissions on costs on October 29, 2019. Counsel for the claimant did likewise on November 12, 2019. Counsel for the respondent provided reply submissions on November 19, 2019.

Relevant Legal Principles

- [4] Costs awards in family proceedings should be treated the same as in civil litigation matters in that costs should follow the event unless otherwise ordered: *Gold v. Gold*, [1993] B.C.J. No. 1792 (B.C.C.A.) at para. 19.
- [5] Costs of a family law case must be awarded to the successful party unless the court otherwise orders: Supreme Court Family Rules, B.C. Reg. 169/2009 ("SCFR") Rule 16-1(7).
- [6] The successful party is the party who achieved substantial success at the trial: *H.K. v. W.K.*, 2018 BCSC 1447 at para. 9.
- [7] When the court should "order otherwise" is a matter of discretion to be exercised judicially having regard to the Rules of Court. Some of the relevant factors to be considered are 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: *Gold* at para. 20.
- [8] The party who asks the court to "order otherwise" bears the onus of persuading the court why it should do so: *H.K.* at para. 9.

- [9] An award of double costs should be made against a party who did not accept an offer to settle that should have been accepted in consideration of all of the circumstances: H.K. at para. 9 and *Hartshorne v. Hartshorne*, 2011 BCCA 29.
- [10] Substantial success is to be measured in broad terms and objectively considering the matters in dispute, their weight or importance to the parties, and the parties relative success or failure on those matters: H.K. at para. 10 and 12.
- [11] A four step inquiry can be used to determine if a costs award should be made:
- 1) Focus on the matters in dispute at the trial;
 - 2) Assess the weight or importance of those matters to the parties;
 - 3) Do a global determination with respect to all the matters in dispute and determine if a party substantially succeeded; and
 - 4) If a party substantially succeeded, determine if there are reasons to otherwise order such that each party bear their own costs.

H.K. at para. 11.

- [12] The court may consider an offer to settle when exercising its discretion on costs: SCFR 11-1(4).
- [13] In a family law case in which an offer to settle has been made, the Court may apply various options, including depriving a party of any or all costs; awarding double costs; and awarding costs in respect of all or some of the steps taken after an offer to settle, if the party who made the offer obtained a judgment as favourable or more favourable than the terms of the offer: SCFR 11-1(5).
- [14] In making such an order, the court may consider:
- 1) Whether the offer to settle was one that ought reasonably to have been accepted;
 - 2) The relationship between the terms of settlement offered and the final judgment of the court;
 - 3) The relative financial circumstances of the parties; and
 - 4) Any other factor the court considers appropriate.
- [15] The court may apportion costs between the parties in appropriate circumstances: SCFR 16-1(14).

Claimant's Position

- [16] Referring to the claimant's offers dated November 23 and 26, 2018, and the respondent's offer of November 28, 2018, the claimant asserts that both parties tried to settle this matter, and both made reasonable settlement offers.

[17] Her position is that I should exercise my discretion to not award costs to either party because:

- 1) Success was divided. She agrees that parenting time was the central issue but believes that it was reasonable to litigate this issue because the best interests of the children is a legitimate enquiry of the Court, and in any event she believes that the difference between the party's positions was that the respondent obtained equal parenting time one and a half years sooner than offered by the claimant. On the financial issues, she submits that the financial offers were similar to what was ordered at trial.
- 2) The trial decision did not exceed the respondent's offer so there is no basis for double costs. Most notably the respondent proposed that he not pay any retroactive child support, but he was ordered to pay \$19,475.
- 3) There is no merit to the claim for special costs.
- 4) The claimant has no financial ability to pay costs because she has limited assets and debts over \$130,000.
- 5) If costs are awarded, they will inappropriately affect the balance in the decision overall; and
- 6) The respondent pursued issues at trial that increased the length and expense of the trial. This includes his claim for undue hardship, which was ultimately rejected by the court; a claim for spousal support that was not abandoned until the trial began; and several days of trial time spent on the issue of the T. Salon shares, for which he ultimately received a relatively nominal amount.

Respondent's Position

- [18] The respondent submits that he was the more substantially successful party at trial because he was successful on the issues that were most important to the parties: parenting time, parenting responsibilities, and decision-making authority. He points out that in the claimant's final offer of November 26, 2018, she would not consider financial concessions unless she maintained primary care of the children until November 30, 2020. After this date, the claimant was prepared to share parenting time equally.
- [19] In the trial decision I concluded that it was in the best interests of the children that they have equal parenting time with their parents. Prior to this, the children had lived primarily with the claimant, and the respondent was required to pay child support to the claimant. The claimant is required to pay the respondent \$323 per month in child support as a result of the decision that the parties share parenting time equally and in light of the income determinations in the trial decision.

