
CANADA / JUDGMENT

M.Y.T.C. v. L.H.N.

2020 BCSC 729

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Supreme Court of British Columbia

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2020 BCSC 729 M.Y.T.C. v. L.H.N.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

M.Y.T.C. v. L.H.N.,

2020 BCSC 729

Date: 20200512

Docket: E172700

Registry: Vancouver

Between:

M.Y.T.C.

Claimant

And

L.H.N.

Respondent

Before: The Honourable Mr. Justice Milman

Supplemental Reasons for Judgment

(Costs and Settling Order)

Counsel for the Claimant:

P. Paul

The Respondent, appearing on his own behalf:

L.H.N.

Written Submissions by the Claimant:

April 15, 2020

Written Submissions by the Respondent:

April 20, 2020

Place and Date of Judgment:

Vancouver, B.C.

May 12, 2020

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I. Introduction

[1] On March 19, 2020, I rendered judgment following the trial of this family law action. My decision is indexed as 2020 BCSC 414. Among the issues addressed at the trial were parenting time, division of assets and debts, child support and spousal support. I made no order as to costs at that time but invited the parties to deliver written submissions on costs for my consideration. The parties have since done so. In their submissions, they each seek an award of costs against the other, on various grounds.

[2] The parties also disagree about the form of order that should be entered to reflect my decision. They have each submitted a draft form of order that they seek to have entered.

[3] These supplemental reasons for judgment address both issues.

II. Costs

A. The Parties' Positions on Costs

- [4] The claimant, M.Y.T.C., seeks an award of enhanced costs in her favour, on the following grounds:
- (a) under Rule 16-1(7) of the Supreme Court Family Rules, on the basis that she was substantially successful in the litigation;
 - (b) under Rule 11-1(4), (5) and (6), on the basis of two settlement offers that she says she delivered to the respondent, L.H.N., through his counsel, on January 23 and 31, 2019, respectively, in which she offered to settle this litigation on terms that are said to have been more favourable to L.H.N. than the result she obtained at trial; and
 - (c) L.H.N. should be penalised by an award of special costs for his reprehensible conduct in the litigation.
- [5] L.H.N. seeks an award of special costs in his favour. He relies on many of the same arguments that formed the basis of his earlier applications to have M.Y.T.C.'s claims struck as an abuse of process, arguments that I generally rejected in my reasons for judgment. In addition, he claims to have been the successful party in the litigation because the final result at trial was no better for M.Y.T.C. than the proposals he made to her in emails sent before this litigation began.

B. Rule 16-1(7): Substantial Success

- [6] Rule 16-1(7) states that the "costs of a family law case must be awarded to the successful party unless the court otherwise orders." Both parties claim to have been successful here.
- [7] The principles to be applied in making an award of costs under that provision were explained as follows by Maisonville J. in *Kraft v. Kraft*, 2018 BCSC 1184 at paras. 18-23, rev'd in part on other grounds, 2019 BCCA 204:
- [18] Unless the court otherwise orders, costs in a family law case are awarded to the successful party: SCFR, Rule 16-1(7). A successful party is one who has been substantially successful: *MacLean v. Mio*, 2011 BCSC 148 at para. 30.
- [19] Determining which party has been substantially successful requires an objective comparison of the results obtained by the parties with the parties' submissions at trial: *MacLean* at para. 30.
- [20] In *D.J.D. v. M.L.D.*, 2017 BCSC 1417, Justice Dardi summarized the law on determining substantial success:
- [14] In a family law case involving multiple issues and where there has been divided success, the Court must engage in a "substantial success" analysis. Substantial success, as defined in the authorities, is when the prevailing party succeeds on 75% or more on the matters in dispute. Substantial success in the litigation is measured objectively and is to be determined by the trial judge by considering the disputed matters globally. 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; *Fotheringham v. Fotheringham*, 2001 BCSC 1321, leave to appeal ref'd 2002 BCCA 454; *Paul v. Pumple*, 2013 BCSC 1844; *Marquez v. Zapiola*, 2014 BCCA 35 at paras. 15-16; *D.R. v. E.P.R.*, 2016 BCSC 550 at para. 8.

[15] 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.

[16] It is clear from the appellate decisions that 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, 57 B.C.A.C. 23 (C.A.).

