

CANADA / JUDGMENT

Moxon v. Moxon

2025 BCSC 779

COURT

Supreme Court of British Columbia

DECIDED

29 April 2025

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2025 BCSC 779 Moxon v. Moxon IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Moxon v. Moxon, 2025 BCSC 779 Date: 20250429 Docket: E25341 Registry: Fort St. John Between: Samuel Jake Moxon Claimant And Jordana Ruth Moxon Respondent Before: The Honourable Justice Chan Reasons for Judgment on Costs Counsel for the Claimant: M. Katerberg S.D. Cope Counsel for the Respondent: J. Macdonnell J.K. Ough Place and Date of Hearing: Prince George, B.C. April 10, 2025 Place and Date of Judgment: Fort St. John, B.C. April 29, 2025

Introduction

- [1] This family law matter proceeded to trial over 19 days from June to August 2024. I issued my ruling on September 23, 2024, indexed as 2024 BCSC 1751. I found the following at para. 140: On a preliminary view, success has been divided. The Court finds each party should bear its own costs. If the parties wish to make different submissions on costs, they are to contact the registry within 30 days of this ruling to arrange a hearing via MS Teams.
- [2] Ms. Jordana Moxon seeks costs, arguing she achieved substantial success and she had made an offer to settle. Mr. Samuel Moxon argues each party should bear its own costs, as neither party achieved substantial success and the offer to settle was not one that ought reasonably to have been accepted. Substantial Success
- [3] Rule 16-1(7) of the Supreme Court Family Rules, B.C. Reg. 169/2009 provides that costs of a family law proceeding must be awarded to the successful party unless the court otherwise orders. Success, for the purposes of this rule, is "substantial success" which has been held to amount to about 75% success globally on all issues, although this is not a mathematical exercise: *Fotheringham v. Fotheringham*, 2001 BCSC 1321 at para. 45; *Harras v. Lhotka*, 2016 BCCA 246 at para. 48. In determining substantial success, the court should consider the matters that were in dispute and the relative importance of each of those matters: *Fotheringham* at para. 46.
- [4] The principal issues at trial were the determination of the value of the family's physiotherapy business and how the value should be divided between the parties.

- [5] I find neither party achieved substantial success on these issues. With respect to the value of the business, Mr. Moxon had urged the Court to accept the second valuation while Ms. Moxon argued it should be the third valuation as it was the closest to the trial date. The Court found the third valuation should be used. Ms. Moxon argued the low-end value of \$525,000 should be accepted. Mr. Moxon argued the value should be the high end of the third valuation, being \$575,000. The Court found the value of the business to be \$575,000. Ms. Moxon had sought reapportionment of the business in her favour, with her receiving 70% of the value. Mr. Moxon had sought an equal division. The Court awarded reapportionment to Ms. Moxon, with her receiving 60% of the value. The equalization payment from Ms. Moxon for the value of the business was determined to be \$230,000. After adjustments for shareholder loans, the Court found Mr. Moxon ought to receive \$234,200 for his shares in the business. Mr. Moxon was granted interest from the date of separation. He was also awarded equal division of the increase in Ms. Moxon's pension from October 2008 to September 2020.
- [6] The matter of the value of the business and how it was to be divided was important to both parties. On this issue, Ms. Moxon's position was she ought to pay Mr. Moxon 30% of \$525,000, which is \$157,500. Mr. Moxon was awarded \$234,200 plus interest from the date of separation. Mr. Moxon received at least \$76,700 more, which is significantly higher. While Ms. Moxon argues reapportionment was the main issue, and she was successful in achieving reapportionment in her favour, the Court did not accept her percentages. The reapportionment that was ordered was 60-40, which is the midpoint from her position (70-30) and Mr. Moxon's position (50-50).
- [7] I do not find Ms. Moxon achieved substantial success at trial. Offers to Settle
- [8] Rule 11-1(5)(d) allows the court to award costs after the date of an offer to settle when the offer is better than the result the other party obtained. This is not dependent on the party being substantially successful at trial: *Paul v. Pumple*, 2013 BCSC 1844 at para. 29; *D.N. v. M.R.*, 2020 BCSC 475 at para. 83.
- [9] Rule 11-1(6) provides that in making such an order, 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. Reasonableness Factor

