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CANADA / JUDGMENT

## N.K.D. v. H.S.D.

2019 BCSC 468

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COURT

Supreme Court of British Columbia

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2019 BCSC 468 N.K.D. v. H.S.D.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

N.K.D. v. H.S.D.,

2019 BCSC 468

Date: 20190401

Docket: E161289

Registry: Vancouver

Between:

N.K.D. also known as N.K.

Claimant

And

H.S.D. also known as H.H.D.

Respondent

Before: The Honourable Madam Justice Jackson

Reasons for Judgment on Costs

Counsel for the Claimant:

M.R. Ellis, Q.C.

Counsel for the Respondent:

L.A. Kahn, Q.C.

Place and Date of Trial:

Vancouver, B.C.

February 1, 2019

Place and Date of Judgment:

Vancouver, B.C.

April 1, 2019

## INTRODUCTION

- [1] This matter involves a family trial between the parties, N.K. (the claimant) and H.D. (the respondent), heard over the course of 13 days before Madam Justice Loo. On August 17, 2018, before her retirement, Loo J. released reasons for judgment which are indexed at N.K.D. v. H.S.D., 2018 BCSC 1394 (the "Trial Decision"). In her reasons, Loo J. made findings with respect to, amongst other things, the marriage agreement, spousal support and the valuation of assets. At para. 257, Loo J. found H.D. had "largely been successful" at trial and was entitled to his costs. N.K. does not dispute H.D. was largely successful at trial.
- [2] On December 4, 2018, Chief Justice Hinkson of the British Columbia Supreme Court made an ex mero motu order appointing myself in lieu of Loo J. to render an order with respect to costs in this matter, pursuant to the Supreme Court Family Rules, R. 22-2(10). My jurisdiction to decide what both parties referred to as a "re-opening application" was not challenged and I am satisfied I have the jurisdiction to do so. In addition, I note the decision of Justice Wilson in B.J.L. v. J.R.D.L., 2004 BCSC 802, where the court at para. 6 stated:

I conclude that a judge assigned to take over the conduct of matters arising from trial, after the retirement of the trial judge, does have the same powers to reconsider matters arising from the trial judgment, and should apply the same principles with respect to reconsideration. However, in doing so, the assigned judge is at a considerable disadvantage, not having heard the trial or submissions at trial. It may well be that the powers should be exercised even more sparingly, particularly when reviewing the discretion exercised by the original judge, as compared to an error in the judgment through misconstruing material evidence or misapplying the law.

- [3] At a hearing held in front of me on February 1, 2019 (the "Costs Application"), I heard the parties' submissions on costs. At that hearing, N.K. sought an order that:
- H.D. be solely responsible for the costs of the expert reports prepared by Mr. Simon Poon;
  - H.D. be solely responsible for the cost of Mr. Gary Mynett's report on distributive taxes;
  - H.D. be solely responsible for any interest charged by Mr. Mynett due to late payment of his account by H.D.;

- the remainder of the costs, both tariff items and disbursements, be apportioned between the parties on a 50/50 basis; and
- the reasonableness of the remainder of the disbursements be dealt with by the Registrar.

[4] These are my Reasons for Judgment on the Costs Application.

## GENERAL LEGAL PRINCIPLES

- [5] In all civil litigation, including family law matters, the general rule is that costs are awarded to the successful party unless the court orders otherwise: Supreme Court Civil Rules, R. 14-1(9); Supreme Court Family Rules, R. 16-1(7). The unsuccessful party bears the burden of persuading the court to exercise its discretion in favour of departing from the default rule: *O'Brien v. O'Brien* (1993), 88 B.C.L.R. (2d) 183 (S.C.) at para. 7; *S.D.W. v. C.W.W.*, 2006 BCSC 162 at para. 29.
- [6] In *Gold v. Gold* (1993), 82 B.C.L.R. (2d) 180 (C.A.), leave to appeal ref'd [1993] S.C.C.A. No. 441, Chief Justice McEachern outlined a number of factors courts are to consider in determining whether a costs order should not follow the event:
- [20] 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.

[Emphasis added.]