[21] In *Litt v. Gill*, 2016 BCCA 288, Justice Garson commented on the unique problem costs pose in family law cases involving multiple issues, noting that the concept of "success" may require a more flexible approach for the purposes of assessing costs:

[53] At its most basic, the successful party is the plaintiff who establishes liability and obtains a remedy, or the defendant who obtains dismissal of the plaintiff's case: *Loft v. Nat*, 2014 BCCA 108 at para. 46. This general principle is more difficult to apply in the context of family cases, where there may be a panoply of claims advanced by each party, and divided success. There, a more flexible "substantial success" test may be more appropriate: see this Court's decisions in *Harras v. Lhotka*, 2016 BCCA 246 at para. 48 and *Marquez v. Ziapola*, 2014 BCCA 35 at para. 16. Costs can also be divided among parties where there is divided success. Success does not imply that a successful plaintiff must be successful on every issue in order to recover costs: *Robbins v. Pacific Newspaper Group*, 2006 BCSC 872, 54 B.C.L.R. (4th) 135 at para. 17.

[22] In *Gold v. Gold*, [1993] B.C.J. No. 1792 (Q.L.), 106 D.L.R. (4th) 452 (C.A.), the Court of Appeal described the trial judge's discretion to deviate from the usual rule that costs are awarded to the successful party:

- [20] The question, then, is: when should the Court order otherwise? With respect, when the court should order otherwise is a matter of discretion, to be exercised judicially by the trial judge, as directed by the Rules of Court. To lay down any strict guidelines or even to attempt to give exhaustive examples is not, I think, helpful because the facts and issues in each family law case vary so greatly. Factors such as 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 itself are all matters which a trial judge, quite properly, may be asked to take into account. Assessing the importance of such factors within the context of a particular case, however, is a matter best left for determination by the trial judge.
- [23] The onus of persuading the court that it should depart from the usual rule rests on the unsuccessful litigant: *Louie v. Louie*, (1996) 64 A.C.W.S. (3d) 1321 (S.C.) at para. 7.
- [8] M.Y.T.C argues that she was "substantially successful" in that sense, given the overwhelming number of discreet issues on which she prevailed. I agree that M.Y.T.C. was generally successful on the financial issues. The division of assets, spousal support and child support orders I made were much closer to the positions that she advanced at trial than those of L.H.N. The main exception in that regard was my rejection of part of her excluded property claim. On the other hand, L.H.N. was substantially successful in resisting M.Y.T.C.'s claims for parenting orders, although he did not obtain the more limited parenting relief that he was seeking either.
- [9] I disagree, however, with M.Y.T.C.'s submission that the parenting issues occupied only a relatively minor part of the trial and that much of the evidence pertaining to them overlapped with other issues in the case. On the contrary, a great deal of trial time, involving a number of standalone witnesses, was devoted exclusively to the parenting issues. Had the trial been confined to the parenting and financial issues alone, I would have been inclined to find that success was divided.
- [10] But the trial was not confined to those issues. A significant part of it was spent dealing with L.H.N.'s many allegations of misconduct on the part of M.Y.T.C. and her counsel. In light of my rejection of L.H.N.'s abuse of process motions and M.Y.T.C.'s level of success on the financial issues, I have concluded that, overall, she was substantially successful at trial, despite L.H.N.'s relative degree of success on the parenting issues.
- [11] In summary, I find that M.Y.T.C. is, *prima facie*, entitled to her costs as the successful party under Rule 16-1(7), unless I am inclined to order otherwise. For the reasons canvassed below in my discussion of M.Y.T.C.'s claim for special costs, I am not so inclined.

C. Rule 11-1 (4), (5) and (6): Settlement Offers

[12] M.Y.T.C. seeks double costs on the basis of two offers to settle that she claims to have made prior to the trial. L.H.N. responds that the offers were never delivered. He argues that the costs award should reflect his success at trial in comparison to the terms he offered to her by email before the litigation began.

[13] Rule 11-1 states in relevant part as follows:

Offer may be considered in relation to costs

(4) The court may consider an offer to settle when exercising the court's discretion in relation to costs.

Cost options

(5) In a family law case in which an offer to settle has been made, the court may do one or more of the following:

- (a) deprive a party of any or all of the costs, including any or all of the disbursements, to which the party would otherwise be entitled in respect of all or some of the steps taken in the family law case after the date of delivery or service of the offer to settle;
- (b) award double costs of all or some of the steps taken in the family law case after the date of delivery or service of the offer to settle;
- (c) award to a party, in respect of all or some of the steps taken in the family law case after the date of delivery or service of the offer to settle, costs to which the party would have been entitled had the offer not been made;
- (d) if the party who made the offer obtained a judgment as favourable as, or more favourable than, the terms of the offer, award to the party the party's costs in respect of all or some of the steps taken in the family law case after the date of delivery or service of the offer to settle.

