
CANADA / JUDGMENT

Wallace v. Pichichero

2021 BCSC 2347

COURT

Supreme Court of British Columbia

DECIDED

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2021 BCSC 2347 Wallace v. Pichichero

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Wallace v. Pichichero,

2021 BCSC 2347

Date: 20211201

Docket: E67316

Registry: Nanaimo

Between:

Judy Wallace

Claimant

And

Mark Pichichero

Respondent

Before: The Honourable Mr. Justice Branch

Supplementary Reasons for Judgment on Costs

Counsel for Claimant:

T. Vining

Counsel for Respondent:

E. Strain

Place and Date of Hearing:

Nanaimo, B.C.

Written Submissions

September 20, October 20, and November 3, 2021

Place and Date of Judgment:

Nanaimo, B.C.

December 1, 2021

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INTRODUCTION

- [1] This is my costs decision flowing from a family law judgment indexed as Wallace v. Pichichero, 2021 BCSC 1642 (the "Reasons"). I will not repeat the facts set out therein except as necessary, and I will use the same defined terms.
- [2] The claimant asserts that she achieved substantial success with respect to the various matters in dispute between the parties, and therefore is entitled to an award of costs in her favour. The claimant further submits that based upon the terms of two formal offers to settle that she made to the respondent on May 7, 2020, she is entitled to an award of double costs from the date of that offer.

- [3] The respondent takes the position that there was an agreement between counsel that neither party would apply for costs against the other. In the alternative, the respondent submits that he at least achieved success on some of the substantive matters, such that there was divided success, and hence each party should bear their own costs. The respondent also seeks special costs against claimant's counsel for violating the alleged agreement.

FACTUAL BACKGROUND RELEVANT TO COSTS

- [4] On May 7, 2020, the claimant delivered two offers to settle to the respondent. The offers to settle remained open indefinitely and were never withdrawn.
- [5] The first of these offers (the "First Offer"), which the claimant relies upon to support her double costs request, provided as follows:
- a) The property of the parties would be equalized by dividing the \$675,113.87 held in claimant's counsel's Trust Account, with the claimant receiving \$553,531.78 and the respondent receiving \$121,582.09.
 - b) The claimant would transfer 50% of the value of her Charles Schwab IRA Investment Account, plus \$15,000, to the respondent via a tax-free spousal rollover. The additional \$15,000 was to represent approximately one-half of the value of the claimant's Penn Mutual Life Insurance Policy.
 - c) The respondent would transfer 50% of the value of his Charles Schwab IRA Investment Account to the claimant via a tax-free spousal rollover.
 - d) The claimant would pay spousal support to the respondent in the sum of \$1,500 per month, with such payments commencing on the first day of the month following pronouncement of the order and continuing on the first day of each and every month thereafter until further order of the Court.
 - e) The claimant would have leave to apply for a review of the spousal support order on the earlier of the date that there is a reduction/termination of the Long-Term Disability Benefits that she receives from Unum Group, or, July 9, 2025, whichever occurred first.
- [6] The Offer was not accepted.
- [7] The Reasons yielded a final order (the "Final Order") on the following terms:
- 1. Subject to Section 12 of the Divorce Act (Canada), the Claimant, Judy Kate Wallace, and the Respondent, Mark Lawrence Pichichero, who were married at Bexar County, Texas, USA on December 27, 1987, are divorced from each other, the divorce to take effect on the 31st day after the date hereof.

