
CANADA / JUDGMENT

M.T. v. J.S.

2020 BCSC 1604

COURT

Supreme Court of British Columbia

DECIDED

29 October 2020

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2020 BCSC 1604 M.T. v. J.S.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

M.T. v. J.S.,

2020 BCSC 1604

Date: 20201029

Docket: E173352

Registry: Vancouver

Between:

M.T., also known as M.S.

Claimant

And

J.S., also known J.W.S., and S.H. Ltd.

Respondents

Corrected Reasons for Judgment: The docket number on the cover page of the Judgment has been corrected on November 4, 2020

Before: The Honourable Mr. Justice Funt

Reasons for Ruling on Costs

Counsel for the Claimant:

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Place and Dates of Hearing:

Vancouver, B.C.

September 23-24, 2020

Place and Date of Ruling:

Vancouver, B.C.

October 29, 2020

1. introduction

[1] This is a ruling on costs in this family matter. The trial reasons are indexed as M.T. v. J.S., 2020 BCSC 203 (the "Trial Reasons").

[2] Subject to the Court's discretion, the general rule is that costs are awarded to the successful party.

[3] J.S., the respondent, at trial, says that he was the successful party.

[4] M.T., the claimant, at trial, says that each party should bear their own costs of the proceedings, except where the Court has previously otherwise ordered.

[5] For the reasons that follow, the Court rules that each party shall bear their own costs (except where the Court has previously otherwise ordered).

2. legal framework

a) Supreme Court Family Rules

[6] Rules 16-1(7) and (9) of the Supreme Court Family Rules, B.C. Reg. 169/2009 [SCFR] are the relevant rules. These rules read:

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.

Costs of applications

(9) Unless the court hearing an application otherwise orders,

- (a) if the application is granted, the party who brought the application is entitled to costs of the application if that party is awarded costs at trial or at the hearing of the petition, but the party opposing the application, if any, is not entitled to costs even though that party is awarded costs at trial or at the hearing of the petition, and
 - (b) if the application is refused, the party who brought the application is not entitled to costs of the application even though that party is awarded costs at trial or at the hearing of the petition, but the party opposing the application, if any, is entitled to costs if that party is awarded costs at trial or at the hearing of the petition.
- [7] As may be seen, Rule 16-1(7)'s language "unless the court otherwise orders" recognizes the Court's discretion in awarding costs. Such language accords with the Court's inherent and general jurisdiction as a superior court: *Crowder v. British Columbia (Attorney General)*, 2019 BCSC 1824, paras. 130-134; *Reznik v. Matty*, 2013 BCSC 1346, paras. 18-27; I.H. Jacob, "The Inherent Jurisdiction of the Court" (1970), 23:1 *Current Legal Problems* 23.
- b) Jurisprudence
- [8] In *Jin v. Cheng*, 2019 BCSC 148, Justice Dardi succinctly summarizes the relevant jurisprudence:
- [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.

3. analysis

a) Commercial Aspects

[9] As with many family cases where significant wealth and income are involved, the case takes on many commercial characteristics and aspects. As described in the Trial Reasons, the parties held various assets and undertook a real estate business through a Holdco-Opco structure.

[10] As stated in the Trial Reasons:

[10] As respondent's counsel describes in his closing submissions:

both parties testified that, during the marriage, they worked together as a very successful team, combining their considerable talents and working together to run a business, raise their children, and to buy, renovate and sell successive houses. As a result of those combined efforts they lived well, enjoyed a generous standard of living, and amassed significant capital.

[11] The parties used Opco and Holdco to facilitate the growth and success of the real estate business and to hold many of the investments which resulted from the "amassed significant capital".

