
CANADA / JUDGMENT

Visser v. Visser

2020 BCSC 161

COURT

Supreme Court of British Columbia

DECIDED

11 February 2020

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2020 BCSC 161 Visser v. Visser

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Visser v. Visser,

2020 BCSC 161

Date: 20200211

Docket: E51363

Registry: New Westminster

Between:

Tara Davina Anne Visser

Also known as Taran Davina Byrne Visser

Claimant

And

Michael Jason Visser

Respondent

Before: The Honourable Madam Justice Shergill

Reasons for Judgment - Costs

Counsel for the Claimant:

D. Glass

Counsel for the Respondent:

M. Brandon

Written Submissions of the Claimant:

December 12, 2019

Written Submissions of the Respondent:

November 28, 2019

Place and Date of Judgment:

New Westminster, B.C.

February 11, 2020

Overview

- [1] Following a trial of this action, I issued reasons for judgment on October 30, 2019 indexed at Visser v. Visser, 2019 BCSC 1856 (the "Trial Reasons").
- [2] At para. 256 of the Trial Reasons I expressed my preliminary view that each party should bear their own costs. However, I invited the parties to make written submissions on costs if they wished to do so. I received written submissions from both parties.
- [3] Mr. Visser argues that he has achieved substantial success, and seeks fixed costs for a matter of ordinary difficulty in the amount of \$53,857. Ms. Byrne argues that each party should bear its own costs, as no party had substantial success. Alternatively, she submits that if I find the claimant was substantially successful, I should exercise my discretion to not award costs, or to award only a portion of the respondent's costs.

Legal Framework

- [4] There are two issues for my determination: first, whether Mr. Visser was substantially successful; and second, if I do find that Mr. Visser was the successful party, whether the circumstances of this case warrant a departure from Rule 16-1(7) of the Supreme Court Family Rules, B.C. Reg. 169/2009.
- [5] Rule 16-1(7) of the Supreme Court Family Rules states that, subject to subrule (9), costs of a family law case must be awarded to the successful party unless the court otherwise orders.
- [6] 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, costs in family proceedings will generally favour the party who has achieved substantial success: Barnard v. Barnard, 2017 BCSC 2162 at para. 25; Newham v. Newham (1993), 50 R.F.L. (3d) 49 (B.C.C.A.) at paras. 29-30.
- [7] Substantial success occurs when the level of one party's success is 75% or better: Barnard at para. 26; T.E.A. v. R.L.H.C., 2019 BCSC 1883 at para. 8.

[8] Substantial success is measured objectively. In *Marquez v. Zapiola*, 2014 BCCA 35 at para. 20, the Court accepted the analysis of Bouck J. in *Fotheringham v. Fotheringham*, 2001 BCSC 1321, wherein at para. 46 he applied a four step inquiry in determining whether substantial success has been achieved and costs should be awarded:

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.

[9] I turn now to the trial proceeding.

Substantial Success

[10] The primary issues at trial were:

- a) allocation of parenting time and who should have final decision making authority regarding the children;
- b) whether the children should continue to remain in their current daycare and after school care arrangements;
- c) how the family assets and debts should be divided;
- d) how much child support is payable and whether income should be imputed to either party;
- e) whether there should be a retroactive adjustment to child support;
- f) the manner in which s. 7 expenses should be divided; and
- g) the amount and duration of spousal support.

[11] There is no dispute that the first three issues (parenting time, final decision making authority, and daycare) were the most important issues to the parties. They took up the majority of trial time and involved a number of witnesses. Mr. Visser was successful on all of these issues. With respect to matters involving the division of family assets and debts, child support, and s. 7 expenses, the parties' success was divided such that no party had substantial success. Ms. Byrne had success on the issue of spousal support, and in having income imputed to Mr. Visser (though at an amount lesser than what she was seeking).

[12] Having regard to the matters in dispute, their weight and importance to the parties, and the global outcome, I find that Mr. Visser was substantially successful at trial.

Should A Costs Award be Made?

- [13] Having found that Mr. Visser substantially succeeded at trial, I turn to a consideration of whether there are reasons to "otherwise order" that each side should bear their own costs.
- [14] When considering whether to depart from the "usual rule" of awarding costs to the successful party, the court has wide discretion, though that discretion must be exercised judiciously: *Gold v. Gold*, [1993] B.C.W.L.D. 2314 (C.A.) at para. 20.
- [15] In determining whether a party should be deprived of its costs, the court should consider the following factors: hardship; earning capacity of both parties; the purpose of the award; the conduct of the parties in the litigation; and the importance of not upsetting the balance achieved by the trial award itself (*Gold* at para. 20).
- [16] 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 at para. 108; and *Dhaliwal v. Beloud*, [1996] B.C.W.L.D. 1976 (C.A.) at para. 34.
- [17] Hardship may be considered in light of the respective earning capacity of the parties: *Lilley v. Lilley*, [1994] B.C.W.L.D. 398 (S.C.) at para. 25.
- [18] The parties have four children in a shared parenting arrangement. They are both largely debt free. At trial, I found the claimant's projected income for 2019 to be \$34,000. The respondent was determined to have an income of \$80,000 for the same year (Trial Reasons at paras. 180 and 186). The costs award sought by the respondent represents approximately 1.5 years' of the claimant's projected gross annual income.
- [19] The claimant argues that an award of costs would cause significant hardship to her, and would upset the balance achieved at trial. The respondent disputes Ms. Byrne's claim for hardship, arguing that her percentage of net disposable income is higher than his, and that the claimant left the marriage with "more asset wealth than did Mr. Visser".
- [20] As a result of the Reasons, the claimant was awarded an exclusion of \$21,384 in RRSPs. This relatively modest figure represents the additional "asset wealth" of Ms. Byrne as argued by Mr. Visser. It is less than half of the costs award that Mr. Visser seeks.
- [21] I note also that the \$15,000 lump sum spousal support payment awarded to the claimant in the Trial Reasons does not erase my concern that the claimant would potentially face hardship if she is ordered to pay costs in the amount sought by Mr. Visser. The figure was modest, and almost completely depleted after adjustments for overpayments of child support, daycare costs, and a compensation payment for household contents.