- [7] Thus, as articulated in *Gold*, in order to determine when a costs order should not necessarily follow the event, the court is to look to 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.
- [8] In response to my inquiry regarding whether there were additional factors the parties viewed as relevant to the exercise of my discretion with respect to costs, N.K. argued the circumstances underlying two specific disbursements (which I will address below) and the overall high cost of the total disbursements in the case, acknowledged by both counsel to be much higher than one would typically expect in a family law trial of this nature, were factors I should also take into account. I will consider the overall costs of the disbursements as part of the hardship analysis and the matters involving the two specific disbursements as part of my consideration of the conduct of the parties in the litigation.

## ANALYSIS

### 1. Hardship

- [9] According to N.K., the costs award would cause her hardship and upset the balance achieved by the overall trial award. H.D. disagrees.
- [10] As noted in *Gold*, when considering a costs award, hardship to the unsuccessful party is a factor to take into account. N.K.'s position is that her financial situation is not as strong or stable as that of H.D., and bearing the entire costs award would cause her hardship. She submits Loo J. could not have anticipated the total disbursements would be so much higher than the normal family law trial of this length. According to N.K., hardship is to be understood as a relative concept and does not require proof of being destitute or pushed into poverty by the costs award.
- [11] In the Trial Decision, Loo J. found N.K. was underemployed. When imputing N.K.'s income, Loo J. found there was no reason why N.K., formerly a university professor, was unable to work full time: Trial Decision, para. 179. Further, Loo J. found N.K.'s entitlements to be as follows (Trial Decision, para. 215):

Based on the terms of the marriage agreement and spousal support, N.K. is entitled to the following:

- \$450,000 from H.D. pursuant to Clause 10 of the agreement, given that their relationship was between seven and ten years long.
- \$3,000 per month in spousal support for seven years from the date of separation (which totals \$252,000). Her imputed income is \$30,000 annually.
- the money in her personal savings accounts.
- her sole ownership of and entitlement to her two properties in India, which are worth approximately \$3,000-\$5,000 (for the plot of land) and \$200,000 (for the apartment in Chandigarh).
- She is not responsible for any of H.D.'s debts or liabilities, and does not have any of her own.
- Adding up N.K.'s assets and receipt of spousal support, she is left with approximately \$950,000 in total.

## Conclusions on Hardship

- [12] In my view, N.K.'s circumstances are not such that the costs award against her would constitute hardship and justify a departure from the normal rule on costs. As noted by Justice Hood in *Fulton v. Fulton*, 2002 BCSC 1194 at para. 52, in almost all cases, an award of costs will generally cause hardship on the payor. In any event, I agree with counsel for H.D. that financial hardship alone is insufficient to justify a departure from the general rule that costs follow the event: *K.D.P. v. A.R.K. aka R.K.*, 2012 BCSC 1025 at para. 17; *Robinson v.*

Lakner, [1998] B.C.J. No. 1047 (C.A.) at para. 5.

2. The conduct of the parties in the litigation

[13] As per Gold, the court can also consider the conduct of the parties in the litigation when assessing a costs award. N.K. submits H.D.'s conduct during the litigation warrants a departure from the general rule that costs go to the successful party. N.K. pointed to several aspects of H.D.'s conduct she submits support some apportionment of the costs in her favour, including:

- failing to file his F8 financial disclosure within the time period established by Supreme Court Family Rules, R. 5-1(11) and failing to make it available before the parties' judicial case conference;
- further failing to disclose his F8 financial statement by the deadline set out in the consent order pronounced on June 30, 2016;
- refusing to pay interim child or spousal support until ordered to do so by Justice Pearlman on January 11, 2017, following a contested application;
- filing of an application to reduce interim child and spousal support, on short leave, one week before Christmas and the same week the parties' mediation was scheduled. N.K. was awarded costs for the contested application to adjourn H.D.'s application in any event of the cause, but the time needed to prepare for both the adjournment and the substantive applications meant the mediation could not proceed; and
- failing to pay the funds payable under the marriage agreement, save two advances, even though he was ordered to do so at trial.

[14] In addition to the above conduct, N.K. also argued that H.D.'s conduct surrounding two expert reports, the Poon Report and the Distributive Tax Report, justifies a departure from a full award of costs in H.D.'s favour.

### The Poon Report

[15] In July of 2017, H.D. obtained an appraisal of the real property interests held by his companies. The report was prepared by Simon Poon of Campbell & Pound Real Estate Appraisers (collectively the "Poon Appraisals"). The valuation of those real property interests was an issue determined at trial. Although clearly relevant, H.D. did not disclose the Poon Appraisals upon receipt.