2. The Claimant will receive the sum of \$555,167.85 and the Respondent will receive the sum of \$121,423.42 from the \$676,591.27, which is held in trust by the Claimant's counsel. Any interest monies that have accumulated on the funds held in trust by the Claimant's counsel beyond the \$676,591.27 balance will be equally divided between the Claimant and the Respondent.
3. The foregoing division of the funds held in trust by the Claimant's counsel is completed in full satisfaction of the following:
 - a. A payment by the Respondent to the Claimant in the sum of \$102,693.84 to equalize the real estate holdings of the parties, the bank accounts of the parties, the vehicles of the parties, the safety deposit boxes of the parties, the chattel items of the parties, and, the income tax debt of the Claimant associated with her disposition of the property located at 7684 Tozer Road, Fanny Bay, British Columbia;
 - b. A payment by the Respondent to the Claimant in the sum of \$18,775.00 as occupational rent for his use of the property located at 7684 Tozer Road, Fanny Bay, British Columbia during the period of December 2012 to August 2017; and
 - c. A payment by the Claimant to the Respondent in the sum of \$14,596.62 to reimburse the Respondent for funds that the Claimant previously received from the funds held in trust at the time of the sale of the property located at Lot 5 Oak Hills, Bandera, Texas.
4. Subject to paragraph 7 of this order, the Claimant will transfer to the Respondent via a tax-free spousal rollover 50% of the value of the Charles Schwab IRA Investment Account, which is held in her name.
5. Subject to paragraph 7 of this order, the Respondent will transfer to the Claimant via a tax-free spousal rollover 50% of the value of the Charles Schwab IRA Investment Account, which is held in his name.
6. The Claimant and the Respondent will each have leave to apply to Court for further directions if the foregoing equalization transfers of their respective Charles Schwab IRA Investment Accounts are refused by the relevant USA authorities.
7. The cash surrender values of the Claimant's Penn Mutual Life Insurance Policy and the Respondent's BMO Life Insurance Policy will be equalized between the parties with this equalization to be achieved by including their respective values in the calculated amounts to be equalized via the tax-free spousal rollovers of the Charles Schwab IRA Investment Accounts of the parties.
8. Within one month of the date of this order, the Respondent will provide the Claimant with copies of all documents in relation to his BMO Life Insurance Policy for the purposes of calculating the foregoing equalization of the life insurance policies of the parties.

9. If the Respondent fails to provide the Claimant with copies of the foregoing documents respecting his BMO Life Insurance Policy within one month, the Claimant will have leave to apply for an additional remedy respecting the Respondent's non-disclosure.
10. Subject to the terms of this order, the Claimant will retain for her own use absolutely, all assets currently held in her name and/or possession, and all claims that the Respondent has or may have to the same are hereby dismissed.
11. Subject to the terms of this order, the Respondent will retain for his own use absolutely, all assets currently held in his name and/or possession, and all claims that the Claimant has or may have to the same are hereby dismissed.
12. Subject to the terms of this order, the Claimant will be solely liable for all debts held in her name and will indemnify and save the Respondent harmless from any liability associated with the same.
13. Subject to the terms of this order, the Respondent will be solely liable for all debts held in his name and will indemnify and save the Claimant harmless from any liability associated with the same.
14. The Claimant's claim as against the Respondent for the payment of spousal support is hereby adjourned generally.
15. The Respondent's claim as against the Claimant for the payment of spousal support on a compensatory basis is hereby dismissed.
16. The Respondent's claim as against the Claimant for the payment of lump sum spousal support is hereby dismissed.
17. The Claimant will pay spousal support to the Respondent based upon a non-compensatory basis in the sum of \$1,300.00 per month with these payments to commence on December 1, 2012 and continue on the 1st day of each and every month thereafter until further order of the Court.
18. The Claimant will have leave to apply for a review of the foregoing spousal support order without the need to provide proof of a material change in circumstances when the payments that she receives from the Unum Insurance Group cease.
- [8] On September 9, 2021, counsel for the claimant, Trent Vining, called the respondent's firm Strain & Co. and spoke with the paralegal Debby Baker. It is alleged that Mr. Vining advised in that call that he did not have instructions from his client to seek costs.

- [9] On September 10, 2021, Mr. Vining called Strain & Co. again. is the respondent alleges that he spoke again with Ms. Baker and proposed releasing funds in his Trust Account prior to the Final Order being entered, subject to a \$50,000 holdback to ensure the claimant followed through with certain required transfers. At the time, Mr. Vining indicated that he had been working on this file for a decade, was owed approximately \$250,000, and that he wanted the matter resolved.
- [10] Based on Mr. Vining's statements, Ms. Strain says she provided advice to the respondent which resulted in him instructing Ms. Strain to sign the Order based on an agreement to leave \$70,000 from each party in the Trust Account.
- [11] It is the respondent's submission that an agreement was finalized September 13, 2021, when Ms. Strain sent a letter to Mr. Vining that outlined the terms of payout of the funds from the Trust Account. The letter states as follows:

