
CANADA / JUDGMENT

Natola v. Armstrong

2020 BCSC 588

COURT

Supreme Court of British Columbia

DECIDED

17 April 2020

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2020 BCSC 588 Natola v. Armstrong

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Natola v. Armstrong,

2020 BCSC 588

Date: 20200417

Docket: E51509

Registry: New Westminster

Between:

Michelle Rita Natola

Claimant

And

Jeffrey Edward Armstrong

Respondent

Before: The Honourable Mr. Justice Funt

Reasons for Judgment

Counsel for the Claimant:

M. Brandon

Counsel for the Respondent:

A. Simoes

Place and Dates of Hearing:

New Westminster, B.C.

December 20, 2019 and

January 6, 2020

Place and Date of Judgment:

New Westminster, B.C.

April 17, 2020

1. introduction

- [1] The respondent has brought a summary trial application in this family law dispute under Rule 11-3 of the Supreme Court Family Rules, B.C. Reg. 169/2009.
- [2] The claimant agrees that a summary trial is appropriate in order to resolve the outstanding issues. I have also found the matter to be one suitable for a summary trial: *Hryniak v. Mauldin*, 2014 SCC 7; *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202 (C.A.)
- [3] The parties have agreed on all non-financial matters. They also agree that a divorce order should be granted by the Court. The grounds for a divorce are readily satisfied. In particular, the parties have lived separate and apart for over a year.
- [4] The main financial issues that must be addressed are:
- a) the division of assets and liabilities;
 - b) child support; and
 - c) spousal support.
2. background
- [5] The parties were married on August 6, 2005 and separated in November 2015 with the respondent moving out from the family residence on December 5, 2015.
- [6] The parties have a daughter who is now 14 years old.
- [7] The parties have co-operated with respect to the sharing of parenting responsibilities and parenting time. Neither party is asking for an order with respect to parenting arrangements.
- [8] Following separation, the parties' daughter lived on a "week-on-week-off" basis with each of her parents.
- [9] In April 2017, the respondent moved in order to be closer to his work. Since this time, the parties' daughter has lived with the claimant on the weekdays and with the respondent on the weekends.

[10] The respondent is employed by a large mining corporation as a "business intelligence consultant". The claimant operates a small cleaning business which she started in 2011.

[11] As discussed further below, the parties have more debt than assets.

[12] The respondent's Guideline Income is as follows:

2016

\$132,000

2017

\$179,360

2018

\$134,730

2019

\$145,000

(expected)

[13] The claimant's Guideline Income as calculated by her counsel is as follows:

2016

\$13,960

2017

\$16,600

2018

\$16,822

2019

\$28,808

(imputed)

[14] The respondent argues that the claimant should have worked full-time during their relationship. The claimant did work part-time, initially at a gym and then starting in 2011 as a house cleaner. I find that the parties' intention was that the claimant would primarily be a "stay-at-home mother" which would allow the respondent to be the primary "breadwinner".

[15] The parties agree that the respondent from January 2016 to December 2019 has paid \$39,270 in child support.

- [16] The parties agree that the respondent from January 2016 to December 2019 has paid \$103,520 in spousal support.
- [17] On February 17, 2017, the claimant obtained an order that starting February 1, 2017, the respondent pay, on an interim basis, child support of \$902 per month and spousal support of \$3,229 per month (the "February 17, 2017 Order"). Prior to this time, the respondent was paying \$700 per month in child support (with no payment made for January and February 2016). Prior to February 2017, the respondent had paid no spousal support.
- [18] Each party has now re-partnered.
- [19] On March 8, 2019, Master Caldwell found the respondent to be in default of his support obligations under the February 17, 2017 Order and fined the respondent \$2,500 under s. 230 of the Family Law Act, S.B.C. 2011, c. 25 [FLA] (the "March 8, 2019 Order"). Master Caldwell also ordered that the claimant would have her costs in any event of the cause.
- [20] The parties agree that the claimant holds a savings account of \$5,141 which is family property and that the respondent has a boat in his name with a value of \$10,000 which is also family property.
- [21] The parties also agree that the respondent has a \$45,000 credit line balance and that he has paid \$13,700 on the debt, both of which are family debt. In addition, there was a Visa card in the respondent's name with a \$5,194 balance. The respondent paid the balance after separation. The parties agree that the \$5,194 is family debt.
- [22] The respondent also had an American Express ("Amex") card with a \$4,592 balance. He says it is family debt. The claimant disagrees. The respondent paid the balance after separation.
- [23] The \$2,500 fine ordered to be paid by the respondent to the claimant under the March 8, 2019 Order has not been paid.
- [24] At hearing, claimant's counsel presented a Bill of Costs seeking \$1,080 for the hearing before Master Caldwell. I have reviewed the Bill of Costs and I find it to be in order.