- [16] In October of 2017, as required by the Supreme Court Family Rules, R. 13-2(2), the parties jointly retained Ken Hollett of Penny & Keeleyside Appraisals Ltd. to appraise the same interests as the Poon Appraisals (the "Hollett Report"). While Mr. Hollett was in the process of preparing his report, H.D. contacted Mr. Hollett, without the knowledge or consent of either his or N.K.'s lawyer, seeking a draft of the report for himself. Mr. Hollett refused and brought H.D.'s unsolicited communications to the attention of both counsel.
- [17] The Poon Appraisals were more favourable to H.D. than the Hollett Report, and were not disclosed by H.D. until he became aware of that fact. N.K. argues H.D. intentionally chose not to disclose the Poon Appraisals until it suited him to do so. Counsel for H.D., Mr. Kahn, who was not H.D.'s lawyer at the time the Poon Appraisals were received, advised the Court that he did not become aware of the Poon Appraisals until after the Hollett Report was prepared, a fact was not disputed by N.K. Upon becoming aware of the Poon Appraisals, Mr. Kahn disclosed them to N.K.'s counsel.
- [18] By letter dated November 15, 2017, Mr. Kahn sent the Poon Appraisals to counsel for N.K. asking whether N.K. would agree to the Poon Appraisals being sent to Mr. Hollett. N.K. refused. When the trial opened, H.D. successfully argued Mr. Poon should be permitted to prepare an expert report for use at trial, and a report was prepared on an expedited basis (the "Poon Report"). Mr. Poon and Mr. Hollett communicated and ultimately agreed on a compromise value which was then accepted by the parties. Neither Mr. Hollett nor Mr. Poon was called to give evidence at trial.
- [19] N.K. argues she should not bear the cost of Mr. Poon's services for preparation of the Poon Report for trial (\$15,129.38), compared to the \$8,907.50 charged by Mr. Hollett, because:
- H.D. failed to disclose the Poon Appraisals until it assisted him to do so;
  - H.D. attempted to provide the Poon Appraisals to Mr. Hollett behind the backs of both counsel;
  - H.D. did not comply with Rule 13-3(2);
  - until he actually prepared the Poon Report, which was during the trial, Mr. Poon was not acting in accordance with an expert's obligations to the court; and
  - because Mr. Poon was not retained to prepare an expert report for trial until the trial had commenced, his high charges likely reflect the urgency in which the Poon Report was prepared.

### The Distributive Tax Report

- [20] H.D. also obtained a report from Mr. Gary Mynett dealing with distributive taxes for his corporate interests (the "Distributive Tax Report"). Both parties acknowledge that N.K.'s position throughout the litigation was that if she received any share of the H.D.'s corporate assets, she wanted to do so by way of a butterfly transaction, which would render the

distributive tax issue irrelevant. While N.K. did not prevent H.D. from obtaining the Distributive Tax Report, she made it clear she felt it was unnecessary and did not agree to pay for any portion of it.

- [21] N.K. submits the Distributive Tax Report was unnecessary. She pointed out that in H.D.'s closing submissions at trial, he stated "the cost of the Distributive Tax Report should be shared if the court relies on same", and that Loo J. did not rely on the Distributive Tax Report. In response, H.D. argues that because Loo J. received the Distributive Tax Report, she therefore relied on it in writing the Trial Decision.
- [22] Counsel for N.K. submits the above conduct was high-handed, tactical moves intended to intimidate N.K. and pressure her financially. N.K. says such tactics should be discouraged and warrant an apportionment of the costs award in her favour.

