

CANADA / JUDGMENT

T.A.O. v. D.J.M.

2022 BCSC 636

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Supreme Court of British Columbia

DECIDED

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2022 BCSC 636 T.A.O. v. D.J.M.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

T.A.O. v. D.J.M.,

2022 BCSC 636

Date: 20220425

Docket: E56593

Registry: New Westminster

Between:

T.A.O.

Claimant

And

D.J.M.

Respondent

Before: The Honourable Justice Shergill

Reasons for Judgment - Costs

The Claimant, appearing on her own behalf:

T.A.O.

The Respondent, appearing on his own behalf:

D.J.M.

Written Submissions from Claimant:

September 27, 2021 and

January 24, 2022

Written Submissions from Respondent:

September 28, 2021 and

January 24, 2022

Place and Date of Hearing:

New Westminster, B.C.

November 24, 2021

Place and Date of Judgment:

New Westminster, B.C.

April 25, 2022

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I. Overview

- [1] Following a trial of this action, I issued Reasons for Judgment on August 27, 2021, indexed at 2021 BCSC 1704 ("Trial Reasons"). I advised the parties of my preliminary view that the respondent was entitled to his costs of this proceeding, as he had achieved substantial success. However, I invited the parties to provide written submissions on costs in the event they wished to seek a different costs award. Submissions were received from both parties in September 2021 and January 2022.
- [2] The claimant mother asks for an order that each party bear its own costs. Alternatively, she seeks a reduced costs award against her on various grounds, including financial impecuniosity.
- [3] The respondent father asks for an award of double costs, based on an offer to settle made a few days before the commencement of the trial. Alternatively, he seeks an award of special costs due to the claimant's conduct during the litigation.

II. Issues

- [4] The issues raised in this costs hearing are as follows:
 - a) Did the respondent achieve substantial success?
 - b) Should the respondent be entitled to double costs after the date of the last offer?
 - c) Alternatively, should the respondent be awarded special costs due to the conduct of the claimant?
 - d) Should the respondent be deprived of some or all of his costs?
- [5] I now turn to an analysis of the issues.

III. Substantial Success

- [6] Rule 16-1(7) of the Supreme Court Family Rules, B.C. Reg. 169/2009 [Rules], provides that, subject to Rule 16-1(9), costs of a family law case must be awarded to the successful party unless the court otherwise orders.
- [7] Costs in family matters are normally assessed on the same principles as those in civil matters, i.e. they follow the result. However, as there are often multiple issues in family law cases on which success may be divided between the parties, in the absence of special circumstances, costs in family proceedings will favour the party who has achieved substantial success: *Barnard v. Barnard*, 2017 BCSC 2162 at para. 25.
- [8] Substantial success occurs when the level of one party's success is 75% or better: *Barnard* at para. 26.

- [9] In *Fotheringham v. Fotheringham*, 2001 BCSC 1321 at para. 46, Justice Bouck articulated the following four-step inquiry for determining whether substantial success has been achieved for the purposes of determining a costs award:
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.
- [10] The *Fotheringham* approach was endorsed by the Court of Appeal in *Marquez v. Zapiola*, 2014 BCCA 35 at para. 20.
- [11] The primary issues requiring resolution in this trial related to: allocation of parental responsibilities in relation to N.; allocation of parenting time in relation to N.; and whether the father should be declared a vexatious litigant. Although neither party got what they asked for vis-à-vis the child (i.e. primary care and decision-making authority), there is no serious dispute that the respondent was substantially successful in all three of these issues.
- [12] The matters which were central to the determination of the main issues, and which took up the most amount of trial time, related to the mother's allegations that the father had sexually touched N. (the parties' biological daughter) and S. (the claimant's daughter from a previous relationship). The allegations were serious and of profound importance to the parties. I found them to be unfounded: Trial Reasons at para. 304. In arriving at this conclusion, I preferred the evidence of the respondent, and found the claimant to be an unreliable witness and lacking in credibility: Trial Reasons, paras. 64-77.
- [13] A subsidiary issue to the sexual touching allegations, was the assertion by both parties that the other parent was unfit because he/she: had perpetrated family violence against the other party; was prone to angry outbursts; and was incapable of managing the child's healthcare needs. I largely found in favour of the father on this issue. Though some of the family violence allegations were substantiated against each parent, I found that they did not impair either party's ability to care for the child or meet her needs: Trial Reasons, paras. 179-184, 306-315, and 324-328. I concluded that it was in the best interests of N. to have both her parents actively involved in her life, and ordered shared parental responsibilities of the child, and an equal shared parenting regime.