3. Divorce

- [25] I will order that the parties be divorced.
- [26] As is common practice, and my preferred practice in most cases, the divorce order may be separated from the corollary relief ordered, if counsel so wish.

4. commencement date of the parties' marriage-like relationship

- [27] The respondent says that the parties commenced a marriage-like relationship in May 2003. The claimant says the marriage-like relationship had started by the spring of 2000.
- [28] In her January 3, 2020 affidavit, the claimant swears (in part):

By the spring of 2000 I was residing exclusively with [the respondent], although for appearances sake, I was pretending to my parents that I still lived with my Grandmother. They would not have approved of me living with boyfriend.

Every morning [the respondent] would drop me off at the New Westminster skytrain station or I would take the bus to the station and go to work in Vancouver. Each evening [the respondent] would pick me up at the New Westminster skytrain station as it was a pretty scary place to be alone at night back then.

[29] Whether a cohabitating couple are in a "marriage-like relationship" is a question of mixed fact and law that requires a broad approach: *Weber v. Leclerc*, 2015 BCCA 492 at para. 22.

[30] The expectation that the relationship will be of lengthy, indeterminate duration may be an important factor: *Weber* at para. 23.

[31] Neither financial dependence nor financial interdependence is a requirement of a marriage-like relationship: *Weber* at para. 21.

[32] I accept the claimant's description of the commencement time of the parties' marriage-like relationship. The claimant's description is consistent "with the probabilities that surround the currently existing conditions" and is in "harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions": *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (C.A.) at 356-357.

[33] In calculating support obligation, claimant's counsel used 15 years as opposed to 12.5 years for the length of the parties' marriage-like relationship. I will adopt the same approach.

5. division of family property and family debt

[34] As noted, the respondent owns a boat in his name with a value of \$10,000 and the claimant has a savings account of \$5,141. To equalize the value of these family properties, the respondent should pay the claimant \$2,429 $((\$10,000 - \$5,141) \div 2)$.

[35] With respect to family debt, the parties dispute whether the \$4,592 Amex card balance in the respondent's name is family debt. As noted, the respondent, after separation, paid off the balance.

[36] Claimant's counsel submits that the respondent has not provided copies of the Amex statements for the respondent to meet his onus that the \$4,592 Amex balance was family debt. I agree. The respondent has not provided "sufficiently clear, convincing and cogent [evidence] to satisfy the balance of probabilities test": *F.H. v. McDougall*, 2008 SCC 53, at para. 46. I find that the \$4,592 Amex balance is not family debt.

[37] In order to equalize the family debt, the claimant should pay the respondent \$31,947 $((\$45,000 + \$13,700 + \$5,194) \div 2)$.

[38] Prior to consideration of any support arrears, the claimant would be required to pay the respondent \$28,438, calculated as follows:

Family debt equalization

\$31,947

Family asset equalization

<\$2,429>

Costs, March 8, 2019 Order

<\$1,080>

\$28,438

6. child support

[39] Set forth above is the claimant's Guideline Income as calculated by her counsel for the 2016 to 2018 and imputed Guideline Income for 2019.

[40] Claimant's counsel calculated the claimant's Guideline Income for 2016 to 2018 by using her gross business income and then deducting some relatively small amounts as related expenses. I have reviewed claimant's counsel's approach and calculations and find them to represent a reasonable approach. I will adopt the figures claimant's counsel has calculated.

[41] For 2019, claimant's counsel has imputed Guideline Income using the provincial minimum wage of \$13.85 per hour and then multiplying by 40 hours per week and 52 weeks in the year. I again adopt his approach.

