
CANADA / JUDGMENT

Wiwchar v. Wiwchar

2021 BCSC 2001

COURT

Supreme Court of British Columbia

DECIDED

14 October 2021

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2021 BCSC 2001 Wiwchar v. Wiwchar

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Wiwchar v. Wiwchar,

2021 BCSC 2001

Date: 20211014

Docket: E24351

Registry: Port Alberni

Between:

David Peter Wiwchar

Claimant

And

Andrea Suzanne Wiwchar

Respondent

Before: The Honourable Mr. Justice Branch

Reasons for Judgment on Costs

Counsel for the Claimant:

C. Beckingham

Counsel for the Respondent:

L. Hughes

Place and Date of Hearing:

Port Alberni, B.C.

Respondent's Written Submissions June 29, 2021, Claimant's Written Submissions July 9, 2021

Place and Date of Judgment:

Port Alberni, B.C.

October 14, 2021

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I. INTRODUCTION

- [1] On June 21, 2020, the Court issued oral reasons on a summary trial application brought by the respondent (the "Reasons"). This is the Court's supplementary decision addressing the issue of costs. I will not repeat the facts previously set out in the Reasons, except as necessary to resolve the costs issue.

II. FACTS

- [2] The respondent seeks ordinary costs at Scale B up to the date she delivered an offer to settle on June 14, 2021, and double costs thereafter.
- [3] The claimant submits that the respondent should not receive any costs, as the respondent was not substantially successful.
- [4] While the parties agreed prior to summary trial that the claimant would purchase the respondent's interest in the family home, there remained one issue in relation to this sale that needed to be determined. Specifically, the claimant argued that the costs associated with a possible future disposition of the home should be deducted prior to the determination of the claimant's price to purchase the respondent's interest. This respondent opposed this request. The respondent's argument was accepted.
- [5] With respect to spousal support, the respondent's position was that she was entitled to support on a compensatory and non-compensatory basis for an indefinite period. With regard to quantum, the respondent's position was that her actual income should be used to calculate support for the period immediately following separation, but she accepted that her income could be expected to increase into the future. The respondent submitted that spousal support in the mid-range of the Spousal Support Advisory Guidelines (the

"Guidelines") should be awarded based on a range of projected future income levels for the respondent. At the hearing, she also agreed that there should be a review when the claimant reached 65 years of age.

- [6] The claimant's position was that the respondent had no entitlement to spousal support and that, if an entitlement were found, no support was payable, as the respondent should be imputed with an income equivalent to the claimant's income of \$95,000. The claimant's position was that the income of the respondent was unduly low because of her choice to keep her earnings below a gross income of \$30,000 per year, in order to avoid charging and remitting GST.
- [7] The Court decided that the respondent's income should be attributed as follows:
- for the calendar year of 2020: \$23,704;
 - for the calendar year of 2021: \$30,000;
 - for the calendar year of 2022: \$35,000;
 - for the calendar year of 2023: \$45,000; and
 - for the calendar year of 2024 and each year thereafter: \$55,000.
- [8] The Court found that the claimant should pay to the respondent compensatory and non-compensatory spousal support in the mid-range of the Spousal Support Advisory Guidelines, commencing February 1, 2020 and payable on the first day of each month thereafter, using the incomes set out above, and calculated as follows:
- \$1,822 per month from February 1, 2020 - December 31, 2020;
 - \$1,661 per month from January 1, 2021 - December 31, 2021;
 - \$1,533 per month from January 1, 2022 - December 31, 2022;
 - \$1,278 per month from January 1, 2023 - December 31, 2023; and
 - \$1,024 per month from January 1, 2024 and continuing on the first day of each month thereafter until the review set out below is concluded.
- [9] Finally, the quantum and duration of spousal support payable by the claimant to the respondent could be reviewed upon application by either party after the claimant reached 65 years of age on July 24, 2032.
- [10] As noted, the respondent made an offer to settle that must also be considered. The offer was delivered on June 14, 2021, one week before the summary trial was anticipated to begin. The offer was open for acceptance until 5:00 p.m. on June 18, 2021.
- [11] On the issue of property division, the offer proposed terms roughly equivalent to that ultimately ordered.

- [12] The offer also proposed a settlement of retroactive support from the date of separation until the date of the offer based roughly on the parties' actual incomes as at separation, yielding a proposal of \$30,000. The offer also proposed the claimant pay the respondent ongoing spousal support of \$1,650 per month on an ongoing basis, until further agreement of the parties or further court order.