I confirm our agreement as follows:

1. Subject to a holdback of \$70,000.00 from each of the parties' share of the funds, the funds that are held in the trust account of Trent AB Vining, will be released to the parties in accordance with the calculation contained in your letter of September 2, 2021.
2. Subject to a further agreement between the parties or order of the court, the holdback funds will be released to the parties upon the completion of the division of their respective IRA Investment Accounts as contemplated in paragraphs 4-7 of the August 20, 2021 order.
3. Each party shall provide the other (through counsel) with a copy of the document he/she have submitted to split the investments within 10 days of receipt of the entered Order.

If you agree to the above, we look forward to receipt of the funds this afternoon.

- [12] Finally, the respondent asserts that any award of costs against him would present a hardship, given his limited earning capacity and his degenerative disabilities.

LEGAL PRINCIPLES

A. Costs Generally

- [13] Supreme Court Family Rules, B.C. Reg. 169/2009 (the "Family Rules"), R. 16-1(7) states "[s]ubject to subrule (9), costs of a family law case must be awarded to the successful party unless the court otherwise orders."
- [14] In *Giles v. Westminster Savings and Credit Union*, 2010 BCCA 282, the Court of Appeal discussed the purpose of costs, stating as follows:
- [74] 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": *Houweling Nurseries Ltd. v. Fisons Western Corp.* (1988), 37 B.C.L.R. (2d) 2 at 25 (C.A.), leave ref'd, [1988] 1 S.C.R. ix;
- "[T]o encourage conduct that reduces the duration and expense of litigation and to discourage conduct that has the opposite effect": *Skidmore v. Blackmore* (1995), 2 B.C.L.R. (3d) 201 at para. 28 (C.A.);
- "[E]ncouraging litigants to settle whenever possible, thus freeing up judicial resources for other cases["]: *Bedwell v. McGill*, 2008 BCCA 526, 86 B.C.L.R. (4th) 343 at para. 33;
- "[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": *Catalyst Paper Corporation v. Companhia de Navegação Norsul*, 2009 BCCA 16, 88 B.C.L.R. (4th) 17 at para. 16.

[15] In *Jin v. Cheng*, 2019 BCSC 148, Justice Dardi summarized the principles governing the award of costs in family law proceedings as follows:

[18] It is well-settled that the term "successful" in Rule 16-1(7) means "substantially successful". In a family law case involving multiple issues and where there has been divided success, a flexible approach to the "substantial success" analysis is required: *Litt v. Gill*, 2016 BCCA 288 at para. 53. The appellate authorities direct that success is to be measured in broad terms and that the court should not finely parse issues: *Stearman v. Powers*, 2017 BCCA 165 at para. 65. In *Reid v. Reid*, 2017 BCCA 191, the Court of Appeal recently affirmed that in assessing whether a party has been substantially successful, the court has a "broad discretion to take into account myriad considerations".

[19] Substantial success, as defined in the authorities, is when the prevailing party succeeds on 75% or more on the matters in dispute. The trial judge is to measure substantial success in the litigation objectively by considering the disputed matters globally and comparing the results achieved with the submissions made at trial. The weight and importance of all the matters in dispute are to be taken into account together with the parties' corresponding relative success or failure. The 75% success threshold is intended to serve as a "rough and ready guide" and the Court is not required to evaluate the substantial success threshold with mathematical precision: *Gold v. Gold* (1993), 82 B.C.L.R. (2d) 180, 106 D.L.R. (4th) 452 (C.A.), leave to appeal ref'd [1993] S.C.C.A. No. 441 [Gold]; *Fotheringham v. Fotheringham*, 2001 BCSC 1321, leave to appeal ref'd 2002 BCCA 454 [Fotheringham]; *Marquez v. Zapiola*, 2014 BCCA 35 at paras. 15-16 [Marquez]; *D.R. v. E.P.R.*, 2016 BCSC 550 at para. 8, aff'd 2016 BCCA 517 [D.R.].

[20] In *Fotheringham* at para. 46, Mr. Justice Bouck endorsed a four-step inquiry in assessing whether a party in a family law case has achieved substantial success in the litigation:

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.