[42] The respondent argued that the claimant had greater income based on the fact that she would receive cash for her cleaning services.

[43] Other than for 2019, the claimant's figures are derived from her tax returns. The respondent's assertion falls short of "sufficiently clear, convincing and cogent" evidence to make a finding that the claimant was evading tax by deliberately not reporting all of her income: *F.H. v. McDougall*.

[44] The respondent also argued that the claimant was underemployed. In the Court's view, it was in the best interests of the parties' daughter that the claimant worked less and was home more at the time of separation and then for several years. At the time of separation, the parties' daughter was 11 years old. She is now 14 years old. For any child, the years from 11 to 14 may give rise to particular challenges. A readily around and available parent can often provide the necessary emotional support.

[45] The parties' daughter is now 14 and is capable of being home alone and doing many things on her own. Claimant's counsel has made his calculation of imputed income based on the claimant now working full-time.

- [46] I reject the respondent's argument that for 2016 to 2018 the claimant was underemployed and that a greater income should be imputed to her.
- [47] In his January 6, 2020 written submission, claimant's counsel sets forth his calculation (with supporting DivorceMate schedules) of child support arrears. I have reviewed his calculations and will adopt them. The total child support arrears to December 2019 is \$23,309.
- [48] As noted, prior to the consideration of support arrears, the claimant is required to pay the respondent \$28,438. Offsetting the \$23,909 in child support arrears, the amount the claimant is required to pay the respondent is reduced to \$4,529 (\$28,438 - \$23,909).

7. Spousal support

- [49] The fundamental principles underlying spousal support are succinctly described by our Court of Appeal in *Chutter v. Chutter*, 2008 BCCA 507, at paras. 45-61. These paragraphs read:
- [45] Section 15.2 of the Divorce Act is the main provision governing entitlement to spousal support. Subsection 15.2(6) provides that a spousal support order should meet the following objectives:
- (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
 - (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
 - (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
 - (d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.
- [46] In order to achieve a fair and equitable distribution of resources, all four of these objectives should be examined: *Moge v. Moge*, [1992] 3 S.C.R. 813 at 850-853, 43 R.F.L. (3d) 345. Having regard to these policy objectives, courts must consider the condition, means, needs and other circumstances of each spouse, including the factors set out in s. 15.2(4):
- (a) The length of time the spouses cohabited;
 - (b) The functions performed by each spouse during cohabitation; and
 - (c) Any order, agreement or arrangement relating to support of either spouse.

- [47] Based on the statutory provisions and the case authorities, the Supreme Court of Canada has identified three grounds for entitlement to spousal support: (1) compensatory support, which primarily relates to the first two objectives of the Divorce Act; (2) non-compensatory support, which primarily relates to the third and fourth objectives; and (3) contractual support (*Bracklow v. Bracklow*, [1999] 1 S.C.R. 420 at paras. 15, 41-42, 44 R.F.L. (4th) 1).
- [48] The claim for spousal support in this case was advanced on compensatory and non-compensatory support principles.
- [49] Although the compensatory and non-compensatory grounds for spousal support are animated by different models of marriage, the case authorities hold that there is no single basis of support or objective under the Divorce Act that supersedes the other, and that many claims involve aspects of both compensatory and non-compensatory principles (*Bracklow*, at para. 27; *Moge*, at 852). A court is not called upon to decide on one basis for support to the exclusion of the other but rather to "[apply] the relevant factors and strik[e] the balance that best achieves justice in the particular case" (*Bracklow*, at para. 32). Moreover, the doctrine of equitable sharing is the overarching principle that must be borne in mind (*Moge*, at 864).
- [50] Compensatory support is intended to provide redress to the recipient spouse for economic disadvantage arising from the marriage or the conferral of an economic advantage upon the other spouse. The compensatory support principles are rooted in the "independent" model of marriage, in which each spouse is seen to retain economic autonomy in the union, and is entitled to receive compensation for losses caused by the marriage or breakup of the marriage which would not have been suffered otherwise (*Bracklow*, at paras. 24, 41). The compensatory basis for relief recognizes that sacrifices made by a recipient spouse in assuming primary childcare and household responsibilities often result in a lower earning potential and fewer future prospects of financial success (*Moge*, at 861-863; *Bracklow*, at para. 39). In *Moge*, the Supreme Court of Canada observed, at 867-868:

The most significant economic consequence of marriage or marriage breakdown, however, usually arises from the birth of children. This generally requires that the wife cut back on her paid labour force participation in order to care for the children, an arrangement which jeopardizes her ability to ensure her own income security and independent economic well-being. In such situations, spousal support may be a way to compensate such economic disadvantage.