Considerations of court

- (6) In making an order under subrule (5), the court may consider the following:
- (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.

- [14] It is incumbent on M.Y.T.C. to prove delivery of any offer upon which she relies. Although proof of delivery to L.H.N.'s then-current counsel of record would suffice for that purpose, I have no evidence before me that the letters in issue here were in fact delivered as alleged. Copies of the letters, signed by Ms. Paul, are attached to M.Y.T.C.'s written submissions on costs. They bear a stamp next to Ms. Paul's signature to indicate where opposing counsel was supposed to sign to acknowledge receipt, but the stamps remain unsigned in each case. Without an acknowledgement of receipt by opposing counsel or, failing that, an affidavit of delivery, M.Y.T.C. has not proved that "an offer to settle has been made" so as to engage the rule.
- [15] Regardless of the question of delivery, I am not satisfied that the terms she offered in those letters were in fact more favourable to L.H.N. than the result she obtained at trial. That is because the offers included parenting terms that I refused to include in my order. Although M.Y.T.C. argues that L.H.N. could have accepted the financial terms separately, I am not persuaded that an offer that ought to have been accepted, but only in part, suffices to attract an award of double costs. The authorities suggest that in assessing whether an award of double costs should be made, it is the entire offer that must be compared with the overall result achieved: *S.S.T. v. L.M.G.*, 2019 BCSC 686 at para. 43; *McLaughlan v. Nestor*, 2018 BCSC 2102, at para. 71; *Paul v. Pumple*, 2013 BCSC 1844, at paras. 32-34.
- [16] I am also not prepared to consider the emails that L.H.N. sent to M.Y.T.C. prior to the commencement of the litigation. It is only offers to settle made during the litigation and in conformity with Rule 11-1 that can properly be considered in this context: *M.S.G. v. S.K.R.*, 2015 BCSC 913, at para. 13.
- [17] In summary, I am refusing to consider any previous settlement offers made by either party in determining the appropriate order to make with respect to costs.

D. Special Costs

- [18] Both parties seek an award of special costs in their favour.
- [19] The circumstances in which this Court has in the past awarded special costs in matrimonial litigation were conveniently summarized by Warren J. in *Hu v. Dickson*, 2015 BCSC 218, at paras. 46-49, as follows:
- [46] Special costs are awarded where a party's litigation conduct can be characterized as "reprehensible". In this context the word reprehensible encompasses both scandalous and outrageous conduct and also milder forms of misconduct deserving of reproof or rebuke. This does not mean that all forms of misconduct justify a special costs order - rather, the misconduct must be such as to be deserving of reproof or rebuke.

- [47] The purpose for this high level of costs is punitive and intended to express the court's disapproval of the party's conduct. It is not necessary that all aspects of a party's conduct in the litigation be reprehensible in order to make an award of special costs that applies to the entire action. However, pursuant to Rule 16-1(14) of the Supreme Court Family Rules, the court has the discretion to award costs that relate to only certain aspects of a proceeding and may do so where it would be disproportionate to award special costs of the entire proceeding.
- [48] The court must exercise restraint in awarding special costs and as such the party seeking special costs must demonstrate exceptional circumstances to justify a special costs order.
- [49] In *Kim v. Hong* Justice Griffin quoted extensively from the judgment of Justice Williams in *Schwabe v. Dr. Lisinski* where he summarized a number of cases in an effort to discern the kinds of conduct that had been characterized as reprehensible and thus warranting an award of special costs. Justice Griffin also categorized the conduct that had been found to justify an award of special costs in a number of family cases. From her reasons, it is apparent that the kinds of conduct that warrant an award of special costs include the following:
- acting with an improper motive, such as to intimidate, exhaust or financially drain the other party in the hopes that they will give up or soften their position in the litigation;
 - dissipating and/or not disclosing assets;
 - abusing the court's process by, among other things, failing to disclose documents, delaying in disclosing documents, failing to respond to reasonable requests, causing unnecessary interlocutory applications, and breaching the Rules of Court in a manner that prejudices the other party;
 - misleading the court, through outright fabrications or through evasive and/or equivocal responses; and
 - disobeying a court order.

[Citations omitted.]