III. LEGAL FRAMEWORK

- [13] The general rule governing awards of costs is that costs should follow the event and are awarded to the successful party, unless the court orders otherwise. Rule 16-1(7) of the Supreme Court Family Rules, B.C. Reg. 169/2009 (the "Rules") states:

Costs to Follow Event

- (7) Subject to subrule (9), costs of a family law case must be awarded to the successful party unless the court otherwise orders.
- [14] The principles governing awards of costs in family law proceedings are summarized in *S.A.M. v. J.A.M.*, 2017 BCSC 2348 at para. 7:
- (a) The costs of a family law case must be awarded to the successful party, unless the court otherwise orders (Rule 16-1(7)) of the Supreme Court Family Rules [Rules];
 - (b) The "successful party" is the party who has achieved substantial success at the trial/hearing (*Fotheringham v. Fotheringham*, 2001 BCSC 1321; *Marquez v. Zapiola*, 2014 BCCA 35);
 - (c) The court's discretion to "order otherwise" must be exercised judicially, bearing in mind a non-exhaustive list of factors that includes hardship, earning capacity, the purpose of the particular award, the conduct of the parties in relation to the litigation, and the importance of not upsetting the balance achieved by the court in relation to the substantive issues (*Gold v. Gold* (1993), 106 D.L.R. (4th) 452 (B.C. C.A.));
 - (d) The party who asks the court to "order otherwise" bears the onus to persuade the court why it should do so (*S.D.W. v. C.W.W.*, 2006 BCSC 162).
 - (e) Financial hardship, without more, is not a sufficient basis for the court to exercise its discretion to depart from the usual rule that successful parties are entitled to their costs (*S.D.W. v. C.W.W.*, *supra.*; *K.D.P. v. A.R.K. aka R.K.*, 2012 BCSC 1025; *Brown v. Kuchar*, 2016 BCSC 194).
 - (f) Where an offer to settle a family case has been made, the court may award double costs for all or some of the steps taken after the date of delivery or service of the offer (Rule 11-1(5) of the Rules).
 - (g) As a general rule, an award of double costs should be made against a party who did not accept an offer to settle that should, in all the circumstances, have been accepted (*Hartshorne v. Hartshorne*, 2011 BCCA 29); and,

- (h) In determining whether a double costs order should be made, the court may consider any factor the court considers appropriate, including whether the offer was one that ought reasonably to have been accepted upon receipt or at any later date, the relationship between the offer and the judgment, and the relative financial circumstances of the parties (Rule 11-1(6) of the Rules).
- [15] Whether a party has achieved "substantial success" is to be measured objectively considering the matters in dispute, their weight or importance to the parties, and the parties' relative success or failure with respect to those matters: *Fotheringham v. Fotheringham*, 2001 BCSC 1321 at para. 60.
- [16] In *Marquez v. Zapiola*, 2014 BCCA 35, the Court of Appeal accepted Justice Bouck's determination in *Fotheringham* that substantial success occurs when the level of one party's success is 75% or better: para. 16. In *Fotheringham*, Justice Bouck stated as follows:
- [46] Based on the above interpretation of Rules 57(9), 57(15) and *Gold*, a decision to award or not award costs after a trial might follow a four step inquiry.
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.
- [17] In *Reid v. Reid*, 2017 BCCA 191, the Court of Appeal said:
- [9] We do not read *Marquez* as requiring that the Court, in determining "substantial success", undertake a mathematical comparison of the amount claimed to the amount awarded. Rather, the Court has broad discretion to take into account myriad considerations in assessing whether a party has been substantially successful.
- [18] Rule 11-1(4) governs cost considerations when an offer to settle has been made.
- [19] Whether an offer to settle is one that ought reasonably to have been accepted is assessed not by reference to the award ultimately made, but the circumstances existing at the time the offer was open for acceptance: *Hartshorne v. Hartshorne*, 2011 BCCA 29 at para. 27.
- [20] If an offer to settle has been made in a family law case, the court may do one or more of the following:
- a) deprive a party of any or all costs for some or all of the steps taken in the family law case after delivery or service of the offer to settle (Rule 11-1(5)(a));

- b) award double costs for all or some of the steps taken after the date of delivery or service of the offer to settle (Rule 11-1(5)(b));
 - c) award a party costs for all or some of the steps taken after the delivery of the offer to settle for which the party would have been entitled had the offer to settle not been made (Rule 11-1(5)(c)); and
 - 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 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 (Rule 11-1(5)(d)).
- [21] Rule 11-1(6) provides that the court may consider the following factors when considering the effect of an offer to settle:
- 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 on any later date;
 - b) the relationship between the terms of settlement offered and the final judgment of the court;
 - c) the relative financial circumstances of the parties; and
 - d) any other factor the court considers appropriate.
- [22] A non-exhaustive list of considerations in determining the reasonableness of an offer includes the timing of the offer, whether it had some relationship to the claim, whether it could easily be evaluated, and whether some rationale for the offer was provided: Hartshorne at para. 27.
- [23] A precise alignment between the offer to settle and the final judgment is not required. In family law proceedings that raise multiple issues, it would be virtually impossible to match an offer to settle with the orders made: H.K. v. W.K., 2018 BCSC 1447 at paras. 68-69.

