
CANADA / JUDGMENT

S.R. v. B.E.

2012 BCSC 807

COURT

Supreme Court of British Columbia

DECIDED

18 April 2012

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2012 BCSC 807 S.R. v. B.E.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

S.R. v. B.E.,

2012 BCSC 807

Date: 20120418

Docket: E33145

Registry: New Westminster

Between:

S.R.

Claimant

And:

B.E.

Respondent

Before: The Honourable Madam Justice Fisher

Oral Reasons for Judgment

In Chambers

Appearing on his own behalf:

S. R.

Counsel for the Respondent:

C.J. Anderson

Place and Date of Trial/Hearing:

Vancouver, B.C.

April 15, 2012

Place and Date of Judgment:

New Westminster, B.C.

April 18, 2012

[1] THE COURT: In reasons for judgment dated November 22, 2011, I made numerous orders pertaining to custody, guardianship, and access of the parties' son, division of property, and child and spousal maintenance. Each party now seeks costs against the other, each alleging that he or she was substantially successful at trial. The claimant seeks, in the alternative, that if he is not found to have been substantially successful, the court should otherwise order costs in his favour. He also seeks an order for double costs based on an offer to settle made November 25, 2010.

Entitlement to costs

The normal rule

- [2] The normal rule with respect to entitlement to costs is found in Rule 16-1(7) of the Supreme Court Family Rules, B.C. Reg. 168/2009. This rule provides that the costs of a family law case must be awarded to the successful party "unless the court otherwise orders." This is subject only to sub-rule (9), which addresses costs for applications where a party is awarded costs at trial.
- [3] This rule is the same as under the previous rule, 57(9), where it was established that costs went to the party who enjoyed substantial success: *Gold v. Gold* (1993), 82 B.C.L.R. (2d) 180; *Fotheringham v. Fotheringham*, 2001 BCSC 1321. Recent authorities have confirmed that the same principle applies to Rule 16-1(7) (as well as Rule 14-1(9) of the Supreme Court Civil Rules): *MacLean v. Mio*, 2011 BCSC 148; *Gain v. Gain*, 2011 BCSC 621; and *Aschenbrenner v. Yahemech*, 2010 BCSC 1541. To determine whether a party has been substantially successful, the court is to objectively compare the relief granted and the results obtained with the parties' positions at trial: *MacLean* at para. 30.
- [4] Substantial success was discussed at some length by Bouck J. in *Fotheringham*. He said this at para. 45:

Gold now seems to say that substantial success in an action should be decided by the trial judge looking at the various matters in dispute and weighing their relative importance. The words "substantial success" are not defined. For want of a better measure, since success, a passing grade, is around 50% or better, substantial success is about 75% or better. That does not mean a

court must descend into a meticulous mathematical examination of the matters in dispute and assign a percentage to each matter. Rather, it is meant to serve as a rough and ready guide when looked at all the disputed matters globally.

[5] Bouck J. set out a four-step inquiry to determine whether or not to award costs after a trial (para. 46):

1. First, by focusing on the "matters in dispute" at the trial. These may or may not include "issues" explicitly mentioned in the pleadings.
2. Second, by assessing the weight or importance of those "matters" to the parties.
3. Third, by doing a global determination with respect to all the matters in dispute and determining which party "substantially succeeded," overall and therefore won the event.
4. Fourth, where one party "substantially succeeded," a consideration of whether there are reasons to "otherwise order" that the winning party be deprived of his or her costs and each side then bear their own costs.

"Otherwise orders"

[6] The court has the discretion to "otherwise order", but this must be exercised judicially. In Gold, the court discussed the factors that a trial judge might take into account in doing so (at para. 20):

To lay down any strict guidelines or even to attempt to give exhaustive examples is not . . . 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.

[7] The onus is on the unsuccessful litigant to persuade the court to exercise its discretion to depart from the usual rule: MacLean, para. 39.

Which party had substantial success?

[8] At trial, the main issues were the access schedule and where the child would attend school, division of property, the determination of income for each party, the respondent's entitlement to spousal support, and the quantum of support. The parties agreed on joint custody and guardianship, except for some of the details of the terms of the guardianship order, and on other matters relating to the child. The respondent also agreed to vacate a restraining order which had been made in August 2009.

[9] With respect to the child issues, the claimant sought joint guardianship giving him the ultimate decision-making authority for major decisions, implementation of the recommendation in a s. 15 report that the parties follow a 2/2/5/5 shared-parenting plan, and

an order that the child be registered in kindergarten in Burnaby or Coquitlam rather than in North Vancouver where the respondent lives. The respondent sought a joint guardianship order giving her ultimate decision-making authority, an access schedule for the claimant from Fridays at 3 p.m. to Monday mornings, and an order allowing the child to remain in kindergarten in North Vancouver.