- [51] In addition to acknowledging economic disadvantages suffered by a spouse as a consequence of the marriage or its breakdown, compensatory spousal support may also address economic advantages enjoyed by the other partner as a result of the recipient spouse's efforts. As noted in *Moge* at 864, the doctrine of equitable sharing of the economic consequences of marriage and marriage breakdown underlying compensatory support "seeks to recognize and account for both the economic disadvantages incurred by the spouse who makes such sacrifices and the economic advantages conferred upon the other spouse" (emphasis added).

[52] The Court in *Moge* discussed the relevance of the parties' standards of living in the context of compensatory support at 870:

Although the doctrine of spousal support which focuses on equitable sharing does not guarantee to either party the standard of living enjoyed during the marriage, this standard is far from irrelevant to support entitlement. As marriage should be regarded as a joint endeavour, the longer the relationship endures, the closer the economic union, the greater will be the presumptive claim to equal standards of living upon its dissolution.

[Emphasis by Rowles J.A., internal citations omitted.]

[53] In *W. v. W.*, 2005 BCSC 1010, 19 R.F.L. (6th) 453, a frequently cited decision in trial decisions in British Columbia, Justice Martinson made the following helpful observation about the interpretation in this province of the emphasized portion in *Moge*:

[11] In British Columbia this comment in *Moge* has been interpreted to mean that in long marriages the result will likely be a rough equivalency of standards of living. Doing so recognizes that the longer a marriage lasts, the more intertwined the economic and non-economic lives of the spouses become.

[12] Throughout the marriage, each spouse makes decisions that accommodate the economic and non-economic needs of the other. The decisions include the way in which child care and other family responsibilities will be handled and the way careers will develop. These decisions can have a significant impact upon the income earning ability of each at the time of separation. Yet it is not easy to determine exactly the relationship between these decisions and the consequent benefits and detriments to each spouse. The rough equivalency of standard of living approach has operated as a workable substitute to assess compensatory claims. See for example, *Dithurbide v. Dithurbide* (1996), 23 R.F.L. (4th) 127 (B.C.S.C.); *Rattenbury v. Rattenbury*, 2000 BCSC 722; *Rinfret v. Rinfret*, [1999] B.C.J. No. 2945 (S.C.); *O'Neill v. Wolfe* (2001), 14 R.F.L. (5th) 155 (B.C.S.C.); *Walton v. Walton*, [1997] B.C.J. No. 1089 (S.C.); *Ulrich v. Ulrich*, 2003 BCSC 192; and *Carr v. Carr* (1993), 46 R.F.L. (3d) 326 (B.C.S.C.).

[Emphasis by Rowles J.A.]

[54] Where compensatory principles do not apply, need alone may be sufficient to ground a claim for spousal support (Bracklow, at para. 43). Non-compensatory support is grounded in the "social obligation model" of marriage, in which marriage is seen as an interdependent union. It embraces the idea that upon dissolution of a marriage, the primary burden of meeting the needs of the disadvantaged spouse falls on his or her former partner, rather than the state (Bracklow, at para. 23). Non-compensatory support aims to narrow the gap between the needs and means of the spouses upon marital breakdown, and as such, it is often referred to as the "means and needs" approach to spousal support.

[55] The concept of "needs" in the context of non-compensatory spousal support goes beyond basic necessities of life and varies according to the circumstances of the parties. As stated by Finch J.A. (as he then was) in *Myers v. Myers* (1995), 17 R.F.L. (4th) 298, 65 B.C.A.C. 226, at para. 10:

"Need" or "needs" are not absolute quantities. They may vary according to the circumstances of the parties and the family unit as a whole. "Need" does not end when the spouse seeking support achieves a subsistence level of income or any level of income above subsistence. "Needs" is a flexible concept and is one of several considerations which a trial judge must take into account in deciding whether any order for spousal support is warranted.

