
CANADA / JUDGMENT

McLaughlan v. Nestor

2018 BCSC 2102

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Supreme Court of British Columbia

DECIDED

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2018 BCSC 2102 McLaughlan v. Nestor

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

McLaughlan v. Nestor,

2018 BCSC 2102

Date: 20181203

Docket: E3200

Registry: Courtenay

Between:

Terry Glenn McLaughlan

Claimant

And

Caroline Ann Nestor

Respondent

Before: The Honourable Mr. Justice Armstrong

Reasons for Judgment

Counsel for Claimant:

G. White

The Respondent, appearing in person:

C. Nestor

Place and Dates of Hearing:

Nanaimo, B.C.

September 7, 2018

Place and Date of Judgment:

Courtenay, B.C.

December 3, 2018

Introduction

- [1] The claimant seeks costs of a summary trial proceeding that was decided January 19, 2018 with reasons indexed under *McLaughlan v. Nestor*, 2018 BCSC 86.
- [2] The parties separated in 2014 after a 17-year marriage. Prior to cohabitating, the respondent initiated preparation of a marriage agreement that was signed by the parties after each had received independent legal advice.
- [3] By the time the parties separated, their circumstances had changed and the respondent sought an order varying and replacing the agreement or in the alternative an equal division of family assets. She also claimed a right to be maintained as a beneficiary on the claimant's life insurance policy, remain on the claimant's medical and dental insurance coverage, an order for retroactive spousal support, and an order increasing the amount of spousal support from the date of a 2014 interim support order.
- [4] In addition to orders concerning life and medical insurance, the result at trial was as follows:
- [244] In summary:
- a. the parties will be divorced 31 days after these reasons;
 - b. the parties' assets will be divided in accord with the Agreement;
 - c. and spousal support of \$3,600 from will be payable to the respondent by the claimant from the date of trial until June 2019;
 - d. retroactive support of \$25,654 is payable;
 - e. the parties are at liberty to seek further direction from the court concerning implementation of the orders in these reasons; and
 - f. the parties are at liberty to make further submissions on the question of costs.

- [5] The claimant seeks costs of the proceeding on the basis he succeeded on all major issues argued at trial. The claimant also seeks costs because the trial judgment reflects an outcome that is close to or equals offers he made during the litigation that were unreasonably rejected by the respondent.
- [6] The respondent argued that the trial judgment reflected mixed results and neither party was substantially successful. In addition, she contends that, acting on the advice of counsel, she did not unreasonably reject the claimant's offers.

Law on Costs

- [7] The analysis in this case is informed by Supreme Court Family Rules, B.C. Reg. 169/2009 [Family Rules], Rules 16-1 (Costs), 11-1 (Offers to Settle), governing the issue of costs dependent on the outcomes of litigation.

- [8] Rule 16-1, "Costs", contains the general rules:

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 whole or part of family law case

- (14) The court may award costs

- (a) of a family law case,
- (b) that relate to some particular application, step or matter in or related to the family law case, or
- (c) except so far as they relate to some particular application, step or matter in or related to the family law case

and in awarding those costs the court may fix the amount of costs, including the amount of disbursements.

- [9] In this case, both parties delivered multiple settlement offers to the other in the months prior to trial. Under Rule 11-1, the settlement offers made before trial may be taken into account on the question of entitlement to costs. Rules 11-1(4), (5), and (6) provide:

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.

[10] There is no question that the usual rule set out in the Supreme Court Civil Rules, B.C. Reg. 168/2009, Rule 14-1(9) is that a substantially successful party is entitled to costs.