- [20] In arguing for an award of special costs in his favour, L.H.N. invites me to revisit many of my earlier findings of fact as having been arrived at erroneously in reliance on falsehoods advanced by M.Y.T.C. and her counsel. In this respect, his submissions are really an effort to reargue the merits of the case, which is not appropriate at this stage. I have already found that M.Y.T.C. was substantially successful in the litigation overall. As I will explain below, I am also satisfied that his misconduct in this litigation has been far more extensive and impactful than hers. For those reasons, I am not prepared to make an award of costs, let alone special costs, in his favour.

- [21] On the other hand, although I dismissed L.H.N.'s abuse of process motions at trial, I noted (at para. 94 of my decision) that M.Y.T.C. had engaged in misconduct that, while serious, did not rise to a level justifying the drastic relief sought by L.H.N. on those motions. That misconduct may, however, now be relevant again in my determination of the appropriate costs award to make at the conclusion of the trial.
- [22] In seeking an award of special costs against L.H.N., M.Y.T.C. argues that there were examples in this case of all of the categories of misconduct listed in the quotation from *Hu v. Dickson* reproduced above. In particular, M.Y.T.C. argues that L.H.N. misconducted himself by, among other things:
- (a) dissipating family assets (withdrawing \$500,000 from the line of credit and leaving M.Y.T.C. to carry the resulting interest charges alone, cashing in the RRSPs, depleting the corporate bank account and wasting and disposing of the dental practice);
 - (b) failing to disclose assets (repeatedly refusing to comply with his discovery obligations or answer questions forthrightly during his examination for discovery and at trial and swearing to false evidence in his Form F8 financial statement, after M.Y.T.C. was forced to apply to court, sometimes more than once, for orders to compel him to submit to an examination for discovery and to produce a financial statement);
 - (c) misleading the court (fabricating debts to his parents and others, falsely claiming impecuniosity when he had access to ample funds, feigning an inability to continue working, conveying false information to the jointly-appointed valuator of his dental practice and instructing the valuator not to share certain information about the pending sale of the practice with M.Y.T.C. or her counsel);
 - (d) disobeying court orders (as I indicated in my earlier reasons for judgment, two other judges have previously found L.H.N. in contempt of court for failing to comply with court orders in this litigation; L.H.N. also refused to comply with certain of my orders and directions during the trial); and
 - (e) abusing the court's process (repeatedly delaying and seeking to adjourn the trial and behaving during the trial in a manner that was said in the argument to be "rude, inflammatory, threatening, disrespectful and insulting").
- [23] Not all of M.Y.T.C.'s complaints justify an award of special costs. For example, it has been held that pre-litigation conduct, such as the initial withdrawal of the \$500,000 from the line of credit, should not form the basis of an award of special costs: *Smithies Holdings Inc. v. RCV Holdings Ltd.*, 2017 BCCA 177. I am also reluctant to penalise L.H.N. for conduct that has already been factored into the financial aspects of my earlier decision. I would not award special costs merely because I favoured M.Y.T.C.'s evidence over that of L.H.N. on particular issues.

- [24] On the other hand, many of M.Y.T.C.'s complaints are well-founded and, when considered cumulatively, justify an award of special costs in this case. I will highlight what I view as the most significant of the categories that lead me to that conclusion.
- [25] First, I agree with M.Y.T.C. that L.H.N. made this litigation lengthier, more complicated and more expensive than it needed to be by failing and sometimes expressly refusing to comply with court orders and his obligations under the Supreme Court Family Rules. The following judicial pronouncements illustrate the problem:
- (i) the Order of Master Taylor made December 12, 2017, requiring that L.H.N. produce banking records and a Form 8 Financial Statement (costs were ordered payable in the cause);
 - (ii) the order of N. Smith J. made March 5, 2018, finding L.H.N. in contempt of court for breaching the Order of Master Taylor and ordering L.H.N., for the second time, to produce a financial statement (L.H.N. was ordered to pay special costs on that application, and that award remains unpaid);
 - (iii) the order of Forth J. made July 13, 2018, finding L.H.N. in contempt of court for failing to pay the \$5,000 penalty imposed N. Smith J. (no costs were awarded on that occasion, due to the mixed success achieved by the parties on the applications before her);
 - (iv) the decision of Sewell J. dated December 7, 2018, refusing L.H.N.'s application to adjourn the trial, in which Sewell J. commented on, among other things, L.H.N.'s failure to cooperate in arranging his examination for discovery and to pay spousal support as previously ordered (L.H.N. was ordered to pay costs in any event of the cause); and
 - (v) my order of July 3, 2019, directing the parties' insurer to issue certain insurance proceeds to M.Y.T.C., which was made necessary because L.H.N. refused to comply with my previous order of May 6, 2019 that he endorse to M.Y.T.C. any cheque issued by the insurer to both of them jointly.
- [26] Second, I agree that L.H.N. conducted the litigation in a manner that was often obstructive and dilatory. The trial lasted much longer than it should have partly because of L.H.N.'s repeated attempts to reargue issues that had already been decided against him, such as the manner in which his abuse of process motions would be heard. As I previously mentioned, those motions occupied a significant amount of trial time and were ultimately found to be without merit. In addition, it is apparent that M.Y.T.C. had to apply more than once for relief that should not have been controversial, such as for orders for production of critical financial information, to compel L.H.N. pick up his belongings from the family home and to arrange for the sale of the family home, among other things.
- [27] Finally, I agree that the intemperate and inflammatory tone of L.H.N.'s testimony and submissions to the court, both orally and in writing, also contributes to the justification for an award of special costs in this case. L.H.N. regularly made unsubstantiated and unwarranted allegations of fraud against not just M.Y.T.C. herself but also her counsel. Even third parties, such as the arms-length purchasers of the family home, were not immune