- [14] While I did not grant the father primary care and primary decision-making authority, or supervision of the mother's parenting time, the decision was far from being a wash. Supervision of the father's parenting time was removed, and a number of conduct orders were made against the mother, to reflect the court's concerns about her conduct. I also dismissed the mother's application that the father be declared a vexatious litigant.
- [15] Consequently, considering the matters in dispute, their weight and importance to the parties, and the global outcome, I find that the respondent was substantially successful overall. He is entitled to his costs pursuant to Rule 16-1(7).

IV. Double Costs

- [16] Rule 11-1(4) permits the court to consider an offer to settle when exercising the court's discretion in relation to costs.
- [17] Rules 11-1(5) and 11-1(6) stipulate:
- (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.
- (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.

- [18] The respondent relies on his offer made on January 9, 2021 (the "Offer") in support of a double costs award. The Offer addressed parenting issues, support, property division, and costs. It was set to expire on January 11, 2021, the first day of trial. The claimant did not accept the Offer. However, midway through the trial, the parties were able to come to an agreement, and settled the issues of child support, spousal support, family property, and family debt. Thus, the sole issues remaining for determination at trial related to parenting time and parental responsibilities.
- [19] In the Offer, the respondent offered equal parenting time and shared parental responsibilities. This was consistent with the position that he held prior to the trial, and also consistent with the outcome at trial. On that basis, the respondent argues that the Offer was reasonable and ought to have been accepted by the claimant thereby avoiding the necessity of a trial.
- [20] In *Hartshorne v. Hartshorne*, 2011 BCCA 29 at para. 27, the court provided guidance with respect to the factors that should be considered when determining the reasonableness of an offer to settle. These include: the timing of the offer; whether it had some relationship to the claim (as opposed to simply being a "nuisance offer"); whether it could easily be evaluated; and whether some rationale for the offer was provided.
- [21] In *J.L.H. v. P.J.H.*, 2017 BCSC 2192 at para. 20, the court held that consideration of whether an offer ought reasonably to have been accepted, is to be assessed at the time the offer is open for acceptance, without reference to the award ultimately made at trial.
- [22] In my view, the Offer was not one that ought reasonably to have been accepted. While offers made on the eve of trial can be considered reasonable, they require more than just a reiteration of the offering party's position taken prior to the trial. In this case, the respondent provided no rationale for the Offer, and no compromise from the position advanced prior to the trial. The claimant believed that the respondent had sexually abused her daughters. Even though I ultimately found these allegations to be unproven, it was not reasonable to expect the claimant to resile from her position seeking supervised parenting time and exclusive parental responsibilities, without providing her with some rationale for the offer. That rationale was missing in the Offer made by the respondent.
- [23] I conclude that a double costs award is not warranted.

V. Special Costs

- [24] The Rules specifically set out two scales of costs: Appendix B costs (Rule 16-1(1)) and special costs (Rule 16-1(2)).
- [25] Special costs are awarded to a litigant where the other party has engaged in reprehensible conduct. They are punitive in nature and encompass an element of deterrence: *Mayer v. Osborne Contracting Ltd.*, 2011 BCSC 914 at para. 8.

[26] Reprehensible conduct can range from "milder forms of misconduct deserving of reproof or rebuke" to "scandalous or outrageous conduct": *Garcia v. Crestbrook Forest Industries Ltd.* (1994), 9 B.C.L.R. (3d) 242, 1994 CanLII 2570 (B.C.C.A.) at para. 17. The principles articulated in *Garcia* have equal application in a family law context: *Tomic v. Tough*, 2013 BCCA 355 at para. 35.