[56] The Ontario Court of Appeal in *Allaire v. Allaire* (2003), 170 O.A.C. 72, 35 R.F.L. (5th) 256, held that self-sufficiency, a spousal support objective primarily related to non-compensatory support (Bracklow, at paras. 41-42), was a relative concept informed by the standard of living previously enjoyed by the parties:

[21] self-sufficiency is not a free-standing concept. It must be seen in the context of the standard of living previously enjoyed by the parties. Where, as here, the economic consequences of the marital relationship were to permanently reduce Ms. Allaire's income, it is inappropriate to consider Ms. Allaire's annual income of \$68,000 as "sufficient" without considering whether Mr. Allaire can financially assist her to live a lifestyle closer to what they shared as a couple.

[57] In *Yemchuk v. Yemchuk*, 2005 BCCA 406 at paras. 41, 48-49, 16 R.F.L. (6th) 430, Prowse J.A. referred to *Myers* and further held that in the context of a long-term marriage involving a sharing of resources, the concept of "need" should take into account the relative standards of living of the spouses following the marriage breakdown. In *Yemchuk*, the husband had appealed the decision of the trial judge dismissing his claim for spousal support on the basis that he had not established any need. While Prowse J.A. found that the husband was entitled to spousal support on compensatory grounds, she also went on to state that the trial judge's treatment of the husband's need for support had been "unduly restrictive":

[41] I am also satisfied that the trial judge erred in viewing Mr. Yemchuk's "need" for support from too narrow a perspective. He treated "need" as solely a question of whether Mr. Yemchuk could meet his stated expenses with the income available to him. After attributing \$800-\$1,000 per month to Mr. Yemchuk, the trial judge found that Mr. Yemchuk could meet his expenses and, therefore, was not entitled to support.

[58] In *Tedham v. Tedham*, 2005 BCCA 502, 20 R.F.L. (6th) 217, Prowse J.A. referred to *Yemchuk* as illustrative of the fact that the courts, at least in longer marriages, are measuring need against the marital standard of living (para. 55), and followed *Allaire* in finding that the objective of self-sufficiency must be viewed in the context of the marital standard of living (para. 60).

- [59] Non-compensatory support was also considered in *Hodgkinson v. Hodgkinson*, 2006 BCCA 158, 25 R.F.L. (6th) 235. In that case, the parties divided assets of close to \$7 million, and the wife was awarded time-limited spousal support on non-compensatory grounds. The trial judge had found that the wife was not entitled to spousal support on either compensatory or non-compensatory grounds: she was not financially disadvantaged by the marriage; she was both highly trained and capable of stepping back into the work force; and she was able to earn investment income from her share of the capital assets. On appeal, Saunders J.A., for the court, held that the trial judge's analysis of the wife's needs and means was "impermissibly narrow"; in part because it had not taken into account the marital standard of living or the husband's post-separation standard of living:
- [68] However, the trial judge did not relate that capacity to earn income from her capital assets and from employment to the standard of living the parties enjoyed during marriage or to the standard of living of Mr. Hodgkinson after trial, or advert to the time lag that would be involved in earning income from a business if Mrs. Hodgkinson immediately resumed work as a chef or caterer. While none of these factors is, by itself, a determinant of Mrs. Hodgkinson's entitlement to spousal support, their absence illustrates what I consider an impermissibly narrow approach to the issue of spousal support.
- [69] Both the question of hardship to Mrs. Hodgkinson ([15.2(6)(c)]) and her self-sufficiency ([15.2(6)(d)]) bear some relationship to the standard of living enjoyed by the parties during the marriage (tempered by the income available) and by the other spouse after the marriage. While Mrs. Hodgkinson is not entitled to support at a level that would maintain the highly affluent lifestyle the parties shared, particularly as it appears to have been beyond the level of Mr. Hodgkinson's earnings, in these circumstances she is entitled to a degree of comfort well beyond "basic needs".
- [74] It was an error, in my view, for the trial judge to fail to recognize these several aspects. The arrangement between the parties during marriage as described by the trial judge, in my view, required consideration of spousal support from the perspective of the standard of living that is still reasonably available to them, although in two residences. While recognizing that Mrs. Hodgkinson is not necessarily entitled, step for step, to Mr. Hodgkinson's standard of living, something closer is required.
- [60] The trial judge distinguished *Hodgkinson* on the basis that the wife had been awarded non-compensatory support for the time required to restore her career, whereas in this case the appellant had been continuously employed for many years. However, the factual differences between *Hodgkinson* and this case do not diminish the principle that an analysis of the support-seeking spouse's "needs" under non-compensatory support, i.e., the objectives of ss. 15.2(6)(c) and 15.2(6)(d) of the Divorce Act, requires some consideration of the standard of living enjoyed by the parties during the marriage and by the other spouse after the marriage.

