
CANADA / JUDGMENT

Y.L. v. G.L.

2017 BCSC 1514

COURT

Supreme Court of British Columbia

DECIDED

25 August 2017

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2017 BCSC 1514 Y.L. v. G.L.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Y.L. v. G.L.,

2017 BCSC 1514

Date: 20170825

Docket: E152716

Registry: Vancouver

Between:

Y.L.

Claimant

And

G.L.

Respondent

Before: The Honourable Mr. Justice J. Sigurdson

Reasons for Judgment

Counsel for the Claimant:

Ronald G. Pederson

Counsel for the Respondent:

Gayle H. Myers

Written Submissions of the Claimant:

August 17, 2017

Written Submissions of the Respondent:

August 17, 2017

Place and Date of Judgment:

Vancouver, B.C.

August 25, 2017

- [1] The parties filed written submissions on costs following my decision of July 13, 2017 [2017 BCSC 1203]. The claimant says that the costs issue should be deferred until the completion of the property and support issues, but if decided now each party should bear their own costs. The respondent submits that as she was substantially successful costs should follow the event and be at Scale C as it was a trial of more than ordinary difficulty.
- [2] I find that the respondent was substantially successful on the central issues: parenting time, custody, primary residence and decision-making authority.
- [3] Costs ordinarily follow the event unless the court otherwise orders: *Gold v. Gold* (1993), 82 B.C.L.R. (2d) 180 (C.A.) at para. 19.
- [4] The issue in this costs application is whether that approach should apply in this particular custody dispute.
- [5] The respondent Ms. L. relies on *S.J.C. v. S.-J.C.A.*, 2010 BCCA 31, and in particular paras. 61-62 where the court stated that:
- [61] Counsel have suggested that this Court should take the opportunity to clarify the extent to which the usual rule that costs follow the event should be applied in custody and access cases. This has been the subject of considerable discussion in the B.C. Supreme Court as reflected in the authorities summarized by the trial judge in this case and by Madam Justice Martinson in *S.D.W. v. C.W.W.*, 2006 BCSC 162, 55 B.C.L.R. (4th) 101.
- [62] While it is apparent there are different approaches to the issue of costs in matters of custody and access in the B.C. Supreme Court, this Court has previously stated that the usual rule that "costs follow the event" (that is, that the "successful" party is entitled to costs) applies in matrimonial proceedings, subject to a discretion to refuse costs to the successful party in certain circumstances. The authority for that proposition is *Gold*, in which this Court sat with five judges in order to determine that question. Although *Gold* was decided in the context of a dispute concerning the division of assets, it has been applied by this Court in several cases where issues concerning the custody of children were involved, albeit in the context of costs of the appeal. See, for example, *Karpodinis v. Kantas*, 2006 BCCA 400, *Yassin v. Loubani*, 2007 BCCA 102, 67 B.C.L.R. (4th), and *Falvai v. Falvai*, 2009 BCCA 387, [2009] 10

W.W.R. 453. (As noted in S.D.W., the Gold approach to costs in matrimonial matters also appears to be in keeping with the approach in other provinces, including Alberta and Manitoba.) In my view, it is not open to this division of the Court to re-open the debate and come to a different conclusion than that expressed in the prior decisions of this Court.

[6] In *T.K. v. R.J.H.A.*, 2015 BCCA 8, the Court of Appeal said:

[86] Costs are a discretionary award. In matters of custody and access, the usual rule that "costs follow the event" applies subject to the discretion not to award costs in certain circumstances. Those circumstances do not include the nature of the issues in dispute. See *Falvai* at para. 11, *S.J.C. v. S.-J.A.*, 2010 BCCA 31 at para. 62, and *Reis v. Bucholtz*, 2010 BCCA 115 at paras. 83-86. Accordingly, I find no error in the judge's exercise of discretion to award the father, as the substantially successful party in the action, ordinary costs.

[7] In *Hansen v. Mantei-Hansen*, 2013 BCSC 1854, Humphries J. declined to award costs in favour of the successful party where the central issue was the primary residence of two young children and she said:

[12] It is clear from the appellate decisions that, although there is no special principle of general application that costs should not be awarded in custody cases, there is a clear discretion in the trial judge, to be exercised judicially, to decide whether to award costs. *Gold v. Gold* (1993) 82 B.C.L.R. (2d) 180 sets out a non-exclusive list of factors to consider when deciding how to exercise one's discretion on costs: hardship, earning capacity, purpose of the award, conduct of the parties, not upsetting the balance achieved by the award, and notes that the facts and issues in each family case vary widely.

[13] It must be kept in mind, when considering that list of factors, that *Gold v. Gold* was not a case involving children. It involved the division of substantial family assets "with each party ending up with a substantial estate", and was heard by a five person panel because a practice had arisen of requiring all family litigants to bear their own costs unless special circumstances justified a different order. The court decided there was no special rule for matrimonial cases.