- [12] Two arm's length parties often use a Holdco-Opco structure as they "work together as a very successful team" to build and run a business and to hold investments. Where after approximately 25 years, there is a falling out between the two arm's length parties, the business, related assets and liabilities, and investments will usually need to be divided having regard to various commercial aspects such as taxes, licences, the treatment and retention of employees and contractors, relationships with clients, the goodwill associated with the business and, more generally, the successful future operation of the business.
- [13] Significant financial costs are often incurred as part of the division of the subject business, related assets, and investments. The costs are incurred as part of the division for the benefit of each of the two arm's length. With a broken relationship, it is for the benefit of each to, so to speak, get on their separate ways.
- [14] In the case at bar, I am satisfied that the trial process and the trial itself facilitated the division of the business, related assets and liabilities, and investments to the benefit of each of the parties at bar.
- [15] I assess the portion of the costs at issue attributable to the division of the business, related assets and liabilities, and investments, to be 25%. Accordingly, before considering substantial success, each party will bear 25% of the total costs each has at issue.
- b) Financial Visibility and Assurance for the Claimant
- [16] Claimant's counsel submitted that the claimant also incurred significant costs to achieve a "proper appreciation" of the relevant financial aspects. Such financial aspects included the respondent's income and, more generally, financial disclosure related to Opco, Holdco, the respondent's assets and liabilities, the flow of funds, and the recording of revenue and expenses.
- [17] A trial, I found that the respondent's wish to separate came as a shock and surprise to the claimant. I also found that the respondent had not intentionally reduced his income or had tried to hide income. I also found that the respondent had made full disclosure of his assets, but, as described below, he had not sought to determine the value of three significant assets.
- [18] Prior to separation, the claimant had little knowledge of the financial aspects relating to Opco, Holdco, and the respondent. She trusted the respondent with such matters as part of their overall relationship. The respondent had not attempted to hide any particular financial aspect. It was simply the manner by which the parties had divided their family and business aspects, duties, and obligations.
- [19] With the shock and surprise of the respondent's wish to separate, the claimant was required to achieve a proper appreciation of the parties' financial matters, including the workings of the Holdco-Opco structure, the various investments, the various liabilities, and the respondent's income. With the shock and surprise of the separation, the claimant and her counsel cannot be faulted for approaching matters with scepticism.

- [20] I do not find fault with either party for the claimant's lack of financial visibility and awareness of the parties' finances (including Opco and Holdco). As noted, it was simply part of the nature of their overall relationship. That said, in order to obtain convincing financial visibility and awareness, the claimant was required to expend effort and financial resources as part of the trial process and trial.
- [21] A proper financial appreciation serves the interest of both parties. It facilitates settlement and avoids the time and expense of litigation: *Leskun v. Leskun*, 2006 SCC 25 at para. 34.
- [22] In the case at bar, the parties reached agreement on several aspects (e.g., the sale of the matrimonial home, including the possible timing of this sale) which served to reduce the time and expense of a possibly much longer trial.
- [23] I assess the portion of the costs at issue attributable to the claimant obtaining a proper appreciation of the relevant financial matters to be 25% of the total costs each has at issue. Accordingly, before considering substantial success, each party will bear 25% of the total costs each has at issue.
- c) Substantial Success
- [24] At para. 29 of the Trial Reasons, I set forth the key issues addressed at trial. For ease of reference, para. 29 of the Trial Reasons read:
- [29] The following key issues must be addressed:
- a) under the Federal Child Support Guidelines, S.O.R./97-175 [FCSG], the respondent's available income ("Guideline Income");
 - b) a formula for determining the respondent's future Guideline Income;
 - c) spousal support;
 - d) child support;
 - e) s. 7 special and extraordinary expenses;
 - f) retroactive child support, spousal support, and "s. 7 special expenses";
 - g) the exercise of significant parenting decisions;
 - h) counselling for the parties and C1 and C2;
 - i) the categorization of the proceeds from the critical illness policy;
 - j) property division; and
 - k) security for child and spousal support.
- [25] The most significant issue was the determination of the respondent's Guideline Income. The determination of the respondent's Guideline Income in turn affected spousal support and child support.

- [26] The respondent was successful in having Guideline Income determined based on actual currently available income.
- [27] The claimant was successful with respect to the inclusion of \$500,000 of critical illness proceeds as family property. Similarly, she was successful in having the value of the respondent's Capilano Golf Club membership and the cash surrender value of the respondent's Empire Life insurance policy included as family property.
- [28] The claimant was also successful with respect to the approach to counselling for C1 and C2.
- [29] The claimant was also successful in having future spousal support not limited for a predetermined number of years.
- [30] In looking at matters globally, I find that the respondent was substantially successful. I will, however, not award the respondent costs as a result of his failure to comply with the valuation rules associated with the trial process of a family law action.