- [20] The respondent submits that his offer of November 26, 2018 was equal to or better than the result he obtained in the judgment. In that offer, he sought equal parenting time with no retroactive or future child support payable by either party. In respect of his RRSPs, he offered to pay \$13,500 in cash compensation and do a spousal rollover of \$15,000 to the claimant. He also sought \$6,500 in respect of the value of the M. Salon shares.
- [21] In the claimant's offer dated November 26, 2018, she sought \$7,000 in cash compensation and a \$30,000 spousal RRSP rollover with no amounts payable for retroactive child support or the shares of M. and T. Salons. This offer also proposed equal parenting after November 30, 2020. The claimant provided an alternative offer dated November 23, 2018, that included a \$15,000 spousal RRSP rollover and \$3,500 cash payment, but this offer did not include a definite date after which the parties would share equal parenting, and this issue would not have been considered again until 2021. The claimant also offered to forego the retroactive child support that she believed she was entitled to.
- [22] In the trial decision, the respondent was ordered to pay \$19,475 in retroactive child support, not ordered to pay any amount in respect of his RRSPs, and received \$4,500 in respect of the M. Salon shares and \$1,500 for the T. Salon shares. He believes he was successful on the financial issues.
- [23] The respondent seeks costs to the date of the offer and double costs thereafter because he believes he was the more substantially successful party and that the claimant should have accepted his November 26, 2018 offer. He notes that the claimant was unwilling to make any financial concessions unless she maintained primary care of the children.
- [24] On the claimant's offer of shared parenting time commencing on November 30, 2020, the respondent asserts that the claimant's past conduct suggests that she may not have adhered to this commitment. He points out that he sought shared parenting time dating back to July 2017 and that throughout the course of this litigation, equal parenting time with the children was his primary objective.
- [25] The respondent further submits that the claimant should be liable for special costs based on the manner in which she conducted this litigation. He points to her refusal to respond to prior offers. He also alleges that the claimant read his personal emails for seven months and gave this information to her counsel, who in turn used it to threaten and intimidate the respondent.

Analysis

- [26] There were a number of matters in dispute at the trial: parenting time, parenting responsibilities and decision making, child support and expenses, the respondent's unsuccessful claim of undue hardship, excluded property, RRSPs, the interests in the M. Salon and T. Salon shares, and the division of jewelry. The respondent's claim for spousal support was abandoned during the trial.

- [27] The issues that were most important to the parties were parenting time, parental decision making and child support. Their fundamental disagreement on parenting time was the issue that drove this matter to trial. A review of the settlement offers shows that the claimant sought to maintain primary care of the children for at least two years from when the offers were exchanged. The respondent wanted equal parenting time dating back to mid 2017 when he moved back to Vancouver, B.C., from Clearwater, B.C.
- [28] In the trial decision, I concluded that the children are best served by having equal parenting time with both of their parents and that the parents were to have joint guardianship and decision-making responsibilities. Flowing from this decision, the claimant is required to pay the respondent an offset amount of child support based on the income determinations I made at trial.
- [29] Success was divided on the financial issues. The respondent was ordered to pay retroactive child support. His claim of undue hardship was rejected. The findings on excluded property resulted in no transfer of RRSPs to the claimant. The respondent will receive \$8,000 in total in respect of the M. Salon and T. Salon shares. The jewelry was divided equally, including the respondent's Rolex watch and the claimant's engagement ring, both of which were sought to be excluded.
- [30] In my view a global determination on all of the matters in dispute reveals that the respondent was substantially successful at trial because he obtained equal parenting time with the children and joint decision making regarding them. Accordingly, he is no longer required to pay child support and instead receives an offset amount of child support based on the party's incomes. The respondent was successful on the issues that were most important to the parties.
- [31] In considering if the Court should "order otherwise", I note that the claimant earns a good income of approximately \$125,000 per year. She therefore has the earning capacity to pay a costs award. Based on her income and earning history, I do not find that her debts constitute a hardship that would prevent her from paying any costs award.
- [32] The purpose of the costs award in this case is to recognize that this matter probably would not have gone to trial if the claimant had been willing to accept equal parenting time. As described in the trial judgment, the respondent made significant efforts to remain involved with the children after moving to Clearwater, BC to obtain employment. He travelled to Vancouver on 72 of 91 weekends to spend time with his children. There was no basis for the claimant to assert that he was not capable of caring for the children on an equal basis.
- [33] In considering the conduct of the parties in the litigation, the respondent spent far too much trial time pursuing the issues of undue hardship and the valuation of the salon shares. I also note that by pursuing a seemingly baseless claim for spousal support until trial, he caused the claimant unnecessary expense in preparing to litigate this issue. While I appreciate that the respondent had to go to trial to obtain equal parenting, doing so on this discrete issue would not have required ten days of evidence. At least half of the trial time, if not more, was

devoted to non-parenting issues.

- [34] An award of double costs is not appropriate in these circumstances because the respondent unnecessarily lengthened the litigation, and his offer did not include an amount for retroactive child support. He was ordered to pay \$19,475 in respect of this at trial.
- [35] On the issue of special costs, the claimant admitted that she read the respondent's personal email when she inadvertently retained access to it when they separated. I am troubled by the suggestion that she shared this information with her counsel and that this information was then used as part of the claimant's litigation strategy. If counsel received information from her client that she knew was obtained by accessing the respondent's private emails, counsel should have immediately returned the information to her client, advised her that it was inappropriate for her client to continue reading the respondent's private emails, and not used this information in any way.
- [36] While I agree that the claimant should not have read the personal email, I accept that she may not have appreciated the seriousness of this transgression. This lapse of judgment is not part of a wider pattern of reprehensible conduct throughout the course of the litigation that is worthy of rebuke. An award of special costs is not warranted in these circumstances.
- [37] I am ordering that the claimant pay 50 percent of the respondent's costs at Scale B based on:
- 1) the respondent's offer to settle based on equal parenting time;
 - 2) the conduct of the respondent in the litigation;
 - 3) the importance of not upsetting the balance achieved by the trial decision; and
 - 4) the relative financial circumstances of the parties, including the claimant's debts.

(DISCUSSION)

- [38] THE COURT: The 50 percent that I ordered is in respect of the trial. For the subsequent applications, each party shall bear their own costs.

(DISCUSSION)

- [39] THE COURT: The order for 50 percent of costs is to the conclusion of the trial: from commencement of the action to the conclusion of the trial. It does not apply to any previous costs orders of masters or judges on interim applications.

"Basran, J"

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