- [22] While the parties share identical net disposable incomes as a result of the Trial Reasons, this is only because \$1,053 of the claimant's monthly net disposable income of \$4,651 consists of child support payments paid by the respondent. As child support is the right of the child, and child support payments are not intended to be used to pay the costs of litigation, I have omitted the monthly child support payments when considering the income available to the claimant to pay a costs award.
- [23] Turning to the conduct of the parties, the claimant was unable to point to any conduct of the respondent which should result in depriving him of his costs. In contrast, the claimant's conduct in the litigation favours making a costs award to Mr. Visser, even despite Ms. Byrne's financial hardship.
- [24] One of the purposes of the costs provisions in the Rules is to encourage conduct that reduces the duration and expense of litigation, and to discourage conduct that has the opposite effect. Thus, in addition to indemnifying the successful litigant for legal fees and disbursements incurred, costs are awarded to encourage or deter certain types of conduct: *Skidmore v. Blackmore* (1995), 2 B.C.L.R. (3d) 201 (C.A.) at 208.
- [25] In pursuit of her claims relating to parenting matters, Ms. Byrne and her witnesses made numerous disturbing allegations against Mr. Visser, none of which were proven at trial. These included accusations of violence against the children and Ms. Byrne. A great deal of court time was spent in addressing these allegations. What was originally set as an eight day trial, required 12 days to complete. Much of this additional time was directly due to the claimant's numerous and unfounded allegations against Mr. Visser. Ms. Byrne's attempts to diminish Mr. Visser in the eyes of the court extended to pre-trial motions. For example, despite knowing that Mr. Visser had not been diagnosed with mental health or cognitive issues, Ms. Byrne swore a misleading affidavit in these proceedings (Trial Reasons at para. 9). This type of conduct needs to be discouraged and militates in favour of making a costs award.
- [26] I turn finally to whether a settlement offer made by the respondent in May 2018 should have bearing on a costs award in this case.
- [27] Rule 11-1(4) of the Supreme Court Family Rules permits the court to consider an offer to settle when exercising the court's discretion in relation to costs. However, the offer to settle sent by the respondent did not contain the language from Rule 11-1(1)(c)(iii), and thus does not fall within the definition of an "offer to settle" in accordance with Rule 11-1.
- [28] There are further reasons for giving little weight to the respondent's offer to settle. Rule 11-1(6) stipulates various factors that the court may have regard to when considering the impact of an offer to settle on the question of costs. These include whether the offer is one that ought reasonably to have been accepted, and the relationship between the terms of settlement offered and the final judgment of the court. The settlement offer made by the respondent did not include any provisions for spousal support or exclusions of the claimant's RRSPs. These were issues of importance to the claimant, and she was ultimately

successful on them. Thus, I find that the claimant's decision to reject the offer was not unreasonable.

Conclusion

- [29] Bearing in mind the claimant's conduct in the litigation, the unfounded allegations of abuse, and the purpose for a costs award, there are insufficient grounds to fully deprive the respondent of his costs.
- [30] However, I am persuaded that there is sound reason to warrant departure from the ordinary rule such that Mr. Visser should not be awarded his full costs of the litigation. There is a marked differential between the parties' earning capacities. This differential will continue as the claimant re-establishes herself in the workforce. In my view, the claimant will suffer significant financial hardship if she is required to pay costs based on the usual rule. An award in the magnitude sought by the respondent will also upset the balance achieved at trial.
- [31] The claimant asks that I make a costs award that reflects the circumstances of the parties, rather than conducting a precise accounting of each parties' success at trial. She relies on T.E.A., where at para. 24, I reduced the successful party's costs by 40% due in part to the marked differential between the parties' earning capacities, and the conduct of the claimant. Ms. Byrne's conduct is not as egregious as that of the claimant in T.E.A. Ms. Byrne also has lesser financial means than the claimant in T.E.A. On the other hand, the earning differential between the parties in T.E.A. was significantly greater than it is in the case at bar.

Costs Award

- [32] Having regard to all of the circumstances of this case, and the applicable authorities and Rules, I award Mr. Visser 50% of his costs of the proceeding at scale B.
- [33] Counsel for Mr. Visser has asked me to fix costs at \$53,857.47. This figure includes \$5,065.81 in disbursements. Ms. Byrne disputes the accuracy of the Bill of Costs, and submits that some of the disbursements claimed under Part E of the Bill of Costs are not supported by the evidence, while others are unreasonable. However, she has not indicated which specific disbursements she disputes. It is evident that a further hearing would be required before me in order to address her concerns.
- [34] The decision to fix costs is discretionary. The discretion is to be used sparingly as the registrar is best placed to conduct an assessment: *Gichuru v. Smith*, 2014 BCCA 414 at para. 154; and *Kemp v. Vancouver Coastal Health Authority Ltd.*, 2016 BCSC 1541 at para. 51.
- [35] 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 than to have the Registrar, whose expertise it is to assess costs, deal with the matter.

[36] As such, I decline to exercise my discretion to fix costs of the proceeding. In the event that the parties are unable to agree to an amount for the costs award, this matter is remitted to the Registrar to assess costs, subject of course to the 50% discount as per paragraph 32 above.

"Shergill J."

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