from the taint of his broad brush. Justice N. Smith found similar conduct to be among the factors justifying an award of special costs in *Negus v. Yehia*, 2018 BCSC 2319, aff'd 2019 BCCA 307.

E. Conclusion on Costs

- [28] L.H.N. has since paid the fines imposed by N. Smith J. and Forth J. for the contempt of court that occurred prior to the hearing before Forth J. It was in the context of that hearing that Forth J. was critical of M.Y.T.C. and her counsel for failing to bring relevant evidence to the court's attention on the application before her seeking a finding of contempt. For those reasons, I am awarding M.Y.T.C. special costs but only for the period following Forth J.'s order of July 13, 2018, and ending on the last day of the trial.
- [29] In summary, I am ordering that, subject to any costs orders previously made to the contrary, L.H.N. is to pay M.Y.T.C. ordinary costs for the entire proceeding, except for the period from July 14, 2018 to January 17, 2020, which will be payable as special costs.

III. Settling the Order

- [30] The main dispute between the parties as to the appropriate form of order arises from M.Y.T.C.'s proposal to reproduce and incorporate into my order the original Scott schedule that she presented in argument at trial. L.H.N. objects to having the Scott schedule form part of my order, on the grounds that it includes aspects of M.Y.T.C.'s trial argument extending well beyond the ambit of my conclusions. His proposed form of order instead tracks the language I used in paragraph 178 of my trial decision, where those conclusions are summarised.
- [31] I agree with L.H.N. that the Scott schedule should not form part of my order. Although I accepted the accuracy of almost all of the items listed in it and their values, I did not adopt its contents in their entirety and in fact specifically rejected certain parts of it. The terms of M.Y.T.C.'s draft order that specify how I calculated the net amounts owing as between the parties reflect my reasoning in reaching my ultimate conclusions, rather than the intended terms of my final order. Those terms should be confined to the conclusions themselves.
- [32] On the other hand, I also agree with M.Y.T.C. that it may be preferable for the order to specify, in greater detail than is apparent in paragraph 178 of my reasons for judgment, how the family assets and debts are to be divided, particularly with respect to the pensions.
- [33] Accordingly, I adopt M.Y.T.C.'s draft form of order, with the following changes:
- (a) paragraph 1 is to be moved below the recitals;
 - (b) all headings are to be deleted;
 - (c) following the recitals, the following should be stated in uppercase letters: "THIS COURT ORDERS AND DECLARES THAT:";

- (d) paragraphs 2, 4, 5, 6, 13, 14, 16 and 18, including the schedule, are to be deleted;
- (e) paragraph 3 is to be deleted and replaced with the following:

"L.H.N.'s applications filed May 16, 2019, May 23, 2019 (as amended May 24, 2019) and January 3, 2020 are dismissed;"

- (f) the first half of paragraph 7 is to be deleted, so that the paragraph begins with the words "The claimant will pay";
- (g) the slash ("/") is to be deleted from paragraph 11 and replaced by the word "and"; and
- (h) a final paragraph is to be added, stating as follows:

"The payments contemplated by this order will satisfy all of the parties' respective monetary claims in this action, other than any subsequent order made as to costs. Except as set out in this order and any subsequent order made as to costs, all of the parties' other claims in this action are dismissed."

[34] Because the trial order itself will be silent as to costs, a separate order should be drawn to reflect the award of costs that I have made in these supplemental reasons for judgment. Both orders may be submitted to the registry for my endorsement without the need for L.H.N.'s approval as to form.

"Milman J."

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