This articulation of the analytical framework survived the enactment of the new Family Rules: *Marquez* at paras. 15-16, 20.

- [21] A trial judge retains the discretion to determine whether there is a sound basis for displacing the usual costs award. Any discretionary exception to the usual costs rules must be made judicially: *Bailey v. Victory* (1995), 4 B.C.L.R. (3d) 389 at para. 13 (C.A.).
- [22] As summarized in *M.S. v. M.M.*, 2016 BCSC 470 at para. 16, the Court of Appeal, in *Gold* at para. 20, identified 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 as factors which a trial judge may consider in exercising his or her discretion. In *Gold*, the Court of Appeal underscored that the overall assessment of these animating factors in the context of any particular case is best left for determination by the trial judge.
- [16] Substantial success is not determined by tallying the number of issues and evaluating success on each issue, or by comparing dollar amounts. It is determined by evaluating success on the issues of substance. In *Cohen v. Cohen*, (1995), 15 R.F.L. (4th) 84 (B.C.C.A) the Court of Appeal stated:
- [4] There is something to respondent's counsel's argument that there was divided success, however, I disagree with his approach in reflecting that division in costs by counting up the number of issues raised by the appellant and making the costs directly proportional to the ratio of success on those issues. In my view, reapportionment was much the largest issue in the case and occupied most of the time. The appellant was successful in her claim for reapportionment. Many of the other issues were, as appellant's counsel submits, different approaches to achieve the same result. I would award the appellant 75% of her costs.

B. Offers to Settle

- [17] In terms of the effect of offers to settle on costs, R. 11-1(5) of the Family Rules provides that where an offer to settlement 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.

[18] Pursuant to R. 11-1(6) of the Family Rules, 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.

[19] In *H.K. v. W.K.*, 2018 BCSC 1447, the court elaborated on the foregoing considerations as follows:

[66] Whether an offer ought reasonably to have been accepted is not determined by reference to the award that was ultimately made at trial, but by considering whether, at the time the offer was open for acceptance, it would have been reasonable for it to have been accepted. The reasonableness is to be assessed by considering factors including the timing of the offer, whether it had some relationship to the claim as opposed to being a nuisance offer, whether it could be easily evaluated, and whether some rationale for the offer was provided: *Hartshorne* at para. 27.

[67] In *Hartshorne*, the court concluded that the offer ought reasonably to have been accepted and awarded double costs. In particular, the court determined that the offer was presented 12 days before the commencement of trial and was comprehensive. If accepted, the offer would have resolved all outstanding disputes between the parties, obviating the need for a 10-day trial. The court also concluded that the offer was sufficiently clear, and that accepting it would not have required the appellant to completely accept the respondent's reasoning in support of it.

- [68] In considering the relationship between the offer and the result at trial, the court should determine whether the "declining" party would have been financially better off, on a global basis, if they had accepted the offer as compared to going to trial: *Kopp v. Kopp*, 2011 BCSC 889 at para. 7. The court in *Kopp* also explained that precise alignment between an offer to settle and the final judgment is not required. The court said:
- [11] It is difficult, and in my view unwarranted, to approach the costs determination by forensic comparison of every offer and counter-offer with the ultimate outcome of the application, and to apply each factor in Rule 11-1(6) to each offer. I reject that approach. The costs issue should not be the tail that wags the dog.
- [69] In *Jukic v. Luta*, 2009 BCSC 365, the court expressed a similar view somewhat differently. It concluded that, in light of the multiple issues involved in a family proceeding, it would be "virtually impossible" to match an offer to settle with the orders made and that such a high standard was not required in order to be entitled to double costs.

C. Counsel Agreements

- [20] In terms of establishing the alleged counsel agreement on costs, "[t]he burden of proving consensus between the parties falls to the party seeking to prove the existence of the agreement, and the standard to be met is proof on a balance of probabilities": *Reid v. Reid*, 2011 BCSC 231 at para. 27.