[11] "Substantial success" is usually interpreted as a party being 75% successful on the matters at issue viewed globally and taking into account the weight of those issues: see *Kakavelakis v. Boutsakis*, 2017 BCCA 396 at para. 94

[12] In *Fotheringham v. Fotheringham*, 2001 BCSC 1321 at para. 46 [Fotheringham], Bouck J. articulated a widely accepted four part inquiry to be used when awarding costs. Although decided under the Rules of Court, 1990, B.C. Reg. 221/90 pursuant to Rule 57, this approach still guides the analysis:

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.
- [13] As was noted in *Aschenbrenner v. Yahemech*, 2010 BCSC 1541 at para. 17, substantial success is not determined by counting up the number of issues and allocating success on each or by comparing dollar amounts. Substantial success means success on matters globally taking into account the weight of the issues and their importance to the parties.
- [14] In *Namdarpour v Vahman*, 2018 BCSC 750 at para. 4, Meyers J. said:
- [4] In *Reid v. Reid*, 2017 BCCA 19 (CanLII), the Court of Appeal noted that determining substantial success is not a mathematical calculation:
- [9] We do not read *Marquez* [1] as requiring that the Court, in determining "substantial success", undertake a mathematical comparison of the amount claimed to the amount awarded. Rather, the Court has broad discretion to take into account myriad considerations in assessing whether a party has been substantially successful. [Emphasis added in *Namdarpour*.]

Background

- [15] When the parties first began living together the respondent was concerned about the disproportionate value of assets she owned as compared with the claimant's assets. She owned assets substantially exceeding the value of the claimant's assets. She initiated preparation of a marriage agreement to protect her assets and her solicitor prepared a separation agreement ultimately signed by the parties. It included terms that each release the other from any claims to the other party's property held at the time or in the future. The parties agreed to keep all of their monies, credit cards, savings, investments, and pensions separate from the other. Any real or personal property purchased by the parties during the marriage in their joint names was to be property of both parties.
- [16] At the time the respondent was well into her career as a pilot and the claimant worked at a local pulp mill. However, 13 years into their relationship the claimant's pulp mill closed and he eventually found employment in Alberta as a power engineer.
- [17] The respondent's health deteriorated in about 2004-2005 as did her income. She received disability insurance benefits for a number of months but did not return to a career as a pilot.
- [18] At the time of separation, the parties owned assets described in para. 45 of the trial reasons; the values ascribed the claimant's personal property was \$658,819, and \$396,454 to respondent's personal property. The residual equity in or coming from the three properties owned by the parties during their relationship in issue was \$632,613 at the date of separation.

- [19] At trial, the claimant argued that the marriage agreement should be enforced and that each party retain the personal property held in their respective names and the equity in the real estate be divided equally after an allocation to him of contributions to the acquisition and building of the Eagle View property and Fort McMurray properties. He claimed the equity in Eagle View should be divided to reflect their individual contributions to the costs of building that property and he should be credited with \$125,710 being the equity in Fort McMurray which was "intended by the parties to be [the claimant's] separate property".
- [20] The respondent wanted the marriage agreement to be set aside and the family assets divided in accord with the Family Relations Act, R.S.B.C. 1996, c. 128 [FRA].

Claimants' Position

- [21] The claimant argued that there were two main issues in this family law dispute. He contends the first question dealing with the enforceability of the marriage agreement was the primary issue and this question was decided in the claimant's favour and resulted in some success on his part.
- [22] The next question was the respondent's entitlement to retroactive and ongoing spousal support. Although she received an order for retroactive and time-limited ongoing support, she was denied support on compensatory grounds and was limited to transitional support on a non-compensatory basis.
- [23] He also contends that offers he made in 2014 and 2016 were sufficiently reasonable and similar to the eventual court order that he should be entitled to double costs from the date of the last offer or that his offer warranted an award of ordinary costs under Rule 11-1(4) of the Family Rules.
- [24] The claimant points out that by enforcing the marriage agreement, the respondent was disentitled to a one-half interest in his personal property of approximately \$638,776. At trial he had argued for a disproportionate share of the equity in real estate and claimed he was entitled to \$598,828 compared with \$333,785 that should be awarded to the respondent.
- [25] Overall he contends he was substantially successful in accord with the principles described in Fotheringham.

Respondent's Position

- [26] The respondent contends that the parties should each bear their own costs of this proceeding. She unsuccessfully claimed that the marriage agreement be set aside in favour of a disproportionate division of assets in her favour under s. 65 of the FRA.