[27] In *Garcia*, Justice Lambert explained what may constitute reprehensible conduct to justify an award of special costs:

[23] However, the fact that an action or an appeal "has little merit" is not in itself a reason for awarding special costs. ... Something more is required, such as improper allegations of fraud, or an improper motive for bringing the proceedings, or improper conduct of the proceedings themselves, before the conduct becomes sufficiently reprehensible to require an award of special costs.

...

[25] If the proceedings are taken, not in the reasonable expectation of a satisfactory outcome, but in order to impose the burden of the proceedings themselves on the opposing party in circumstances where one party is financially much stronger than the other, then the absence of merit, coupled with the improper motive, is in my opinion a combination which may well amount to reprehensible conduct sufficient to require an award of special costs.

[emphasis added]

[28] The "something more" or "exceptional circumstances" threshold for reprehensible conduct, was noted in *Carter v. Canada (Attorney General)*, 2015 SCC 5 at para. 137.

[29] In *Westsea Construction Ltd. v. 0759553 B.C. Ltd.*, 2013 BCSC 1352 at para. 73, Justice Gropper articulated the following principles for awarding special costs:

- a) the court must exercise restraint in awarding special costs;
- b) the party seeking special costs must demonstrate exceptional circumstances to justify a special costs order;
- c) simply because the legal concept of "reprehensibility" captures different kinds of misconduct does not mean that all forms of misconduct are encompassed by this term;
- d) reprehensibility will likely be found in circumstances where there is evidence of improper motive, abuse of the court's process, misleading the court and persistent breaches of the rules of professional conduct and the rules of court that prejudice the applicant;
- e) special costs can be ordered against parties and non-parties alike; and
- f) the successful litigant is entitled to costs in accordance with the general rule that costs follow the event. Special costs are not awarded to a successful party as a "bonus" or further compensation for that success.

[30] Special costs may be ordered where a party:

- a) pursues a meritless claim and is reckless with regard to the truth;
- b) makes improper allegations of fraud, conspiracy, fraudulent misrepresentation, or breach of fiduciary duty;
- c) displayed "reckless indifference" by not recognizing early on that its claim was manifestly deficient;
- d) made the resolution of an issue far more difficult than it should have been;
- e) brings proceedings to impose a financial burden on the opposing party;
- f) presents a case so weak that it is bound to fail, and continues to pursue its meritless claim after it is drawn to its attention that the claim is without merit;
- g) brings a proceeding for an improper motive;
- h) maintains unfounded allegations of fraud or dishonesty; and
- i) pursues claims frivolously or without foundation.

(See Garcia at 748; International Hi-Tech Industries Inc. v. FANUC Robotics Canada Ltd., 2007 BCSC 1724 at paras. 7-13; Webber v. Singh, 2005 BCSC 224 at para. 28; McLean v. Gonzalez-Calvo, 2007 BCSC 648 at paras. 26, 29; Buchan v. Moss Management Inc., 2008 BCSC 1286 at paras. 11-12; and Edwards v. Bell, 2004 BCSC 399 at paras. 12, 43-45.)

[31] Special costs may be awarded even when the successful party does not have to pay legal fees. This is because the purpose of the special costs award is to penalize rather than to compensate: Fullerton v. Matsqui (District) (1992), 74 B.C.L.R. (2d) 311 (C.A.) at paras. 23 and 29.

A. Claimant's Conduct

[32] In support of his allegations that the claimant's conduct was reprehensible, the respondent points to the following:

- a) trial findings related to the claimant's lack of credibility, propensity to lie under oath, and lack of forthrightness;
- b) trial findings that the allegations of sexual abuse were unfounded;
- c) the claimant's actions with respect to the children, such as improperly involving S. in the litigation, and allowing N. to be subjected to an invasive medical procedure; and
- d) inappropriate emails sent by claimant's counsel, alleging that the respondent stole the claimant's company and was a pedophile (the "Offending Emails").

