

CANADA / JUDGMENT

## Muller v. O'Flynn

2020 BCSC 172

COURT

Supreme Court of British Columbia

DECIDED

24 February 2020

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2020 BCSC 172 Muller v. O'Flynn

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Muller v. O'Flynn,

2020 BCSC 172

Date: 20200224

Docket: E51554

Registry: Vernon

Between:

Lars Muller

Claimant

And

Marnie Rae O'Flynn

Respondent

Before: The Honourable Mr. Justice Wilson

Reasons for Judgment on Costs

The Claimant on his own behalf:

L. Muller

Counsel for the Respondent:

B. Kirkpatrick

Place and Date of Trial/Hearing:

Kelowna, B.C.

February 4, 2020

Place and Date of Judgment:

Kelowna, B.C.

### **February 24, 2020**

- [1] The respondent applies for costs arising out of this family law trial that took place over eight days during the summer of 2019. The reasons for judgment are found at 2019 BCSC 1674. The respondent also seeks double costs after the delivery of an offer to settle made on January 24, 2019.
- [2] The primary issue at trial was whether or not the parties had a binding and enforceable agreement whereby the respondent was to buy out the claimant's interest in the former matrimonial home. At the trial, I concluded that the parties had a binding agreement and that the respondent was entitled to buy out the claimant's interest in the home for \$30,000 as agreed. The claimant had already received the \$30,000 and what was required was for the respondent to ensure that the claimant was released from the financial encumbrances registered on title, and for the claimant to convey his title. The decision from trial provided for a 90-day window for this to occur.
- [3] There is no question that the respondent was the successful party at trial.
- [4] The formal offer of January 24, 2019 made by the respondent's counsel proposed the following:
  - a) the claimant would sign a Form A transfer of his interest in the home to the respondent subject only to the existing mortgage;
  - b) the transfer would be held by counsel pending the respondent obtaining a release of the claimant from the mortgagee;
  - c) the respondent would have 60 days to arrange for the refinancing;
  - d) the respondent would pay to the claimant an additional \$10,000;
  - e) each party would bear their own costs;
  - f) each party would keep their personal property in their possession; and
  - g) a separation agreement would be entered into to reflect the terms of the agreement.
- [5] As to the last point, the issue of a separation agreement was raised at trial. Any new lender for the respondent required a court order or a separation agreement as a condition of refinancing.

- [6] The offer was made on a Thursday, two business days before the trial had been scheduled to commence. The letter stated that the offer was revoked at 11:00 p.m. on the Friday; the trial was scheduled to start on the following Monday. The trial did not proceed on that date, but commenced some six months later. There can be no doubt that the claimant had an opportunity to consider the offer because it was expressly rejected by the claimant through his counsel.

## Legal Framework

- [7] Rule 16-1(7) of the Supreme Court Family Rules provides that the successful party is entitled to its costs unless the court orders otherwise:
- (7) Subject to subrule (9), costs of a family law case must be awarded to the successful party unless the court otherwise orders.
- [8] Rule 11-1 sets out the options available to the court when a formal offer has been made. Rule 11-1(4) provides that an offer to settle may be taken into account in determining whether or not to exercise the court's discretion to alter an award of costs. Rule 11-1(5) outlines the options available to the court:
- (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.
- [9] Rule 11-1(6) sets out the considerations that the court is to take into account:
- (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] The principles that govern the award of costs in a family law proceeding were summarized by Justice Bernard in *S.A.M. v. J.A.M.*, 2017 BCSC 2348 at para. 7:

- (a) The costs of a family law case must be awarded to the successful party, unless the court otherwise orders (Rule 16-1(7)) of the Supreme Court Family Rules [Rules];
- (b) The "successful party" is the party who has achieved substantial success at the trial/hearing (*Fotheringham v. Fotheringham*, 2001 BCSC 1321; *Marquez v. Zapiola*, 2014 BCCA 35);
- (c) The court's discretion to "order otherwise" must be exercised judicially, bearing in mind a non-exhaustive list of factors that includes hardship, earning capacity, the purpose of the particular award, the conduct of the parties in relation to the litigation, and the importance of not upsetting the balance achieved by the court in relation to the substantive issues (*Gold v. Gold* (1993), 106 D.L.R. (4th) 452 (B.C.C.A.));
- (d) The party who asks the court to "order otherwise" bears the onus to persuade the court why it should do so (*S.D.W. v. C.W.W.*, 2006 BCSC 162);
- (e) Financial hardship, without more, is not a sufficient basis for the court to exercise its discretion to depart from the usual rule that successful parties are entitled to their costs (*S.D.W. v. C.W.W.*, supra.; *K.D.P. v. A.R.K aka R.K.*, 2012 BCSC 1025; *Brown v. Kucher*, 2016 BCSC 194);
- (f) Where an offer to settle a family case has been made, the court may award double costs for all or some of the steps taken after the date of delivery or service of the offer (Rule 11-1(5) of the Rules);
- (g) As a general rule, an award of double costs should be made against a party who did not accept an offer to settle that should, in all the circumstances, have been accepted (*Hartshorne v. Hartshorne*, 2011 BCCA 29); and,
- (h) In determining whether a double costs order should be made, the court may consider any factor the court considers appropriate, including whether the offer was one that ought reasonably to have been accepted upon receipt or at any later date, the relationship between the offer and the judgment, and the relative financial circumstances of the parties (Rule 11-1(6) of the Rules).