- [27] She wanted to be awarded some additional equity in the parties' real property based on the fact she used proceeds of sale of land she owned before cohabitation in purchasing real property after beginning cohabitation. She also wanted to retain her investments and equity derived from gifts.
- [28] The respondent was awarded spousal support payable at \$3,600 per month from June 19, 2014 until June 2019. This resulted her receiving retroactive support of \$25,654 to reflect the difference between the claimant's Line 150 income in 2014 and his actual income until trial.
- [29] Her claim for spousal support was based on compensatory and non-compensatory principles. On the question of spousal support, the respondent also defeated the claimant's assertion that she had formed a new partnership which could have worked to reduce or eliminate her support claims.
- [30] The respondent was also successful in obtaining an order giving her ongoing health insurance and life insurance.
- [31] Overall the respondent contended that no costs should be awarded to either side because neither achieved substantial success.
- [32] Finally, she argued that she had not unreasonably refused to accept the claimant's settlement offers and the offers she made to the claimant were reasonable in the circumstances and should have been accepted by him.

Analysis

Property at Date of s. 57 Declaration

- [33] A s. 57 declaration under the FRA was made in January 2014. At that point, the claimant owned personal property, not including real estate, worth \$658,915 and the respondent's personal property was valued at \$396,454.
- [34] Further, the equity in the parties' real estate assets (or proceeds from real estate sale) was \$632,613.

Spousal Support

- [35] At the time of trial the respondent was unemployed and claimed a right to spousal support on a compensatory and non-compensatory basis. She was requesting retroactive spousal support in addition to ongoing support.
- [36] She had received interim spousal support of \$3,798 on the claimant's Guideline income estimated in 2014. Conversely, the claimant argued that no spousal support is to be payable and failing that conclusion, support should be set at a significantly reduced level. The claimant's argument was based, in part on the respondent's deliberate underemployment and because she had formed a new marriage-like relationship. He also argued that his financial circumstances were reduced and he contended a reduction in spousal support was

warranted.

- [37] On this point, the respondent's claim for compensatory support was not allowed and I concluded she had been underemployed or failed to reasonably pursue employment. She was also imputed income at \$35,000 per year although the claimant had been requesting an imputation of income at \$60,000 per year.
- [38] On the other hand, the claimant's contention that the respondent had re-partnered was rejected and the quantum of the respondent's ongoing spousal support was not "significantly reduced". The respondent succeeded in obtaining retroactive support and limited duration ongoing support.
- [39] In the end, the support payments from 2014 the trial date were \$25,654 less than was warranted by the circumstances and retroactive spousal support in that sum was granted.
- [40] The claimant was given continued spousal support until June 2019 at the sum of \$3,600 per month
- [41] At the time of trial, the claimant continued working in Fort McMurray and was earning income in the order \$206,000 - \$243,000 each year.
- [42] The respondent's income for 2014 was in the order of \$32,911. She had earned various types of investment income but did not have employment income in the years before trial.
- [43] The claimant sought a reduction in his Line 150 income for support purposes because of transportation costs he incurred travelling to Fort McMurray.
- [44] Overall, the respondent achieved some success, albeit to a limited extent, in obtaining spousal support.

Property Division

- [45] The claimant asked the Court to divide family assets on the basis of the marriage agreement. The respondent argued that due to significant changes between the date of the agreement and the date of separation, the agreement operated unfairly and should not be enforced.
- [46] The respondent argued that if the agreement was not enforced, the parties' property should be reapportioned in her favour under s. 65 of the FRA.
- [47] After trial the personal property was addressed and the respondent retained 38% of the total personal property owned by the parties and the claimant received 62%. If the property had been divided equally, the respondent would have received \$126,600 in additional assets.
- [48] The respondent sought 80% of the proceeds from the sale of their Valley View property and 100% reapportionment of her various investment and pension plans. She did not succeed on this claim.