D. Special Costs Against Counsel

- [21] A special costs order against counsel is an extraordinary measure and attracts "a particularly stringent threshold": *Walsh v. Muirhead*, 2020 BCCA 225 at para. 32. In *Walsh*, the court stated:
- [34] As such, in this province, a special costs award against a lawyer, whether grounded in Rule 14-1(33)(c) or the superior courts' inherent authority, requires a finding of "reprehensible" conduct that amounts to a "serious abuse of the judicial system by the lawyer, or dishonest or malicious misconduct on [their] part, that is deliberate" (*Jodoin* at para. 29). An order for the personal payment of special costs cannot be justified on a "mistake, error in judgment or even negligence" (*Nuttall* at para. 29). Instead, there must be a "marked and unacceptable departure from the standard of reasonable conduct expected of a player in the judicial system" (*Jodoin* at para. 27, quoted with approval in *Nuttall* at para. 28).
- [22] In *Quebec (Director of Criminal and Penal Prosecutions) v. Jodoin*, 2017 SCC 26, the court stated that the threshold is only met where there is "an unfounded, frivolous, dilatory or vexatious proceeding that denotes a serious abuse of the judicial system by the lawyer, or dishonest or malicious conduct on his or her part, that is deliberate": para. 29.

ANALYSIS

A. Substantial Success

- [23] The award of costs turns on the question of substantial success. I begin my analysis of same by reviewing the orders which issued at trial before returning to the more holistic approach required by the case law.
- [24] Order 1 granting the divorce was not contested.
- [25] Orders 2-13 relate primarily to property division. Reviewing the determination of the various contested property issues:
- a) the claimant was successful on the issue of the appropriate exchange rate on the U.S. bank accounts;
 - b) the claimant was successful at ensuring that the tax bill associated with the increase of value of the Home would be shared equally;
 - c) the claimant was successful at getting the respondent to compensate her for occupational rent, but at a moderated rate;
 - d) the claimant was successful in having the court adopt her proposed approach to the Charles Schwab IRA Investment Accounts;
 - e) the claimant was successful at getting an order in her favour regarding the treatment of the respondent's BMO Life Insurance Policy, but only on the basis of an alternative structure she proposed;
 - f) the claimant was not successful at including the Flying L. Ranch within the family assets; and
 - g) the claimant was not successful at claiming any portion of the increase in the value of the Home after the Groves Order.
- [26] Orders 14-17 address spousal support:
- a) the claimant was successful in having the court consider the payments to the respondent from the U.S. Department of Veterans Affairs as part of the spousal support determination;
 - b) the claimant was successful in having some attribution of income to the respondent to reflect potential rental income from the Home;
 - c) the claimant was successful in having the court adopt her proposed framework to address the fact that she resides in the U.S., and both parties receive U.S. income streams;
 - d) the claimant was successful in limiting spousal support to a figure close to the amount proposed by the claimant;

- e) the claimant was successful in securing a right to review the spousal support payable when her primary disability benefits come to an end;
- f) the claimant was successful at avoiding a lump sum spousal support award;
- g) the claimant voluntarily adjourned her own request for spousal support;
- h) the claimant was unsuccessful at avoiding a finding as to the respondent's entitlement to spousal support, although the entitlement was limited to a non-compensatory basis, and was described as "relative[ly] soft[]": Reasons at para. 112;
- i) the claimant was unsuccessful in securing a finding that the respondent was intentionally underemployed; and
- j) the claimant was unsuccessful at avoiding a retroactive spousal support award.

[27] As is clear from this review, determining substantial success is a challenge in this case, as there were many issues in dispute, and mixed results on those issues.

[28] In *Fotheringham v. Fotheringham*, 2001 BCSC 1321 at para. 46, Justice Bouck set out a four-step inquiry to assess whether a party achieved substantial success in family litigation.

[29] First, the court should focus on the "matters in dispute". This may be discerned by considering the relative success of the parties with regard to the issues before the court. Here the claimant was successful on approximately eleven of the sixteen contested issues at trial. Although substantial success is not determined based solely on a count of the results on the various issues, this does give a sense for the extent of the claimant's success.

[30] Second, the court should weigh the importance of the matters before it, with a focus on which party achieved greater success on the more important issues. In the present case, there were effectively two main issues: the division of property and spousal support. I agree that the claimant was largely successful on the property issues. The claimant notes that the respondent argued at trial that, of the \$676,478.21 in trust, the respondent should receive \$644,705.39 and the claimant only \$31,772.83. However, the final division was such that the claimant received the lion's share.