- [10] The joint guardianship order gave neither party ultimate decision-making authority for one year. In the event they are not able to reach agreement on major decisions during that time, a parenting coordinator is to have the authority to make the decision. At the end of this one-year period, either party will be at liberty to apply for an order granting him or her ultimate decision-making authority.
- [11] The access schedule proposed by the respondent was ordered to be in effect until the claimant relocated. When he does, the parties are to discuss whether the recommended 2/2/5/5 schedule can be implemented. The child was to stay in his North Vancouver school until the end of June 2012, after which the parties have to discuss the school location beginning in September 2012. If they are unable to agree on either of these issues, the parenting coordinator is to decide.
- [12] On these issues, the respondent was more successful than the claimant, as the access schedule she proposed was put into place until the respondent relocated, and the 2/2/5/5 had to be assessed once the claimant relocated his residence.
- [13] The financial issues occupied most of the time at trial. With respect to division of property, the claimant sought an order that each party keep his or her own assets. He argued for a 100 percent reapportionment of family assets in his favour, relying primarily on non-family assets in Iran owned by the respondent and the debt he incurred after separation and prior to trial. The respondent acknowledged that equal division would be unfair having regard to the length of the marriage and the other factors in s. 65 of the Family Relations Act, R.S.B.C. 1996 c. 128, and sought a 25 percent interest in the family assets, consisting of the parties' former matrimonial home in Pitt Meadows, the house on Wildwood Crescent, and a number of RSPs.
- [14] The Wildwood house and the RSPs were reapportioned 90 percent in the claimant's favour. The respondent succeeded in obtaining an interest in the family assets where the claimant disputed any entitlement at all, but the interest she obtained in those assets was 15 percent less than what she sought and 10 percent more than what the claimant sought. In assessing reapportionment, however, I did not consider it appropriate to take the respondent's non-family assets in Iran into account, and this was an issue which occupied much time at trial.
- [15] Considering the issues disputed at trial and the positions taken by the parties, I consider the respondent to have been more successful on this issue.

- [16] The respondent sought both child and spousal support retroactive to July 2009. The claimant disputed the respondent's entitlement to spousal support. Critical to these issues was imputation of income. Each party sought to impute income to the other. The respondent sought to impute income to the claimant of between \$134,000 and \$180,000. The claimant took the position that his income was \$90,000 per year and sought to impute income to the respondent at the same amount, based on gifts and support provided to her by her father.
- [17] Both parties succeeded in having income imputed to the other but not at the amounts proposed. The claimant's imputed income at \$100,000 was \$10,000 more than the income he said he earned. The respondent's imputed income was set at \$25,000 based on some of the funds provided by her father, an amount substantially less than that proposed by the claimant.
- [18] On this issue, I consider the respondent to have been successful as the claimant's position was that the respective incomes of each party should be equal, thus negating any requirement on his part to pay child or spousal support. The result was quite different from that.
- [19] The respondent was successful in obtaining an order for spousal support for a period of three years, retroactive for one year. She was also successful in obtaining a child support order but only on a prospective basis.
- [20] Overall, taking into account the primary matters in dispute, the importance of the issues, and weighing the mixed result, I find that the respondent was substantially successful in this family law case.

Should the court "otherwise order" costs in favour of the claimant?

- [21] The claimant submits that the court should depart from the usual rule in this case because of the conduct of the respondent in the proceedings. He points to her failure to produce documents related to the assets in Iran, her refusal to agree to vacate the restraining order before trial (alleging bad faith and making allegations for tactical advantage), and the fact that he had to bring many pre-trial applications which should not have been necessary.
- [22] The respondent submits that she did produce documents relating to the assets in Iran in accordance with prior court orders but points out that those documents were neither in her possession nor control. She says that her conduct in maintaining the restraining order was not inappropriate as it is not appropriate to go behind a court order. The fact that she consented at trial to having this vacated should be considered.
- [23] I have some sympathy for the claimant's concerns about the respondent's lack of cooperation before trial. There were numerous applications necessitated by the respondent's refusal to communicate and cooperate. This is not unusual, unfortunately, in family law proceedings, where people often react due to hurt and anger.

- [24] With respect to the respondent's document production, the fact is that she did produce numerous documents from Iran with translations. Although I expressed concern with the lack of evidence regarding the actual value of the assets in Iran, this had no bearing on the division of property and only some bearing on the determination of income.
- [25] That said, there is no basis for the claimant to complain about the respondent's conduct at trial. Many of the issues were resolved by consent. In contrast, the claimant's insistence on addressing issues of marginal relevance throughout the trial unduly prolonged the proceedings despite numerous directions from the court. I fully appreciate that the claimant was self-represented at trial, but that does not mean that his conduct of the proceedings should be ignored.
- [26] Overall, I am not persuaded that the usual rule for costs should not be followed in this case except in respect of pre-trial applications where the issue of costs was not determined. There is authority for the court to award a portion of a substantially successful party's costs: see MacLean at para. 49, where this principle is mentioned, and there are a number of cases cited therein.
- [27] Accordingly, the respondent is entitled to costs on the ordinary scale except for costs related to preparation and attendance at contested pre-trial applications where such costs were not dealt with.