[14] The thoughtful analyses at the trial level in the custody cases listed at para. 10 above in *K.D.P.* and in many other cases show the overwhelming importance trial judges place on the best interests of the children, as they are statutorily bound to do. This was not a factor that was considered in *Gold* because it was irrelevant to the considerations there, but it clearly governs all the trial decisions referred to. Of course, the court must always consider the best interests of the children and that is not necessarily a factor that would go to costs. However, it is a factor when the children would thrive under either parent and each parent has a legitimate position to put forward that their parenting plan should be preferred. The very process of having an independent adjudicator decide which plan should be preferred then becomes a matter of the best interests of the children. In some cases, it is not fair to the children and their relationship with each parent that the recipient of an offer to settle be forced to step aside for fear of not correctly predicting the outcome of the trial.

- [15] This is not to be confused with what has been termed the "genuine belief theory" of costs - that is, if you maintain your position on custody in good faith and in the genuine belief you have a legitimate position you are somehow protected from an order for costs (see K.D.P. at para. 19). Obviously that is not a justifiable position.
- [16] The underlying reasoning in all the cases in which parents have been required to bear their own costs in a custody battle is based not on a party's "genuine belief", but on the court's assessment, after observing the parents and their witnesses and hearing all of their evidence, that each parent was a worthy primary residence/custodial parent and the decision, often heart-breaking because of its difficulty and importance, could go either way. For the children's sake, a decision has to be made, and the trial judge is given this important and difficult task of deciding what is in their best interests. Where such circumstances exist, trial judges have often declined to make orders for costs in custody cases, whether articulating it as a matter of principal (not the recommended approach, given the Court of Appeal's views on the wide applicability of Gold), or a matter of discretion (the approach approved by the Court of Appeal in Gold and the cases that have followed it).
- [17] Obviously there are custody cases where similar circumstances to those outlined above do not exist and the discretion to award costs might be exercised differently.
- [18] For instance, in *S. (I.M.M.) v. S. (D.J.)* 2010 BCSC 891, cited by the claimant, the court referred to the defendants "protracted course of negative conduct in relation to the plaintiff that was clearly not in the best interests of the children" when awarding costs to the plaintiff.
- [19] In the present case, it is clear that the situation outlined in para. 16 above exists. As counsel for the claimant said in his opening at trial, the parties have many strengths and had cooperated in the best interests of the children, managing to resolve all the other issues. The custody issue remained, and there were two competing plans upon which the parties simply needed to have an adjudication.
- [8] I have also considered *R.A. v. W.A.*, 2016 BCSC 663, *J.E.H. v. J.A.B.*, 2016 BCSC 2190, *Pasco v. Pasco*, 2015 BCSC 2143, and *D.J.D. v. M.L.D.*, 2017 BCSC 1417. In both *J.E.H. v. J.A.B.* and *D.J.D. v. M.L.D.*, one of the factors the court considered in deciding whether or not to follow the usual rule that costs follow the event was whether, as in Hansen, each parent had put forward a well-founded and reasonable parenting plan.
- [9] The claimant says that was the case here but the respondent's counsel in her written submission said this:

Respondent is not of the view that what was in the best interests of B had to be adjudicated. The Claimant took a very extreme position and not necessarily lawful when he removed the child from the Respondent's care in spite of their agreement and without her consent and knowledge. He disputed the third party impartial evaluation and recommendations by Dr. Elterman. His position throughout the litigation was extreme and combative and in the Respondent's view inflammatory and not in the child's best interests. His actions seem to be motivated by spite

rather than what was in the child's best interest especially his position that the child was better off without his mother in his life. His conduct caused the trial to be longer than it ought to have, []

- [10] Although the respondent in her written submissions discussed some of the factors mentioned in Gold and whether the usual rule should be departed from, I agree with Mr. Pederson that some of those factors are not particularly relevant to a custody dispute. Although both parties generally advanced legitimate positions in what they saw as the best interests of B., I am not persuaded that this is a case where the usual rule that costs follow the event should be departed from. Some of the factors that lead me to that conclusion are as follows. The claimant often did not take a measured position that reflected an appreciation of the mother's role in the life of the child. The position of the claimant appeared on occasion to be driven by animus towards the respondent. The evidence was occasionally prolonged by the responses of the claimant at trial. While the claimant may have honestly held the view that his proposed outcome was in the best interests of the child, he occasionally took positions in support of that outcome that I do not think he believed had real merit.
- [11] Overall, although each parent is a competent loving parent, I do not think that this was a case, particularly given Mr. L's position about Ms. L's role in the child's life, where each parent could be said to have put forward a well-founded and reasonable parenting plan that required adjudication by the Court.
- [12] In all the circumstances, costs should follow the event. While I think that the claimant's conduct caused some delay in the trial, there were also delays that were not of his making. I direct that costs should be assessed at Scale B and on the basis that the trial lasted 28 days.
- [13] I received submissions from both counsel as to the form of order that should be entered following the trial decision. The only difference between the orders submitted related to drop-offs following the child's visits with his father. I have decided to settle the order in the form proposed by Ms. Myers given that Ms. L. has settled in Vancouver and it is fair in my view for the parties to share the time and expense of driving. I am satisfied that arrangements can be made by Mr. L. to take the child to Vancouver.
- [14] Accordingly, with the addition of a provision referring to this decision on costs, the trial order is settled in accordance with the draft proposed by Ms. Myers, with a correction of the phrase in para. 16 to read "will have authority to make the final decision".

"The Honourable Mr. Justice Sigurdson"

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Prepared on 27 October 2026 · Esheria