- [33] Details regarding the Offending Emails are set out in my ruling on a contempt application brought by the respondent, which is indexed at 2021 BCSC 1724. I have placed no weight on the Offending Emails when determining if the claimant has acted reprehensibly. In my view, it would be unjust to consider the Offending Emails as part of the conduct of the claimant, since there is no evidence that the claimant instructed her counsel to use the language employed in the Offending Emails.
- [34] However, there were numerous trial findings that, when taken together, support the contention that the claimant acted reprehensibly during the litigation. For example, I found that:
- a) the claimant "exaggerated or fabricated much of the later allegations reported after the initial comment by N. to her" (Trial Reasons, para. 296);
 - b) the claimant coached N. to make disclosures to the parenting time supervisor (Trial Reasons, para. 300,);
 - c) the claimant improperly involved S. in the litigation and "tried to have her come to court to testify in this trial even after S. told the court that she no longer wished to continue with her testimony" (Trial Reasons, para. 326);
 - d) the claimant subjected N. to a highly invasive vaginal and anal exam when there was no reasonable basis to do so (Trial Reasons, paras. 212-213, 324, and 327);
 - e) the claimant advanced allegations of sexual abuse based on the "flimsiest of evidence" (Trial Reasons, para. 333); and
 - f) the claimant withheld important and relevant information from the court during an ex parte Protection Order hearing (Trial Reasons, para. 70).
- [35] In relation to point (f) above, I noted as follows in the Trial Reasons:
- [70] There was evidence that Ms. O. was less than forthright during the litigation process. For example, when she sought the ex parte Protection Order on March 21, 2019, she did not provide the court with material information that was known to her at the time. In my view, her decision to not share this knowledge with the judge was calculated. She consciously chose to withhold information that she felt would be harmful to her case. There is evidence that this pattern of behaviour continued through other parts of the litigation process.
- [36] The claimant submits that her conduct was not reprehensible. She argues that she always acted in good faith, and in what she genuinely believed to be the best interests of the child. As an example, she points to the fact that following separation, she initially agreed to equal parenting time, and it was only when the child made a disclosure to her mother and grandmother, that the claimant changed her position and sought supervised parenting time against the father. However, at Trial, I found that the claimant's changed position was motivated by her fear that the father would take the child from her, rather than a genuine desire to ensure the safety of the child: Trial Reasons, paras. 292-293.

B. Respondent's Conduct

- [37] The claimant asserts that even if she was involved in litigation misconduct, the respondent should not be awarded special costs because he also acted reprehensibly and does not arrive before the court with "clean hands". In support, she points to the following: his failure to pay child support or spousal support for two and a half years; his failure to provide full disclosure necessitating multiple and expensive court applications; and the respondent taking actions which substantially increased the debts of a family asset, thereby "probably" making it worthless.
- [38] There is ample authority for the proposition that the court may decline to order special costs, if the cost applicant does not come to court with "clean hands", or is also guilty of reprehensible conduct: see *Beavan v. Small*, 2019 BCSC 278 at paras. 46-51; and *Bassett v. Magee*, 2018 BCSC 2322 at paras. 144-145. However, the evidence in this case falls far short of establishing reprehensible or other improper conduct on the part of the respondent.
- [39] I did not make any adverse findings in the Trial Reasons against the respondent in relation to child support, spousal support, financial disclosure, or family debts. The parties settled these issues midway through the trial, and no evidence was elicited in relation to them.
- [40] The allegation that the respondent's behaviour necessitated the claimant filing multiple court applications, was also raised at Trial. In rejecting the application to have the respondent declared a vexatious litigant, I stated the following in the Trial Reasons:
- [354] During court proceedings, Ms. O. and her counsel suggested that Mr. M. had commenced somewhere in the neighbourhood of 30 court applications. There is simply no evidence to support such an assertion. Between the filing of the NOFC in November 2018 and the start of the trial, the parties filed approximately 18 notices of application between them, roughly amounting to nine for each side. Substantive orders were made at 16 chambers hearings, two judicial case conferences, two trial management conferences, and one judicial management conference.
- [355] There is no evidence to support the contention that Mr. M.'s applications were vexatious or that he was otherwise involved in a misuse of the court process. The applications he filed were reasonable. While some of them may have had little chance of success, they were far from trivial or vexatious. More often than not, they were filed in response to a position taken by Ms. O. which the respondent felt was unreasonable, or to move the matter along.
- [356] Contrary to Ms. O.'s assertions, she is not the innocent victim in the sprawling litigation that has consumed the parties for almost three years, but rather an equal participant...
- [41] Thus, there is no evidentiary basis to conclude that the respondent has come to the court without "clean hands" or acted reprehensibly in the litigation.