[31] Although my preliminary view expressed in the Reasons was that success appeared to be divided, I did not yet have the benefit of the specific mathematical calculation of the split of the trust funds that the various findings would yield. With the benefit of this broader view, it is clear that the claimant achieved substantial success on the property division issues.

[32] With regard to spousal support, it is my view that the claimant had greater success on the most complex and important sub-issues. That is, the claimant was successful at avoiding a finding that there was a compensatory basis for the respondent's entitlement, which took up a substantial portion of trial time. Conversely, the respondent secured a long-term award in his favour, but at a moderated amount, and subject to a right of review.

- [33] Third, Fotheringham provides that the court should conduct a "global determination" of the matters at issue. Viewed in isolation, there was divided success on the issue of spousal support. Viewed holistically alongside the property findings, however, the global balance tilts towards the claimant.
- [34] Finally, Fotheringham directs the court to consider whether there are reasons to deprive the substantially successful party of its costs. In the present case, I have identified no such factors. Given the substantial compensation both parties were set to receive from the amounts in trust, and the disability benefits being received by both sides, I cannot find that the respondent's financial situation is so desperate that it requires a different result from that which is otherwise justifiable.
- [35] In conclusion, given:
- a) the claimant's success on nearly 75% of the issues when viewed individually;
 - b) the claimant's success on the property issues and the mixed results on the spousal support issues; and
 - c) that the time spent at trial tilted more heavily on issues on which the claimant was successful;

I find that, subject to the issues addressed below, the claimant should have her costs on the basis that she was substantially successful.

B. Effect of the Settlement Offer

- [36] The claimant submits that the First Offer was reasonable and should have been accepted by the respondent. The claimant argues that the First Offer was easily evaluated, was made after years of litigation and disclosures, and remained open for acceptance for over a year. Accordingly, the claimant seeks double costs against the respondent from the date of the First Offer.
- [37] Under the First Offer, the claimant proposed that she receive \$553,531.78 and the respondent receive \$121,582.09 from the amounts in trust. The Final Order is almost identical, allocating \$555,167.85 to the claimant and \$121,423.42 to the respondent.
- [38] In terms of the Charles Schwab IRA investment accounts and Penn Mutual Life Insurance policy accounts, under the First Offer, the claimant would transfer 50% of the value of her Charles Schwab IRA Investment Account, plus \$15,000, to the respondent via a tax-free spousal rollover. The additional \$15,000 was intended to represent approximately one-half of the value of the claimant's Penn Mutual Life Insurance Policy. The respondent would also transfer 50% of the value of his Charles Schwab IRA Investment Account to the claimant via a tax-free spousal rollover.

- [39] The Final Order provided that the respondent would transfer 50% of the value of his Charles Schwab IRA Investment Account to the claimant via a tax-free spousal rollover, and that the values of the claimant's Penn Mutual Life Insurance Policy and the respondent's BMO Life Insurance Policy would be equally divided between the parties and included in the tax-free spousal rollovers of their respective Charles Schwab IRA Investment Accounts. I find that this is largely equivalent to the First Offer.
- [40] In terms of spousal support, under the First Offer the claimant proposed to pay \$1,500 per month in spousal support, with such payments to commence on the 1st day of the month following pronouncement of the Order. The Final Order provided that the claimant would pay \$1,300 per month in spousal support to the respondent, with these payments to commence on December 1, 2012, and continuing on the 1st day of each month thereafter until further order of the Court. Again, I find that there is a reasonable equivalence between the First Offer and the Final Order.
- [41] In terms of spousal support duration, under the First Offer the claimant would have leave to apply for a review of the spousal support order on the earlier of the date that there was a reduction/termination of the Long-Term Disability Benefits that she receives from Unum Group, or, July 9, 2025, whichever occurs first. The Final Order provided that the claimant would have leave to apply for review of the spousal support order when the payments that she receives from the Unum Insurance Group cease. Again, I find a rough equivalence.
- [42] I conclude that the First Offer contained fair terms, and it was unreasonable not to accept it at the time that it issued. The offer addressed all major matters at issue, was delivered well in advance of the trial, and was sufficiently clear and comprehensive so as to allow the respondent to fairly evaluate its merits: *Hartshorne v. Hartshorne*, 2011 BCCA 29 at para. 27. The litigation had been ongoing for several years and the parties were thus presumably well aware of the facts underlying the issues when the First Offer was delivered.
- [43] The respondent says that that it was not unreasonable for him to rely on an expert report from Stephen Cheng (the "Cheng Report") when valuing his spousal support claim (and rejecting the First Offer). I disagree. While the Court of Appeal held in *Sampley v. Burns*, 2018 BCCA 178 at para. 66, that it was an error at law for a trial judge not to consider whether the existence of an expert report gave a party reasonable grounds to reject a settlement offer, the analysis remains fact-driven and within the discretion of the trial judge. In my view, the Cheng Report did not provide the respondent reasonable cause to reject the First Offer. The report was a fairly mechanical net present value calculation based on set factual assumptions. The amount of spousal support awarded largely turned on those underlying facts. The respondent did not need the Cheng Report to assess the applicable factual matrix. Mr. Cheng was not in a position to opine on those facts. Accordingly, I find that the Cheng Report did not provide the respondent a reasonable basis to reject the First Offer.

