
CANADA / JUDGMENT

TC v. LA

2020 BCSC 2235

COURT

Supreme Court of British Columbia

DECIDED

1 December 2020

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2020 BCSC 2235 TC v. LA

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

TC v. LA,

2020 BCSC 2235

Date: 20201201

Docket: E-18165

Registry: Smithers

Between:

TC

Claimant

And

LA

Respondent

Before: The Honourable Mr Justice Crerar

(appearance via teleconference)

Oral Reasons for Judgment (Costs)

In Chambers

Counsel for the Claimant

appearing by teleconference:

G. Greene

Counsel for the Respondent

appearing by teleconference:

K. Simington

Date of Claimant's Written Submissions:

Date of Respondent's Written Submissions:

November 26, 2020

Smithers, B.C.

November 16, 2020

Smithers, B.C.

Place and Date of Judgment

via teleconference:

December 1, 2020

Smithers, B.C.

- [1] In this application, the respondent, whom I will refer to as the mother, seeks an order that the claimant, the father, pay costs of the proceedings and double costs for all steps in the proceedings after August 4, 2020, when a formal offer to settle was sent in letter form. The second ground of relief sought is that the costs payable by the father be paid out of the father's share of the net proceeds of the sale of the family house. Those funds are currently held in trust by the father's counsel.
- [2] As indicated, on August 4, 2020, 27 days before the start of the trial, counsel for the mother sent to the counsel for the father, a formal offer to settle under the Supreme Court Family Rules, rules 11-1(5) and (6).
- [3] The trial of this matter was heard over five days: August 31 to September 4, 2020. The reasons are indexed as 2020 BCSC 1313 (the "Trial Reasons").
- [4] On the second day of trial, the Court made a ruling as to whether the father could allege spousal misconduct against the mother to deprive her of support. These allegations were to have been advanced by calling the couple's teenage daughter to testify on her father's behalf against her mother.
- [5] The Court ruled that such evidence was inadmissible and that the daughter would not testify, at least with respect to that subject matter. These reasons are indexed at 2020 BCSC 1315 (the "Misconduct Reasons").

- [6] It was the father's primary defence at trial that the mother's conduct had disqualified her from spousal support.
- [7] After the Court dismissed this ground of evidence, the father accepted his obligation to pay spousal support. He maintained that the mother was entitled to a lower range of support than that suggested by the mother. At the end of the day, the Court ordered that the father pay the mother spousal support based on a two-tiered schedule of support. The Court ordered that the father pay the mother spousal support of some \$189,000 over 14 years.
- [8] In addition to spousal support, there were only two other relatively minor issues remaining to be decided.
- [9] The first was the mother's interest in a recreational property that was partly owned by other members of the father's family. The second was whether the father's RCMP disability pension would be divided equally pursuant to Part 6 of the Family Law Act, SBC 2011, c 25, or whether that pension was personally compensable, to the father alone.
- [10] The mother was successful on both of these matters at trial. The Court wholly agreed with the mother's position on the recreational property. With respect to the pension, the Court technically agreed with the father that the pension would not be considered as income per se, based on the case law. But at the end of the day, the Court agreed with the mother and found that the pension should be considered as funds available to the father, in fixing an appropriate amount of spousal support: also consistent with the case law.
- [11] Parenting time was not an issue at trial. In June, just before the previous trial date, the mother had made the unusual and, in the Court's estimation, generous concession to allow the father to have primary parenting time and responsibility with the two children. Under that agreement, the children would reside primarily with the father.
- [12] On this application, it is the position of the mother that the father ought to have accepted the August settlement offer. Had he accepted that offer, he would have been better off than he was in the final trial result. Under the offer to settle, the mother was willing to accept some \$160,000 as spousal support paid over 12 years. With respect to the recreational property and the pension, what the mother offered was exactly what was ordered after trial.
- [13] The father acknowledges that the mother was generally successful at trial with respect to spousal support and the recreational property.
- [14] With respect to the pension, the father argues that he was at least conceptually successful on the law in having that pension excluded from the strict calculation of income. Again, at the end of the day, the Court concluded that the pension was indirectly included, to the mother's credit, with respect to fixing the appropriate amount of spousal support.
- [15] The father also argues that costs should be on the ordinary scale, based on the concluding paragraph of the Trial Reasons:

Absent further submissions, and I do not encourage them, given the limited resources of the parties, she is entitled to costs of this litigation, on the ordinary scale.