### Conclusions on the parties' conduct in the litigation

- [23] Each party in a family action has documentary disclosure obligations imposed under the Supreme Court Family Rules, R. 9-1, which requires parties to disclose documents that are or have been in their possession or control and that could, if available, be used at trial to prove or disprove a material fact. The parties' disclosure obligations are ongoing throughout the litigation: Supreme Court Family Rules, R. 9-1(6); *Este v. Esteghamat-Ardakani*, 2017 BCSC 878 at para. 104. Even where a party claims privilege over a document, the existence of the document must be disclosed and it must be described in a manner that, without revealing information that is privileged, will enable other parties to assess the validity of the privilege claim: Supreme Court Family Rules, R. 9-1(3) and (4).
- [24] With respect to the costs of the Poon Report, the parties agree the Poon Appraisals were relevant and should have been disclosed in a timely fashion. However, while I agree the cost of Mr. Poon's services in preparing the Poon Report were probably higher because it was procured on an expedited basis, I cannot say the reason it had to be expedited was because of H.D.'s late disclosure of the Poon Appraisals. As I have noted above, N.K. was asked to consent to the Poon Appraisals being made available to Mr. Hollett two months before the trial began, but she refused.
- [25] Justice Loo allowed Mr. Poon to prepare an expert report, rather than refusing to permit reliance on his expert opinion. In making that decision, she can be taken to have considered whether or not it was in the interests of justice to disallow the expert evidence because of its late disclosure. In addition, the valuation figure the parties finally agreed on was a function of both the Hollett Report and the Poon Report.
- [26] With respect to the Distributive Tax Report, I disagree with H.D.'s position that Loo J.'s receipt of the report is evidence she relied on it in her Trial Decision. There is no mention of the Distributive Tax Report in her reasons; Mr. Mynett prepared two reports, but Loo J. only referred to his report titled "Guideline Income Report and Corporate Valuation", which was a separate report. It was not necessary for the court to address the issues raised in the

Distributive Tax Report, nor did H.D. satisfy me there was a reasonable likelihood it would have been necessary to do so. It is my understanding the issues addressed in the Distributive Tax Report would only have arisen in the event Loo J. had refused to allow N.K. to take any corporate interests to which she was entitled by way of a butterfly transaction, an eventuality I believe would have been unlikely. Therefore, I find the Distributive Tax Report was unnecessary.

- [27] I will also consider N.K.'s conduct at trial in my consideration of this factor. In the Trial Decision, Loo J. made serious adverse credibility findings about N.K. For example, at para. 148 of the Trial Decision, she stated:

I find that N.K. has deliberately not told the truth and fabricated much of her evidence. Wherever the evidence of N.K. conflicts with the evidence of H.D. on all matters, I prefer the evidence of H.D.

- [28] I agree that many of H.D.'s tactical litigation choices revealed less than sound judgment. However, it appears both parties made flawed choices throughout the litigation based on what they perceived would be most advantageous to them. In the particular circumstances of this case, I do not find H.D.'s conduct warrants divergence from the general rule that costs follow the cause. My finding on this issue should not be understood as suggesting such conduct is condoned by the court.

3. The importance of not upsetting the balance achieved by the award itself

- [29] N.K. argues that the effect of the costs award undermines the other orders made by Loo J. in the Trial Decision. She argues that where the costs order would interfere with a dependent spouse's ability to maintain self-sufficiency, the court has the discretion to refuse to award costs to a substantially successful litigant. H.D. argues the costs award does not upset the balance of the remainder of Loo J.'s award.

### Conclusions on balance of the award

- [30] Given the particular circumstances of N.K.'s situation, I am satisfied the costs award in favour of H.D. will not interfere with N.K.'s ability to maintain self-sufficiency. Further, I do not find the costs award undermines the Trial Order made by Loo J., as she was aware of all aspects of the order when she ordered that H.D. was entitled to his costs. In my view, the balance she intended to achieve included the costs aspect of her order.

### CONCLUSION

- [31] After careful consideration of the relevant factors, I am not satisfied they justify an order departing from H.D.'s entitlement to his costs as the party who was largely successful at trial. However, I agree with N.K. that the Distributive Tax Report was unnecessary, and I order that H.D. be solely responsible for that expense. With respect to any interest charges for late payment of Mr. Mynett's Guideline Income Report and Corporate Valuation, which

H.D. agreed to fund before trial, counsel for H.D. says he does not believe any late payment interest was charged but is not opposed to an order confirming N.K. is not responsible for any such interest in the event he is wrong.

[32] Therefore, I make the following orders:

1. H.D. is solely responsible for the cost of Mr. Mynett's Distributive Tax Report;
2. H.D. is entitled to his costs from N.K.;
3. by consent, H.D. is solely responsible for any interest charged due to late payment of Mr. Mynett's account associated with his preparation of the Guideline Income Report and Corporate Valuation; and
4. in the event the parties cannot agree, the reasonableness of any remaining disbursements is to be determined by the Registrar.

"Jackson J."

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