- [44] It is not enough that there is an expert report that may support a better outcome at trial--the report itself must address the specific factors that may affect the court's ultimate determination to reasonably inform a party's decision. That is not the case here.
- [45] Finally, it should be noted that the Cheng Report only addressed spousal support, and thus cannot be taken as supporting the respondent's decision to reject the property division aspects of the First Offer.
- [46] Moving to a consideration of the relationship of the Final Offer to the Final Order, the extent to which it mirrors the Final Order is uncanny. While this is not a determinative factor--as the analysis must focus on the circumstances when the Offer was delivered--it illustrates that the Offer was well within the "range of outcomes that could have reasonably been anticipated": *Haigh v. Kent*, 2013 BCSC 298 at para. 15.
- [47] Under R. 11-1(6), the court may also consider the relative financial circumstances of the parties and "any other factors" it considers appropriate prior to granting an order for double costs. In the present case, the respondent asserts that a costs (or double costs) order against him would upset the balance of the trial judgment and would cause him significant financial hardship. I am unable to make such a finding. The respondent produce little in the way of evidence in support of this submission. The distribution to the respondent from the amounts in trust under the order, coupled with the ongoing financial security provided by his disability payments and his new spousal support award mitigate against any hardship finding. I do not see that a double costs award will undermine the balance sought to be achieved in the judgment.
- [48] Based on the foregoing analysis, I find that the circumstances warrant a double costs award against the respondent from the date of the First Offer, pursuant to R. 11-1(5)(b) of the Family Rules. The offer was timely, comprehensive, and manifestly reasonable. The respondent should have accepted it, and his failure to do so caused the parties to continue this lengthy and expensive litigation through to a long trial. Where there has been an accurate and timely offer to settle high conflict litigation such as this, double costs ought to be the rule rather than the exception: *K.M. v. I.M.*, 2017 BCSC 716 at para. 16.

C. Alleged Agreement Not to Claim Costs

- [49] I am unable to find that there was a binding agreement that the claimant would not seek costs.
- [50] The September 13, 2021 letter, which purportedly confirms the agreement not to seek costs, makes no mention of costs.
- [51] In terms of the earlier alleged conversations, simply advising that you do not have instructions to seek costs does not mean that you might not eventually receive such instructions.

[52] I find that the respondent has not done enough to satisfy the Court on a balance of probabilities that such an agreement exists. As such, it cannot serve as an impediment to the costs orders made above.

D. Special Costs Against Claimant's Counsel

[53] As noted above, a costs award against counsel is an extraordinary order and "requires a finding of 'reprehensible' conduct that amounts to a 'serious abuse of the judicial system by the lawyer, or dishonest or malicious misconduct on [their] part, that is deliberate'": Walsh at para. 34.

[54] There was no such conduct in this case. As I have found that there was no agreement not to seek costs, there is no factual basis on which to rest this claim.

CONCLUSION

[55] I find that the claimant should have her costs up to the date of the First Offer, and double costs thereafter.

"Branch J."

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