[61] Finally, I note that in *Fisher v. Fisher*, 2008 ONCA 11, 88 O.R. (3d) 241, the Ontario Court of Appeal recently reiterated the principle that self-sufficiency is a relative concept encompassing more than the ability to meet basic expenses:

53 Self-sufficiency, with its connotation of economic independence, is a relative concept. It is not achieved simply because a former spouse can meet basic expenses on a particular amount of income; rather, self-sufficiency relates to the ability to support a reasonable standard of living. It is to be assessed in relation to the economic partnership the parties enjoyed and could sustain during cohabitation, and that they can reasonably anticipate after separation.

[50] The respondent argues that with the claimant having re-partnered she is not entitled to spousal support. The respondent relies on *Lee v. Lee*, 2014 BCCA 383 to support his argument.

[51] Where spousal support is based on a compensatory basis, re-partnering is usually not a relevant consideration: *Rozen v. Rozen*, 2016 BCCA 303, at paras. 46-55.

[52] The respondent says that the claimant is not entitled to support on a compensatory basis. As I understand the respondent's argument in this regard, he is saying that the claimant is in no worse of a position than she was at the beginning of the marriage-like relationship. The respondent then says that *Lee* applies to prevent the award of spousal support on the basis of a disparity of incomes.

[53] With respect, I cannot accede to the respondent's argument. I find that the compensatory basis for spousal support applies. The claimant sacrificed years supporting the respondent in his career by taking care of the parties' daughter and serving as a home-maker. This was done at the cost of earlier building a career or a business, such as a cleaning business. It has not been shown that the claimant's re-partnering enables her to use other assets to generate income: *Rozen* at para. 56.

[54] The claimant seeks spousal support for a total of 135 months. The claimant bases this period of support on a 15-year relationship where the mid-range spousal support duration is 11 years and 3 months.

[55] The claimant seeks monthly spousal support of \$2,594 based on the respondent and her having Guideline Income of \$145,000 and \$28,808 respectively. Subject to a review described further below, I will award \$2,594 in monthly spousal support.

[56] The respondent, as of December 2019, has paid \$103,520 in spousal support which is the equivalent of 40 months of spousal support. As such, there should be 95 months (135 months - 40 months) of further spousal support to fulfill the mid-range spousal support of 11 years and 3 months. Ninety-five months from December 2019 is February 2027.

[57] For the sake of simplicity, I will end spousal support as of December 31, 2026 with the shortened period offsetting in rough terms the \$4,529 that the claimant otherwise owes the respondent (see para. 48 above).

8. review

[58] Finally, I will order that either party may apply between May 31, 2025 and August 1, 2025 to have child support or spousal support or both reviewed: Jendruck v. Jendruck, 2014 BCCA 320, at paras. 30-33.

[59] In November 2024, the parties' daughter will turn 19 years of age. The opportunity for either party to seek a review will enable matters to be considered in light of the fact that the parties' daughter may no longer be a child of the marriage, her then current needs (if any), the then respective incomes of the parties, and any other relevant aspect.

[60] Each year, the parties will exchange relevant tax information, including a full copy of any relevant tax return on or before May 15 of the year following the relevant taxation year.

9. costs

[61] This summary trial has brought resolution to matters which serves to benefit each party. Accordingly, each party will bear their respective costs and disbursements.

"Funt J."

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Prepared on 25 October 2026 · Esheria