- [49] The claimant was seeking occupation rent because the respondent lived in the Eagle View property and had excluded him from using this residence for approximately three years. He did not succeed on this claim.
- [50] In the end, the agreement was not set aside or varied. The net sale proceeds of the Valley View property, \$236,632, were to be divided equally and, under the marriage agreement, the respondent was entitled to one half of the equity realized from the sale of the Fort McMurray property.
- [51] Concerning the Eagle View property, the Court rejected the claimant's view that he should be exempted from an equal sharing due to a collateral understanding between the parties that an independent obligation existed on the respondent to contribute equally to the acquisition and development of the property: see para. 218. Thus, the equity in Eagle View, was divided equally between the parties.
- [52] The respondent unsuccessfully claimed a greater interest in the Eagle View property because of her extensive efforts in managing the parties' affairs and attending to construction details.
- [53] On the real property claims, both parties achieved some measure of success and neither party achieved complete success. The claimant was seeking 64% of the real estate equity but was awarded only 50%; thus he received approximately \$88,500 less from those assets than claimed at trial. The respondent achieved a commensurate improvement in her trial outcome but not compensation for her contributions to their first property acquisition nor her efforts in developing Eagle View.

Summary

- [54] In the result, the respondent received retroactive spousal support from January 2014 to December 31, 2017 of \$25,654 in addition to ongoing spousal support until June 2019 which amounts substantially exceeded the outcome advocated by the claimant.
- [55] There were ancillary orders including terms requiring the claimant to keep the respondent as a beneficiary of his life insurance to the extent of the unpaid portion of the claimant's spousal support obligations. He was also required to maintain the respondent on his medical and dental insurance coverage until December 31, 2019.

Substantial Success

- [56] The principles underlying costs applications in family cases have been addressed by the Court of Appeal in *Litt v. Gill*, 2016 BCCA 288. Garson J.A. for the Court discussed a more flexible approach in cases concerning costs in family law cases:
- [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 (CanLII) 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 (CanLII) at para. 48 and *Marquez v. Ziapola*, 2014 BCCA 35 (CanLII) at para. 16.

- [57] At the time of separation, all the real property at issue was owned by the parties jointly and, under the agreement was divided equally, including the Fort McMurray property. On the other hand, the personal property was all divided in accordance with the agreement.
- [58] In Mr. McLaughlan's trial argument he claimed entitlement to a one half interest in the Valley View property, the entirety of the equity derived from the Fort McMurray property of approximately \$125,710 and a disproportionate share in Eagle View based on an agreement, not included in the marriage agreement, concerning the parties contributions towards building Eagle View.
- [59] Mr. McLaughlan pointed out that, in the reasons, the Court accepted that he was not seeking reapportionment of family assets unless the marriage agreement was set aside.
- [60] It is clear the claimant was seeking a larger share of the equity in Eagle View based on an agreement he wished to enforce concerning the respondent's obligation to contribute to building costs. This argument was separate and distinct from the suggestion that there should be a reapportionment of the family assets in the event the marriage agreement was varied.
- [61] I will not engage in a meticulous examination of the various issues, unsuccessful arguments and the analysis concerning some of the ancillary issues. Costs are very much a matter for a trial judge's discretion.
- [62] The claimant's position at trial was that he should receive 64% of all the assets owned by both parties and the respondent 36%. In the end, the parties were awarded an equal division of the real estate being \$316,306 each. Thus, the respondent was successful in achieving an additional \$128,000 above a 50% share in the parties' property. The claimant's personal property was not divided between the parties and, on that point he achieved some success.
- [63] The respondent was successful in achieving spousal support until June 2019 and retroactive spousal support of \$25,654.
- [64] She also requested unlimited spousal support from the date of trial.
- [65] Overall, I accept that the claimant achieved reasonable measure of success in this proceeding based on the Court's finding the marriage agreement was not unfair and would not be set aside. Nonetheless, the respondent achieved significant success in rebutting the claimant's claim to a disproportionate share of the Eagle View equity and the Fort McMurray property and obtaining support.

- [66] I find that neither party was successful on the majority of issues nor did either achieve "substantial success" that could be construed as success on 75% or better on the issues that were important to the parties or concerning the actual divisions of assets.
- [67] Taking into account these factors, including the upholding of the marriage agreement and the financial consequences to both parties, the outcome at trial did not reflect a level of substantial success to either party.
- [68] Subject to the following discussion on the impact of settlement offers I would exercise my discretion in this case and order both parties will bear their own costs. Taking into account the results and the importance of each issue to the parties, neither party achieved substantial success.