C. Analysis

- [42] Special costs are awarded as a punitive measure "to deter litigants from engaging in reprehensible conduct in the frivolous and unmeritorious prosecution or defence of claims": *Hundal v. Border Carrier Ltd.*, 2012 BCSC 2196 at para. 7.
- [43] The claimant advanced serious unfounded allegations against the respondent that he had sexually molested his daughter and step-daughter. The allegations had a devastating impact on his relationship with his daughter, and were ultimately found to be wholly without merit. They were based on the "flimsiest of evidence", and were buttressed by further disclosures that were exaggerated or fabricated by the claimant. To advance her case, the claimant coached the younger child, improperly tried to involve the older child in the litigation, subjected the younger child to an invasive medical procedure, and withheld important information during an *ex parte* proceeding. The claimant's actions were reprehensible and were not motivated by the best interests of the child.
- [44] This conduct of the claimant is worthy of rebuke, and warrants an award for special costs.
1. Elimination or Reduction of costs award
- [45] I now turn to the claimant's argument that regardless of the outcome at trial or her conduct, she should not be required to pay costs, or alternatively, that she should pay a reduced costs award.
- [46] When considering whether to depart from the "usual rule", the court has wide discretion, though that discretion must be exercised judiciously and in accordance with the Rules: *Gold v. Gold* (1993), 82 B.C.L.R. (2d) 180, 1993 CanLII 1248 (B.C.C.A.) at para. 20.
- [47] Where the court finds it appropriate to depart from the ordinary rule, it may order a portion of a substantially successful party's costs, or order costs in regards to a proceeding or an issue: see *H. (J.E.) v. H (P.L.)*, 2014 BCSC 125; and *Dhaliwal v. Beloud*, [1996] B.C.W.L.D. 1976, 1996 CanLII 510 (B.C.C.A.).
- [48] An unsuccessful party who seeks to deviate from the usual practice that costs be awarded to the party that has achieved substantial success, bears the burden of establishing that the court should exercise its discretion for a different costs award: *Lilley v. Lilley*, [1994] B.C.J. No. 74, 1994 CanLII 2743 (B.C.S.C.) at para. 17.
- [49] Factors that the court may consider in exercising its discretion, include "hardship, earning capacity, the purpose of a particular award, the conduct of the parties in the litigation, and the importance of not upsetting the balance achieved by the award itself": *Gold* at para. 20.