## Positions of the Parties

- [11] The respondent says she should receive her costs as the successful party. She says that the formal offer was one the claimant should have accepted in the circumstances and was on more favourable terms to the claimant than the order made at the trial.

- [12] The claimant says that an order for costs, and in particular an order for double costs, would, in his words, "ruin him financially". He asks for an order that each party bear their own costs. He says the trial took longer than it should have because of evidence about child care issues that were not germane to the dispute. He also referred me to issues he had with his former counsel who was not his counsel at trial.

#### Discussion

- [13] The respondent is presumptively entitled to her costs because she was the successful party at the trial.
- [14] I am also satisfied that the outcome she achieved was better than the terms of the offer to settle. Not only was the window for completion of the transaction shorter in the offer (60 days as opposed to 90 days), but more importantly the offer included a further payment to the claimant of \$10,000.
- [15] The Supreme Court Family Rules, consistent with the Supreme Court Civil Rules, include provisions for offers to settle in order to encourage parties to resolve their disputes outside of court. If a party does not accept an offer that should have been accepted, there are consequences by way of costs because the successful party was put to the expense of going to trial to obtain relief that should have been agreed to.
- [16] As was set out in *S.A.M. v. J.A.M.*, a party who makes an offer should generally be entitled to double costs if the offer should have been accepted. I am satisfied the claimant should have accepted the respondent's offer. Although the offer was made on the eve of the earlier trial date and expired, the claimant had sufficient time to consider it. The claimant rejected the offer through counsel. This was ostensibly a single-issue trial.
- [17] The claimant alleges that he will suffer financial hardship if an order for costs is made. Even where one party has achieved substantial success at trial, it is still open to the court to award only a portion of the successful party's costs: *K.D.P. v. A.R.K.*, 2012 BCSC 1025 at para. 18.
- [18] However, the claimant's income, while lower than it was at various times during the relationship, is still greater than the respondent's income. The fact that a party's financial circumstances are weaker now than before the litigation is not unusual. I have no doubt that the respondent is also worse off financially as a result of going to trial. Litigation is expensive. Neither financial hardship nor sympathy alone provide sufficient basis to exercise the court's discretion and depart from the usual rule: *Brown v. Kucher*, 2016 BCSC 194 at paras. 15 and 16. A claim of hardship cannot be made out in this case.
- [19] I do not consider the issues the claimant said he had with his former counsel to be a relevant consideration in determining whether to deprive the respondent of her costs. Costs are intended to provide some compensation to the successful party for the legal costs they incur in the litigation. I need not point out that the respondent played no role in choosing the claimant's lawyer. The respondent's legal costs were undoubtedly significant as a result of having to go to trial, a trial that could have been avoided had the claimant accepted the offer

I have concluded he ought to have accepted.

- [20] Subject to the comments that follow, the respondent is entitled to double costs from the date of the offer to settle.
- [21] In my view, however, the respondent's conduct unnecessarily prolonged the trial of this matter. I would therefore limit the award of costs to account only for those days of trial that were necessary to prove her case.
- [22] Under Rule 16-1(13) the court has the ability to deprive a party of some or all of its costs if anything was done improperly or unnecessarily:
- (13) If anything is done or omitted improperly or unnecessarily, by or on behalf of a party, the court or a registrar may order
- (a) that any costs arising from or associated with any matter related to the act or omission not be allowed to the party, or
- (b) that the party pay the costs incurred by any other party by reason of the act or omission.
- [23] The trial of this matter took much longer than was necessary because the two parties were both examined and cross-examined at great length regarding reams of text messages exchanged between them. For the reasons set out in paras. 22 to 27 of the reasons for judgment, none of this evidence was relevant.
- [24] I raised my concerns about this evidence early on in the trial. Counsel for the claimant advised me that the only reason he needed to review all of the text messages was because the respondent was taking the position that she was delayed in obtaining her refinancing because her income was lower than anticipated in 2016 and 2017, and that the reason for her lower income was because the claimant refused to look after the children to afford her the opportunity to accept shifts as an on-call registered practical nurse.
- [25] The respondent's mortgage broker and banker were called as part of the respondent's case. The respondent is presumed to know before the trial starts what evidence her witnesses are going to provide. They did not testify until the last full day of evidence. Both said that the respondent would not have qualified for a mortgage without a cosigner, regardless of whether her income had been higher. Whether she turned down shifts, due to a lack of child care or otherwise, never mattered.
- [26] Counsel for the respondent argued that the messages were relevant in terms of the parties' communications with their banker. Perhaps one or two of the text messages were relevant on that issue, but only peripherally so.

- [27] Counsel for the respondent also said the various text messages were also relevant on the issue of credibility. First, credibility alone does not render a document relevant. Second, while credibility will often be in issue at trial, this case was not a credibility contest between the parties. The material facts were not seriously contested; the trial was primarily about the legal consequences of facts that were not significantly disputed, not which party I should believe.
- [28] From my review of my notes from the trial, approximately four days of trial time was spent on the direct examinations and cross-examinations of the two parties on these irrelevant documents and related matters pertaining to the breakdown of the relationship between the claimant and his children. The trial could and should have been completed in no more than four days. Instead, it took twice that amount.

## Disposition

- [29] In all of the circumstances, it would not be fair or reasonable to expect the claimant to pay for the costs for those days at trial that were unnecessary and did nothing to prove or disprove any of the matters in issue.
- [30] I conclude that the respondent is entitled to double costs from the date of the offer to settle, but the costs of the trial are to be assessed as if this was a four-day trial.

"Wilson J."

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