Settlement Offers

- [69] Pursuant to the Family Rules, settlement offers pursuant to Rule 11-1 are only considered in costs assessments after the court has first determined costs pursuant to Rule 16-1(7).
- [70] Rule 11-1(4) of the Family Rules permits the court to consider an offer to settle in exercising its discretion as to costs: see *Paul v. Pumple*, 2013 BCSC 1844 [Paul]. That discretion is however restricted and must be exercised within the parameters set out in Rule 11-1(5): see *A.E. (Litigation Guardian of) v. D.W.J.*, 2009 BCSC 505 at para. 51, *aff'd* 2011 BCCA 279 at para. 14. The court may consider the factors in Rule 11-1(6) in making an order under subrule (5): see also *K.M. v. I.M.*, 2017 BCSC 716.
- [71] In *Paul*, the court summarized other features to be considered under Rule 11-1(5):
- when considering cost options in respect of offers to settle, the court may award only those costs incurred after the date of the offer: see *Paul* at para. 25;
 - that rule permits the court to award double costs only if an award *simpliciter* is granted: see *Paul* at para. 27;
 - subrule(d) permits the court to award costs after delivery of the settlement offer if that offer is better than the result achieved in the litigation independently of the success at trial: see *Paul* at para. 29; and
 - the entirety of any settlement offer must be considered and assessed against the overall result of the trial outcome, which must be better than the offer in its entirety: see *Paul* at paras. 33-34.
- [72] For the reasons that follow, I have concluded that neither parties' settlement offers warrant an order for costs against the other.
- [73] The claimant contends that under Rule 11-1 I am permitted to consider a costs order notwithstanding a lack of "substantial success" on both parties: see *S.M.S. v. D.M.T.*, 2016 BCSC 339.

- [74] Under Rule 11-1(5)(d) I may award costs to a party in respect of some or all steps in this case if the judgment obtained is as "favourable as, or more favourable" than the terms of the offer. The analysis requires the court to assess the overall result of the trial in relation to the offer in its entirety.
- [75] In this case, I have concluded that neither party achieved substantial success in the litigation. Both parties delivered multiple offers to settle.
- [76] The respondent made settlement offers on October 2, 2014, January 15, 2016, and January 12, 2017. Conversely, the claimant's offers were made October 21, 2014, January 19, 2016, March 23, 2016 and June 30, 2016.
- [77] In the respondent's January 2017 proposal, she listed 15 items of personal property to be retained by the claimant together with a payment by her to him of \$16,590. She proposed an equal division of the proceeds of the sale of Valley View, and Eagle View. She proposed an equal division of the claimant's RRSP assets and shares and his pension. She proposed that he pay spousal support (based on an income imputed to her \$35,000 per year) until further order of the court. In addition she proposed that the claimant provide health care benefits available through his employment, \$15,000 against retroactive spousal support (lump sum without tax).
- [78] This offer followed the claimant's June 30, 2016 offer in which he proposed that the respondent retain ownership of the Valley View property, he would retain ownership of Eagle View and ensure no debt was owing on Valley View. He proposed keeping all of his financial assets and the respondent retaining all of her financial assets. By this time they had agreed on a division of chattels; however he proposed retaining the Jeep, Corvette and Sunbeam motor vehicles. He suggested each party would retain their respective Canada Pension Plan contributions and abandon all of their claims.
- [79] I have concluded that, by comparison to the trial judgment, neither parties' offers to settle was equal to or better than the outcome at trial. The Court must not compare competing offers to determine which offer came closest to the outcome at trial: Rule 11-1(5) does not "introduce a game of horseshoes": see *Walburger v Lindsay*, 2015 BCSC 959 at para. 29.
- [80] After considering the offers and the judgment, I conclude that the entirety of neither party's offers considered globally and concerning the efficacy of the marriage agreement, the division of equity in the parties' real property, the division of personal assets, and the respondent's claims for retroactive and future support (opposed by the claimant) were superior to the outcome of the trial.
- [81] In the result, based on the absence of substantial success achieved by either party and the failure of each party's offers to settle to exceed the terms of the judgment, neither party is entitled to costs.

"Armstrong J."

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