- [10] In considering whether an offer was one which ought reasonably to have been accepted, the proper consideration is not whether the offer was reasonable, but whether it was unreasonable to refuse the offer: *Cottrill v. Utopia Day Spas and Salons Ltd.*, 2019 BCCA 26 at para. 30. The Court of Appeal in *Cottrill* went on to cite Justice Gomery's explanation of this distinction in *Kobetitch v. Belski*, 2018 BCSC 2247 at paras. 24-25:
- [24] In my opinion, the wording of the subrule stating this consideration is important. The consideration is not whether it would have been reasonable for the plaintiff to have accepted the offer. It is whether the plaintiff ought reasonably to have accepted the offer. The difference is this. An offer might be such that a reasonable plaintiff could choose to accept it or not. One might term it "a reasonable offer". On the other hand, to say that an offer ought reasonably to have been accepted is to say that a reasonable person should have accepted it. It was unreasonable to refuse it.
- [25] According to the distinction I am drawing, having regard to the wording of the subrule, the consideration is not whether the offer was a reasonable offer. It is whether it was unreasonable for the plaintiff to refuse it. [Emphasis in original.]
- [11] The Court of Appeal has also explained in *Hartshorne v. Hartshorne*, 2011 BCCA 29 at para. 27 that courts must assess the reasonableness of the decision to refuse the offer without reference to the award ultimately made or the court's decision on the merits. As the Court explained in *Hartshorne*:
- [27] Instead, the reasonableness is to be assessed by considering such factors as the timing of the offer, whether it had some relationship to the claim (as opposed to simply being a "nuisance offer"), whether it could be easily evaluated, and whether some rationale for the offer was provided. We do not intend this to be a comprehensive list, nor do we suggest that each of these factors will necessarily be relevant in a given case.
- [12] With these factors in mind, I turn now to the factual matrix of the case at bar.
- [13] Ms. Moxon relies on an offer to settle made on July 9, 2024, after the start of the trial. She offered to pay Mr. Moxon \$225,000 for his shares in the business. The offer expired on July 16, 2024, which was the first day of the next set of court dates.
- [14] This offer was made after six days of trial, during a pause in the proceedings, while Mr. Moxon was still under cross examination. The offer stated that it was being made due to Mr. Moxon's "inconsistent, contradictory and false testimony under cross examination", which has "completely contradicted and invalidated his entire case".
- [15] I find it was not unreasonable for Mr. Moxon to have refused the offer to settle. The offer was made in the midst of Mr. Moxon's cross examination. The offer seemed to have been based on Ms. Moxon's view that Mr. Moxon's credibility was being destroyed during his cross examination. However, the determination of his credibility was not easily assessed at the time of the offer, as he had not completed his testimony. No examples were provided to justify Ms. Moxon's view that Mr. Moxon had provided false or contradictory evidence. At

the end, this Court did not find Mr. Moxon to be not credible.

- [16] The offer was open for acceptance for one week, while Mr. Moxon was under cross examination. It would have been difficult for Mr. Moxon to have discussed the offer in any meaningful way with his counsel during this period. I find in the circumstances it was not unreasonable for Mr. Moxon to have refused the offer. Relationship between the terms of settlement offered and the final judgment of the court
- [17] In terms of the final judgment of the court, Mr. Moxon was more successful than the offer to settle. He received a higher value for his shares in the business, plus interest and a share in the increase of Ms. Moxon's pension.
- [18] I do not find Ms. Moxon is entitled to an award of costs due to her offer to settle. Other Issues
- [19] Ms. Moxon had also raised other issues with respect to the conduct of the litigation which she argues entitles her to an award of increased or special costs.
- [20] She submitted various pre-trial applications that had been filed by Mr. Moxon but not pursued substantially increased her costs, as she was required to retain a second counsel. She seeks special costs against counsel for Mr. Moxon personally. As I understand it, the various arguments for special costs stem from an application filed by Mr. Moxon to disqualify counsel for Ms. Moxon.
- [21] The parties agreed to bifurcate the costs hearing, such that the Court will make a ruling first on whether Ms. Moxon is entitled to costs, before embarking on any application by Ms. Moxon for special costs against counsel personally. As I understand it, the Court needs to make a threshold determination whether costs are payable by Mr. Moxon before deciding if those costs ought to include special costs as against counsel.
- [22] The Court has determined Ms. Moxon is not entitled to an award of costs. There is no need to consider the various other arguments raised by Ms. Moxon that she is entitled to increased costs or special costs against counsel.
- [23] In any event, even if I had found one party was entitled to costs, I would have exercised my discretion to not order costs so as not to upset the balance created by the award. In *Gold v. Gold*, 82 B.C.L.R. (2d) 180 (C.A.), 1993 CanLII 1248 at para. 20 the Court of Appeal discussed the court's discretion to not order costs: 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 [Emphasis added]

Conclusion

[24] In my view, each party should bear its own costs.

[25] The hearing room fees and the fees for the joint expert Derek Sanders should be shared equally. "Chan J."

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