- [50] The respondent has prepared a draft Bill of Costs, ranging from approximately \$102,000 to \$107,000. This is comprised of approximately \$65,000 to \$70,000 for tariff items at a scale of ordinary difficulty or more than ordinary difficulty; and approximately \$35,000 for costs of parenting time supervision and the expert testimony and report of Dr. Elterman. The remaining amount claimed is for disbursements and taxes.
- [51] The claimant concedes that the respondent's Bill of Costs will exceed \$100,000. She submits that she will suffer financial hardship if she is required to pay anything close to this amount.
- [52] The claimant submits that she "was on welfare only a year ago" and is facing an insurmountable debt load with limited earning capacity. In support, she relies on her Form F8 Financial Statement filed November 5, 2020 (the "claimant's Financial Statement"), which indicates an income of \$24,000 and a debt of \$300,000. The claimant asserts that she has incurred further financial obligations since filing her Financial Statement - she had to borrow \$20,000 from an uncle, a further \$20,000 from a family friend, and owes her previous legal counsel \$25,000. As such, she estimates her current indebtedness to exceed \$400,000, with negligible assets and no source from which to borrow additional funds.
- [53] At Trial, I found the claimant to be a wholly unreliable witness, seriously lacking in credibility, and prone to exaggeration and hyperbole. Her assertions regarding financial matters did not withstand cross-examination, and were refuted by documents that revealed the opposite. Given my significant concerns regarding the claimant's credibility, I am not prepared to accept the claimant's assertions about her financial impecuniosity, without corroborating evidence. None was provided.
- [54] The claimant did not provide any documentation evidencing her earnings since the trial. Nor was this Court provided with any documentation to support the approximately \$318,000 in unsecured debts listed on her Financial Statement, of which approximately \$120,000 was purportedly borrowed from friends and relatives. No affidavits were provided from these persons to support the claimant's assertions regarding her indebtedness to them. Approximately \$200,000 is alleged to be debts owing to third parties, such as banks, credit card companies and the Canada Revenue Agency. No supporting documentation was provided from any of these entities.
- [55] To justify departing from the usual rule regarding costs, the financial hardship that will be experienced by the claimant has to be of a magnitude that is considered severe or extreme. The claimant has failed to meet the onus to establish that this is the case. As noted above, the claimant has not provided sufficient credible and reliable evidence to corroborate her submissions on costs.

- [56] In *K.A.M.R. v. W.H.G.*, 2014 BCSC 783, the claimant sought to deprive the respondent of part of his costs. The respondent's income was \$154,000; the claimant asserted her net income was \$8,400; the draft Bill of Costs was approximately \$15,000; and the costs ultimately awarded were \$20,762.77. In denying the claimant's request to deprive the respondent part of his costs on the grounds of hardship to the claimant, Justice Punnett provided the following useful summary of the jurisprudence:
- [16] As Madam Justice Martinson stated in *S.D.W. v. C.W.W.*, 2006 BCSC 162 at para. 29:
- [29] While financial hardship is one factor to consider, that factor is insufficient on its own to depart from the usual rule that costs follow the event: Nor is sympathy a sound basis for departing from the usual rules:
- [17] The fact that the substantially successful party has a greater income than the party liable for costs does not in itself dictate that the court should exercise its discretion and not award costs in the normal course. (Lilley at para. 25).
- [18] If the award of costs will cause hardship that is out of the ordinary or affects the payor's income earning capacity or has an unacceptable impact on the balance achieved by the award then costs may be denied to the substantially successful party. (See *S.D.W. v. C.W.W.*, 2006 BCSC 752 at para. 6).
- [19] In other words, the financial hardship must be significant enough that it invokes the court's discretion, not because of sympathy, but because it is of such magnitude that it would be significantly unfair when considered in the context of the successful party's right to recover costs. How "out of the ordinary" such financial hardship must be is a question of fact; however, the word "hardship" is telling, given it is defined in the Oxford English Dictionary as "[a] condition which presses unusually hard upon one who has to endure it; hardness of fate or circumstance; severe toil or suffering; extreme want or privation."
- [20] For example, in *Bird v. Kohl*, 2012 BCSC 1424, the claimant was unemployed and dependent upon his parents for shelter and owned no significant assets other than his interest in the former matrimonial home (which would likely to applied to partially satisfy the claimant's judgement against him), yet the court still awarded costs of \$18,856.54 against him, noting that he had the capacity to restore his former earning power although it would take several years to do so.
- [57] I am also not persuaded by the claimant's argument that the respondent should be disentitled to costs because he did not retain legal counsel.

[58] It is well established that a party who is not represented by counsel is still entitled to their costs of a proceeding, including consideration for special costs: see *McKnight v. Hutchison*, 2014 BCCA 472 at para. 39. In *Skidmore v. Blackmore* (1995), 2 B.C.L.R. (3d) 201, 1995 CanLII 1537 (B.C.C.A.), the issue before the court was whether a successful self-represented litigant may be awarded costs in excess of his or her disbursements. At para. 28, Justice Cumming noted:

the view that costs are awarded solely to indemnify the successful litigant for legal fees and disbursements incurred is now outdated. A review of R. 37, which deals with offers to settle, reveals that in certain circumstances a party may be entitled to costs, or double costs, or to no costs at all. One of the purposes of the costs provisions in R. 37 is to encourage conduct that reduces the duration and expense of litigation, and to discourage conduct that has the opposite effect. Thus, although it is true that costs are awarded to indemnify the successful litigant for legal fees and disbursements incurred, it is also true that costs are awarded to encourage or to deter certain types of conduct.