d) Trial Process

- [31] The purpose of a trial is to bring a final resolution of the issues in dispute. In family cases where children are involved, finality is particularly important because it brings certainty. Certainty in a child's family environment serves the best interests of the child.
- [32] In the case at bar, C1 and C2 are each young men. That said, the resolution of their parents' financial affairs would serve their respective best interests by helping to reduce the potential for conflict between their parents.
- [33] The Family Law Act, S.B.C. 2011 c. 25 [FLA] and the SCFR require the value of a party's assets to be stated. The importance of valuation goes directly to the fair division of property.
- [34] Without values, a final property division cannot be made. Here, property division had to be left on a "if and when" basis with respect to several key investments.
- [35] In the case at bar, the fair market values for Holdco's investment in the Squamish LP, a pre-sale contract for one of the Squamish condominium units, and all of the shares in the capital of U.S. Co., which, in turn, held the Elizabeth LP units were not set forth by either party. The amounts involved were significant. Holdco's cost of the Squamish LP units was \$250,000. U.S. Co.'s cost of the Elizabeth LP units was \$365,000.
- [36] In *Este v. Esteghamat-Ardakani*, 2018 BCCA 290, leave to appeal ref'd [2018] S.C.C.A. No. 477, Justice Frankel, in writing for out Court of Appeal, states:
- [89] The objects of the Supreme Court Family Rules, set out in Rule 1-3, include "the just, speedy and inexpensive determination of every family law case on its merits". That object cannot be achieved unless the parties make full and frank disclosure of their respective financial circumstances. It is significant that the Rules contain provisions dealing with the ordering of "particulars" in regard to both a "pleading" and a Form F8. Under Rules 4-6(3) and 7-1(15) particulars can be ordered with respect to a "pleading". The only other provision in the Rules

under which particulars can be ordered is Rule 5-1(14), which deals with Form F8s.

- [90] The importance of Form F8s is underscored by the fact the Rules contain a specific enforcement provision with respect to them. Under Rule 5-1(28), failure to file a Form F8, or to comply with an order for particulars, can result in a number of things including: dismissal of all or part of a claim; striking out all or part of a response to a claim or counterclaim; a fine; and costs.
- [37] In this regard, the respondent's April 4, 2019 Form F8 financial statement under the heading, Part 3 - Property - Details, lists Holdco with its value stated to be "unascertained". Holdco held the Squamish LP units and all of the shares in the capital of U.S. Co. which, as noted, held the Elizabeth LP units. Holdco's 2018 financial statement shows \$268,995 in long-term investments without any related notes. U.S. Co.'s financial statements were not attached to the respondent's April 4, 2019 Form F8 financial statement.
- [38] The claimant also did not provide values for the three foregoing investments.
- [39] As noted in the Trial Reasons, neither party had, at trial, a reasonable sense as to the fair market value of any of the three investments.
- [40] The respondent ran the financial and business affairs of Holdco, Opco, and U.S. Co. at the time the three investments were acquired. He was in the much superior position of the two parties to obtain appraisals or other information to provide a reasonable sense as to the fair market value of each of the three investments. His failure to do so frustrated the final resolution of the issue of property division.
- [41] As Justice Frankel in *Este* notes, the objects of the SCFR include "the just, speedy and inexpensive determination of every family case on its merits". [Emphasis added.]
- [42] The finality of a determination is not achieved where valuation matters are left suspended either as "unascertained" or on an "if and when" basis. Without finality, the potential for future conflict between the parties and the possible engagement of the Court is left alive.
- [43] Where complete financial information is not provided, trial time is not used efficiently with associated unnecessary expense.
- [44] The lack of complete financial information also requires greater judicial writing time. Such extra writing time could be used for the timely delivery of reasons for other litigants. The public helps fund the costs of our courts.
- [45] The Court has the inherent jurisdiction to administer "justice according to law in a regular, orderly, and efficient manner": *Jacob* at 28.
- [46] As a result of the respondent's lack of compliance with the SCFR by not providing a reasonable sense of the fair market value for each of the three investments noted, the Court will exercise its discretion to not award costs to the respondent.

4. conclusion

[47] The Court rules that each party shall bear their own costs (except where the Court has previously otherwise ordered).

"Funt J."

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Prepared on 25 October 2026 · Esheria