Offer to settle

- [28] The claimant seeks double costs on the basis of an offer to settle he made on November 25, 2010. Given that I have determined he is not entitled to costs under Rule 16-1, such an order cannot be considered. However, Rule 11-1(5)(a) permits the court to deprive a party of any or all the costs to which he or she would otherwise be entitled in respect of all or some of the steps taken in the family law case after the date of the delivery of an offer to settle. Sub-rule (6) directs the court to 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; and
 - (d) any other factor the court considers appropriate.
- [29] In *Hartshorne v. Hartshorne*, 2011 BCCA 29, the Court referred to the principles summarized by Mr. Justice Frankel in para. 74 of *Giles v. Westminster Savings and Credit Union*, 2010 BCCA 282, (at para. 25 of *Hartshorne*):

The purposes for which costs rules exist must be kept in mind in determining whether appellate intervention is warranted. In addition to indemnifying a successful litigant, those purposes have been described as follows by this Court:

- "[D]eterring frivolous actions or defences . . .
- "[T]o encourage conduct that reduces the duration and expense of litigation and to discourage conduct that has the opposite effect" . . .
- "[E]ncouraging litigants to settle whenever possible, thus freeing up judicial resources for other cases . . .
- "[T]o have a winnowing function in the litigation process" by "requir[ing] litigants to make a careful assessment of the strength or lack thereof of their cases at the commencement and throughout the course of the litigation", and by "discourag[ing] the continuance of doubtful cases or defences" . . .

[Citations omitted]

- [30] The court in Hartshorne emphasized at para. 25 that the costs rules are in place "to encourage the early settlement of disputes by rewarding the party who makes a reasonable settlement offer and penalizing the party who declines to accept such an offer".
- [31] The first factor in Rule 11-1(6)(a), whether the offer to settle was one that ought reasonably to have been accepted, is not determined by reference to the court's decision. Rather, the court must determine whether, at the time the offer was open for acceptance, it would have been reasonable for it to have been accepted. 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: Hartshorne at para. 27.
- [32] In this case, the claimant's offer to settle was in response to a prior offer to settle made by the respondent on November 15, 2010, also made under the rules. Both offers address the issues of joint custody and guardianship and the terms of access depending on where the claimant was living. The offers were not that far apart on some issues - in fact, they agreed on joint custody and guardianship - but the claimant's offer contained much more detail. Of particular importance was the provision in the claimant's offer for a 2/2/5/5 parenting schedule once he returned to the Lower Mainland.
- [33] Looking at the matter from the point of view of the respondent at the time, many of the items ought reasonably to have been accepted, but given that the offer was comprehensive on these issues, it is difficult for the court to conclude that the entire offer ought reasonably to be accepted. The 2/2/5/5 arrangement was an important issue to the parties. There was considerable uncertainty about where the claimant was going to be working and living, and this was an important factor to consider in agreeing to a comprehensive shared-parenting agreement. Moreover, the offer did not address all the issues in dispute, so acceptance

would not have negated the necessity to go to trial.

- [34] The second factor to consider is the relationship between the terms of the offer and the judgment of the court. Decisions of this court have held that in family law cases involving many issues, the offer and the result should be compared on a global basis: see, for example, Gain at para. 69. This is difficult to do in a case such as this where the offer to settle only addressed one set of issues and the judgment addressed many more. However, with respect to the child issues, many of the matters contained in the claimant's offer were not contested at trial, such as joint custody and guardianship, vacating the restraining order, a mutual non-removal clause, and counsel holding the child's passport.
- [35] With respect to the claimant's proposed 2/2/5/5 schedule, I determined that the recommendation for such a schedule would only work well if the parties lived in reasonable proximity to one another. At trial, the claimant had moved back to the Lower Mainland but he had still not relocated from his residence in Pitt Meadows so the matter remained uncertain, and a 2/2/5/5 schedule was not ordered.
- [36] On these matters, the claimant did not obtain the same or more in the judgment.
- [37] With respect to the relative financial circumstances of the parties, the claimant says that he is struggling financially, primarily due to debts incurred as a result of this litigation. I do appreciate how difficult the litigation process is, but this is something that affects all litigants. Given that the respondent received little in the division of assets and was awarded spousal support, I do not see this factor, absent other factors, as sufficient to justify an order depriving the respondent of costs.
- [38] With respect to any other factors the court considers appropriate, it is certainly the case that it would have been much better if the respondent had consented earlier to the matters she did not dispute at trial, but the fact is that little time and resources were spent at the trial on the matters set out in the claimant's offer. As I indicated earlier, most of the trial time was spent on the financial issues, and much of that was dealing with numerous irrelevant matters pursued quite relentlessly by the claimant both in evidence and argument. While I do not fault him for not understanding the legal process, his failure to take direction from the court when asked to do so many times is largely what caused this trial to take 11 days.
- [39] It is my view that depriving the respondent of costs in the circumstances here would not serve the important deterrent function of these costs rules, and for all of these reasons, I am not satisfied that the respondent should be deprived of the costs to which I have determined she is entitled.

Order

- [40] The respondent is entitled to costs on the ordinary scale except for costs related to preparation and attendance at contested pre-trial applications where no costs orders were made.

"Fisher J."

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