[59] As indicated elsewhere, I reject the claimant's assertion that the respondent displayed conduct during the litigation which should deprive him of a costs award. This is simply not proven on the evidence.

[60] The claimant also argues that requiring her to pay the costs award would upset the balance achieved at trial. Because the parties settled all the financial issues between them, the trial was restricted to addressing parenting matters. As such, it would be a misnomer to suggest that the balance achieved at trial would be upset by the costs award.

[61] However, looking more broadly at the overall financial circumstances of the parties, I note the following:

- a) Pursuant to the Order pronounced January 22, 2021 (the "Consent Order") the settlement of the financial issues between the parties resulted in the claimant owning all of the family shares in DEL (a business manufacturing tea products).
- b) In consideration of giving up his interest in DEL, the respondent received \$15,000, a dismissal of spousal support claims, and a dismissal of child support arrears which the parties agreed had been adequately addressed through the asset division.
- c) The respondent's income for child support purposes as agreed to by the parties in the Consent Order, is \$26,500. This is similar to the claimant's income of \$24,000 as set out in her Financial Statement.

- d) The respondent's unsecured debts as indicated on his Form F8 Financial Statement filed July 22, 2020 (the "respondent's Financial Statement") are approximately \$210,000. While they are less than the \$300,000 in debts asserted to by the claimant in her Financial Statement (or her current estimate of \$400,000), these claimed debts are still substantial. Further, I did not have the same concerns at trial about the credibility or reliability of the respondent's evidence as I did with the claimant's evidence.
- [62] Having regard to the evidence, I am not swayed that the costs award would shift the financial balance achieved between the parties. However, even if I accept that this would occur, I consider such impact to be temporary. By all accounts, the claimant is intelligent, hard-working, and motivated to succeed. The claimant has sole ownership of the most valuable asset owned by the parties during the relationship. As in *Bird*, I find that she has the capacity to restore her former earning power in the next few years even if she faces a financial setback due to her cost obligations to the respondent.
- [63] Further, the importance of not upsetting the financial balance between the parties must be considered alongside the other factors, such as the purpose of the costs award, and the conduct of the claimant. These all militate against reducing the costs award.

2. Conclusion

- [64] Having regard to the evidence as a whole, I conclude that the costs award against the claimant should not be eliminated or reduced.

VI. Fixing a Lump Sum Award

- [65] Although the respondent has asked me to assess the costs, I decline to do so. In my view, this is more appropriately done by the registrar. In *Gichuru* at para. 106, the Court of Appeal noted that although a judge has the discretion to determine the quantum of costs, this discretion should be exercised sparingly since the "court officer best placed to determine if the fees billed by a lawyer are objectively reasonable is usually the registrar."
- [66] Registrars routinely assess costs for matters that have gone to trial. Aside from being the trial judge, I have no special familiarity with this case such that it would be a better use of resources for me to assess costs rather than to have the Registrar, whose expertise it is to assess costs, deal with the matter.
- [67] As noted in *Kemp v. Vancouver Coastal Health Authority Ltd.*, 2016 BCSC 1541, at para. 51, the decision to fix costs is discretionary, and the discretion is to be used sparingly. The circumstances in this case do not warrant the exercise of my discretion to assess costs.

VII. Order

- [68] I therefore order as follows:

- 1) Pursuant to Rule 16-1(1)(b)(i) of the Supreme Court Family Rules, the claimant is ordered to pay the respondent's costs of the family law case, to be assessed as special costs.
- 2) This matter is referred to the registrar to assess the amount of costs payable in accordance with Rule 16-1(2).
- 3) The respondent shall have his costs of this application, assessed in accordance with Appendix B, at a scale of ordinary difficulty.

"Shergill J."

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