III. ANALYSIS

- [24] The respondent was substantially successful in relation to the calculation of the price for the respondent's interest in the family home.
- [25] In relation to the spousal support claim, the respondent was substantially successful in relation to the issue of entitlement, but received mixed results in relation to quantum. The Court accepted that the respondent has not been intentionally underemployed since separation. However, the Court found that she had the capacity to earn greater income in the future, and established an attributed step up of her income going forward. The respondent accepted that a step up would be reasonable, but only on an alternative basis.
- [26] The Court accepted the respondent's request for a retroactive award.

- [27] As to duration, the Court accepted the respondent's proposal at the hearing that it be indefinite with a right of review when the claimant reaches 65.
- [28] I find that the appropriate order (prior to any consideration of the offer to settle) would be for the respondent to receive 75% of her costs, particularly given that she was substantially successful on three of the four issues remaining at the hearing: *Jean Louis v. Jean Louis*, 2021 BCCA 324 at para. 41; *Singleton v. Singleton*, 2008 BCSC 1446 at para. 39; *R.W.B. v. A.A.*, 2005 BCSC 1354 at paras. 20-22. It was only in relation to quantum of spousal support that she was not substantially successful. However, at a practical level, this was the key issue in terms of the cash flow as between the parties, and justifies the discount.
- [29] In relation to the offer to settle, the respondent's proposed terms in relation to the property division largely match the final order.
- [30] In relation to the retroactive payment, the offer proposed \$30,000, and it appears that the amount derived from the judgment will be in that range.
- [31] In relation to future support, although the \$1,650 proposed in respondent's offer was less than the amount awarded up to December 31, 2021, it is greater than the amounts established for the period thereafter. The offer also did not provide for the right of review at age 65, which concession was only proposed by the respondent at the hearing itself.
- [32] Were it appropriate to isolate each part of the offer, I would have found that the offer should reasonably have been accepted in relation to the property claim and the retroactive support claim, but not in relation to the ongoing spousal support claim. However, an offer to settle should be assessed in a more general fashion. In *M.Y.T.C. v. L.H.N.*, 2020 BCSC 729, the court stated:
- [15] Regardless of the question of delivery, I am not satisfied that the terms she offered in those letters were in fact more favourable to L.H.N. than the result she obtained at trial. That is because the offers included parenting terms that I refused to include in my order. Although *M.Y.T.C.* argues that L.H.N. could have accepted the financial terms separately, I am not persuaded that an offer that ought to have been accepted, but only in part, suffices to attract an award of double costs. The authorities suggest that in assessing whether an award of double costs should be made, it is the entire offer that must be compared with the overall result achieved: *S.S.T. v. L.M.G.*, 2019 BCSC 686 at para. 43; *McLaughlan v. Nestor*, 2018 BCSC 2102, at para. 71; *Paul v. Pumple*, 2013 BCSC 1844, at paras. 32-34.
- [33] Likewise, in *Paul v. Pumple*, 2013 BCSC 1844, the court found as follows:
- [34] I agree with the approach suggested by Myers J. The purpose of the Rule is to encourage and facilitate the settlement of disputes. Family law cases often include many different issues. In giving consideration to an offer to settle, the entire offer must be considered. Mr. Pumple was not entitled to pick and choose among the offer's component parts in determining whether or not to accept the offer; rather he was required to accept or reject the offer as a whole. What is important, therefore, is whether the overall result of the trial is better than

the offer in its entirety.

- [35] The division of asset portion of the offer in this case cannot be separated from the child support and trust provisions. Ms. Paul concedes that Mr. Pumple, in relation to the child support and trust provisions, obtained a better result than that contained in the offer to settle. I find that the overall result of the trial was more favourable to Mr. Pumple than Ms. Paul's offer. In these circumstances the prerequisite of Rule 11-1(5)(d) has not been met and the offer to settle cannot give rise to an award of costs in favour of Ms. Paul.
- [34] Considering "the overall result of the trial", I cannot say that the respondent obtained an outcome more favourable than her offer, particularly given the reduced future support she was awarded at the summary trial. This was the core issue with the heaviest financial implications.
- [35] Hence, I find that the offer to settle does not change the appropriate direction on costs, which is an award for 75% of her costs at the usual scale.

"Branch J."

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