

CANADA / JUDGMENT

N.D.S. v. J.A.S.

2020 BCSC 1396

COURT

Supreme Court of British Columbia

DECIDED

18 September 2020

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2020 BCSC 1396 N.D.S. v. J.A.S. IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: N.D.S. v. J.A.S., 2020 BCSC 1396 Date: 20200918 Docket: E54930 Registry: New Westminster Between: N.D.S. Claimant And J.A.S. Respondent Before: The Honourable Mr. Justice Riley Reasons for Judgment Re: Costs Counsel for the Claimant: S. Butler Counsel for the Respondent: D. Boyd Date of Claimant's Written Submissions: July 24, 2020 Date of Respondent's Written Submissions: July 31, 2020 Date of Claimant's Written Reply Submissions: August 12, 2020 Place and Date of Judgment: New Westminster, B.C. September 18, 2020

Introduction

- [1] These reasons for judgment deal with costs following a five-day trial in a family law case. The reasons for judgment on all other issues were released on 24 June 2020, and are indexed as N.D.S. v. J.A.S., 2020 BCSC 1034.
- [2] Costs awards in family law cases are governed by Rule 16-1 of the Supreme Court Family Rules, B.C. Reg. 169/2009. The starting point as set out in Rule 16-1(7) is that costs should be awarded to the successful party, unless the court otherwise orders. The successful party is the one who achieved "substantial success" at the trial or hearing: S.A.M. v. J.A.M., 2017 BCSC 2348 at para. 7; Kraft v. Kraft, 2018 BCSC 1184 at para. 18.
- [3] In the case at bar, success was divided. The contentious issues at trial were property division, child support, and spousal support. The claimant Ms. S was successful in her claim for unequal division of the net proceeds from the sale of the former family home. In my view, this was the most consequential issue, both monetarily and in terms of the time and energy required to litigate it. Although Ms. S's claim for lump sum spousal support was dismissed, that claim was presented as an alternative to the unequal division of family property claim. For his part, the respondent Mr. S prevailed in establishing a lower Guideline income than that argued for by the claimant. He was also successful in obtaining a partial reduction in arrears of support. However, I agree with claimant's counsel that these two issues were of lesser consequence than the issue of property division.

- [4] The claimant argued that she should receive double costs from the date of her most recent written offer to settle, made four days before trial. The implications of such a settlement proposal are dealt with in Rule 11-1(4) to (6).
- [5] Having perused the relevant correspondence, I do not agree that the offer was one that ought reasonably to have been accepted by the respondent. The offer contained a number of elements which are difficult to compare with the result after trial. The settlement offer was focused on a proposal for lump sum spousal support, while at trial the court acceded to Ms. S's alternative argument seeking unequal division of family property. Furthermore, I do not agree with Ms. S's submission that the bottom line monetary amount contained within the settlement proposal is comparable to the net result of the judgment. Looking just at the bottom line figures, the amounts proposed in the claimant's settlement letter are less favourable to the respondent than the results after trial, both in terms of Mr. S's net share of the proceeds of sale of the former family residence,[1] and his ongoing child support obligations.[2]
- [6] The claimant also appears to argue that an award of double costs is justified on the basis of the respondent's "blameworthy conduct". In *Hartshorne v. Hartshorne*, 2011 BCCA 29 at para. 25-39, the Court considered blameworthy conduct as an "other factor" under the equivalent of Rule 11-1(6)(d), as part of the justification for an award of double costs. Although there were periods of time when Mr. S failed to pay support as he was required to do under existing orders, I do not view his conduct as comparable to that discussed in *Hartshorne*. This consideration does not tip the scale in favour of an award of double costs in this case.
- [7] Rule 16-1(7) provides that the court has a discretion to depart from the general principle that a successful party should be entitled to costs. A non-exhaustive list of factors governing the court's exercise of discretion in declining to order costs to the successful party in family law proceedings was set out in the leading case of *Gold v. Gold* (1993), 82 B.C.L.R. (2d) 180 (B.C.C.A.) at para. 20. The relevant factors include financial hardship, earning capacity, the purpose of the award, the conduct of the parties in the litigation, and the importance of not upsetting the balance achieved by the judgment.
- [8] In the case at bar, counsel for Mr. S argues that an award of costs in favour of Ms. S would "upset the balance" achieved by the judgment. I do not agree. Ms. S is on a fixed income and both children continue to reside with her. Her financial ability to secure stable housing for herself and her children after the sale of the former family residence is somewhat precarious. By contrast, Mr. S has re-partnered, was at the time of the judgment living rent-free, and has the potential for future increases in employment income. All of this militates against a finding that awarding costs to Ms. S, as the successful party at trial, would somehow upset the balance achieved by the judgment.

- [9] In the final analysis, I see no reason to depart from the general rule providing that the party who achieved substantial success - in this case the claimant Ms. S - should be entitled to costs. However, I am not persuaded that the respondent should be required to pay double costs. "Riley J."
- [1] In Ms. S's settlement offer, the total of all amounts to be deducted from the net proceeds of sale of the former family residence (items 2 and 4(a) to (d) of the offer letter) was \$262,000. Under this proposal, assuming net equity of \$750,000, Mr. S's share from the sale of the former family home would have been \$113,000. This is substantially less than the amount Mr. S will be expected to receive under the terms of the judgment (again assuming net equity of \$750,000), which I calculate as \$187,500 for his share of the former family home, less \$19,000 for arrears of support, for a total of \$168,500. Even in the event of a lower sale price, and taking into account deductions for closing costs and real estate commissions, the amount Mr. S can be expected to receive under the terms of the judgment is substantially more than that which he would reasonably have expected to receive under the terms of Ms. S's settlement offer.
- [2] In Ms. S's settlement offer, the amount of proposed child support was \$433 per month for one child and \$723 per month for two children. This is more than the \$328 per month for one child and \$561 per month for two children that Mr. S is required to pay under the terms of the judgment.

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