- [16] Those words, of course, anticipated exactly this sort of application for double costs. It simply set out a default ruling to avoid a further appearance at Court had there been no such offer, or no offer superior to the trial result.
- [17] The father also argues that the argument with respect to spousal misconduct was a reasonable one to take. I will return to this argument in a moment.
- [18] Finally, the father argues that while the mother made concessions with respect to parenting time, that remained an issue at least until June. He accordingly argues that he was successful at that point on that contested issue, in that the mother ultimately gave the father primary parenting responsibilities.
- [19] The father, therefore, argues that the Court should find that there was divided success, with no costs awarded one way or the other. Alternatively, the father should receive costs to June 2020 and the mother should receive costs thereafter.
- [20] I turn to the legal basis for double costs. This application is brought under Rule 11-1 of the Supreme Court Family Rules. Rule 11-1(6) sets out the four factors the Court may consider in determining costs where an offer to settle has been made:
- (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.
- [21] I will consider together the first two factors: (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, and (b) the relationship between the terms of settlement offered and the final judgment of the Court.
- [22] Under each of these considerations, the father ought to have accepted the offer to settle. As indicated, the father would have been better off financially had he accepted the mother's offer to settle. He could have avoided the stress and cost of the trial had he accepted that offer to settle. The offer to settle was delivered in an easy-to-understand and transparent cover letter attaching DivorceMate calculations. The offer to settle was delivered 27 days before trial; the acceptance of that offer at that time would have avoided the significant build-up in time and money preparing for trial.

- [23] I turn to factor (c): the relative financial circumstances of the parties. The mother lives in an apartment above a store on the main street of Smithers. She is considerably in debt, not only with respect to legal fees but with respect to other debts, including loans advanced to her by family members. She is in a relatively low-paying job and her prospects for earning more money in the future are not favourable. The father, in contrast, lives in a house. The house is owned by his mother. The facts concerning that arrangement are uncertain, but it would appear that he can continue living in the greater comforts of this house. On the other hand, I am also conscious that he is responsible for the primary care of the children.
- [24] I turn to (d): any other factors the Court considers appropriate. Of course, these also speak to factors I have canvassed under factors (a) and (b). I concluded in the Trial Reasons at para 113 that this matter should never have gone to trial. This comment is even more pertinent given the revelation now that a reasonable offer to settle had been advanced a month before trial. Alternatively, the parties could have conducted a simple one-day summary trial focusing on the recreational property and the status of the pension, rather than consuming five days of court time, at their expense and that of the public.
- [25] The primary defence advanced by the father was, as stated, the spousal misconduct allegation against the mother. Early in the trial, Mr Greene said, "it is really my entire case." On the first day of trial, after hearing this proposition, the Court noted the express prohibitions on the evidence concerning spousal misconduct set out in both Family Law Act, s. 166, and the Divorce Act, RSC 1985, c 3 (2nd Supp) s.15.2, as well as the clear comments in the jurisprudence, including *Leskun v Leskun*, 2006 SCC 25. Nonetheless, the father persisted with this position. In the reasons issued on the second day of trial, the Court concluded and confirmed that the spousal misconduct evidence and argument could not be advanced.
- [26] In the course of the argument, the Court had noted that the cases did not seem to support the position of the father, especially in light of the express statutory prohibitions. In response to this initial skepticism, Mr Greene stated that he hoped that this present case would be "the case" that re-establishes spousal misconduct as a relevant consideration.
- [27] Mr Greene did not seek to advance a novel argument based upon developments in the case law or new statutes. Spousal misconduct has been advanced as an argument since time immemorial. The clear purpose of the clear prohibitions in the statutes and *Leskun* is to remove spousal misconduct as an argument and a subject of evidence in family law matters. To paraphrase *Leskun* at para 20, spousal misconduct is firmly and clearly "off the table as a relevant consideration."
- [28] The authorities relied upon by Mr Greene in support of spousal misconduct evidence were on a wholly different planet from the factual scenario before the Court at trial. As canvassed in the Misconduct Reasons, those cases involved instances of attempted murder, violence, and fraud. They were readily distinguishable and wholly incomparable to the rather mundane facts before the Court in this matter. As I noted at para 26 of the Misconduct

Reasons, the spousal misconduct alleged against the mother, and tensions between the daughter and the mother as a result of the family break-up, were unremarkable. They were, rather, typical in a family law dispute such as the present.

- [29] The spousal misconduct argument should never have been pleaded; it should never have been advanced; it wasted the Court's time; it was not a legitimate argument or position to take. Further, the allegations of misconduct against the mother, and the prospect of the daughter testifying against the mother, no doubt increased the stress on all members of the family, including the children, and served as a form of emotional blackmail against the mother proceeding to trial.
- [30] In the circumstances, I grant the orders sought in paragraphs 1 and 2, namely, that the mother shall receive ordinary costs of the proceedings up to August 4, 2020, and double costs thereafter, and that all costs payments will be made directly from the father's share of the sale proceeds of the family house.
- [31] With respect to the costs of this application, I assess them as lump-sum costs at \$600, to be paid by the father to the mother. Once again, those funds will come out of the father's share of the house sale proceeds.
- [32] Anything arising from that, counsel?
- [33] MR GREENE: Not from me, My Lord.
- [34] MS SIMINGTON: Not from me, My Lord.
- [35] THE COURT: All right, thank you both.

"Crerar J"

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Prepared on 24 October 2026 · Esheria