IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *B.K.A. v. D.M.A.,*
2011 BCSC 17

Date: 20110110
Docket: E040142
Registry: Vancouver

Between:

B.K.A.

Plaintiff

And

D.M.A.

Defendant

Before: The Honourable Mr. Justice Pearlman

Reasons for Judgment on Costs

Counsel for the Plaintiff:	Angela Thiele
Counsel for the Defendant (as to costs only):	Gordon Turriff, Q.C.
Written Submissions Received from the Plaintiff:	August 13, 2010 & November 1, 2010
Written Submissions Received from Counsel for the Defendant:	October 15, 2010
Written Submission Received from the Defendant D.M.A. personally	November 30, 2010
Place and Date of Judgment:	Vancouver, B.C. January 10, 2011

INTRODUCTION

[1] By reasons for judgment indexed as *B.K.A. v. D.M.A.*, 2010 BCSC 604, I dismissed the application of the defendant to move the two children of the marriage to California, and to have their sole custody and primary residence there. The judgment provided that in the event that the defendant chose to remain in North Vancouver, she would have the primary residence of the children, with the plaintiff and the defendant

having joint custody and joint guardianship of the children on the Master Joyce model. The judgment granted the defendant's application for the appointment of a parenting coordinator to assist the parties in communicating with each other, particularly with respect to the children. Expenses incurred for the services of the parenting coordinator will be shared between the parties in proportion to their *Guidelines* incomes.

[2] The judgment also required the plaintiff to pay basic child support to the defendant in the *Guidelines* amount of $1,721 per month, and for the parties to share section 7 special or extraordinary expenses, including the costs of child care, in proportion to their respective *Guidelines* incomes, which I found to be $122,250 for the plaintiff and $74,000 for the defendant.

[3] I invited written submissions on costs, which I have now received.

BACKGROUND

[4] A brief history of this litigation is necessary to an appreciation of the parties' respective positions on costs.

[5] The plaintiff and the defendant were divorced by an order pronounced by Mr. Justice McEwan on February 17, 2005. That order provided that the plaintiff and the defendant would have joint custody and joint guardianship of the children, with primary residence with the defendant and liberal and generous access to the plaintiff.

[6] In mid July 2008, the defendant moved to San Diego, California, with the children without seeking or obtaining the consent of the plaintiff or the permission of the court for their relocation.

[7] On July 29, 2008, on the *ex parte* application of the plaintiff, Mr. Justice Holmes ordered that the plaintiff have interim sole custody of the children of the marriage and that the defendant return the children to British Columbia forthwith.

[8] The defendant did not comply with that order, or with the subsequent order of Mr. Justice Powers pronounced August 20, 2008, directing the defendant to return with the children to British Columbia forthwith.

[9] On August 29, 2008, Madam Justice Lynn Smith found the defendant in contempt of the two previous orders of the court directing the defendant to return the children from California. Madam Justice Smith also awarded the plaintiff permanent sole custody of the children, in order to facilitate their return from California. The plaintiff retrieved the children from California by August 30, 2008 and had them in his primary care from September until December 2008.

[10] Madam Justice Smith subsequently ordered the defendant to pay costs and special costs to the plaintiff in the amount of $15,000 as the penalty for her contempt of court.

[11] In December 2008, the defendant applied to vary the custody order of Madam Justice Smith. Ms. A. sought an order providing that she and the plaintiff would have permanent joint custody of the children, and an order that the children's primary residence would be with her.

[12] The defendant's application came on for hearing before Mr. Justice Hinkson (as he then was), on December 17, 2008. Mr. Justice Hinkson did not vary that part of Madam Justice Smith's order granting the plaintiff sole custody of the children, but did order that the plaintiff and the defendant share parenting on a 50/50 one week on, one week off basis. Mr. Justice Hinkson also ordered that the parties retain a registered psychologist for the purpose of preparing a report pursuant to s. 15 of the *Family Relations Act* on an appropriate parenting arrangement for the children. His Lordship ordered that the costs of the application before him would be left to the trial judge, anticipating that there would be a trial of the issues of custody and access following receipt of the s. 15 report.

[13] From January 2009 until early November 2009, the plaintiff and the defendant each parented the children on a week on, week off basis.

[14] In the fall of 2009, the plaintiff anticipated his return to work at the new family Toyota dealership in Squamish, British Columbia. He proposed to the defendant that she have the primary residence of the children, and that he have access on Wednesday nights and every second weekend. The defendant agreed to that arrangement, which continued until February 14, 2010.

[15] At para. 45 of my reasons of judgment, I found that on February 14, 2010 at the defendant's insistence, the parties reverted to the week on, week off parenting arrangement ordered by Mr. Justice Hinkson. That arrangement continued through the trial of this action.

[16] The parties retained Dr. Elterman to prepare the s. 15 report ordered by Mr. Justice Hinkson. Dr. Elterman's report of September 25, 2009 addressed a plan by Ms. A. to move the children from North Vancouver to Coquitlam. Dr. Elterman recommended:

> I would strongly recommend that Ms. A. continue to reside in North Vancouver ... while the children are well adjusted and resilient and could adjust to a relocation, they have both strongly stated a preference not to move.

[17] During the hearing of this application, because Dr. Elterman's report of September 25, 2009 did not address the defendant's intended move with the children to California, I requested a supplementary report from Dr. Elterman providing his recommendations concerning the options of Ms. A. relocating to California with the children, or Mr. A. being the primary caregiver for the children in North Vancouver. In his report of March 3, 2010, Dr. Elterman recommended that the children go to California with their mother. When the hearing of this application continued following the delivery of Dr. Elterman's supplementary report, Dr. Elterman, on the application of the plaintiff, attended for cross-examination. The plaintiff and the defendant both gave *viva voce* evidence respecting their parenting, and parenting plans.

POSITIONS OF THE PARTIES

[18] I turn now to the positions of the parties on costs.

[19] The plaintiff seeks an order for his costs at Scale B, and for his disbursements for all steps taken in

this proceeding since the return of the children from California, on August 29, 2008. The plaintiff submits that he was the successful party, and that there are no special circumstances that would warrant a departure from the usual rule that costs should follow the event.

[20] The plaintiff has submitted draft bills of costs under both the current tariff contained in Appendix B of the *Supreme Court Family Rules*, and the former tariff in Appendix B of the *Supreme Court Rules*, B.C. Reg. 221/90. By his draft bill of costs under the former *Rules of Court*, the plaintiff claims costs at Scale B in the amount of $12,073.60, together with disbursements of $10,209.50 for a total of $22,283.10. Under the *Supreme Court Family Rules* draft bill of costs, the plaintiff claims costs of $13,000, and the same disbursements. Mr. A. urges the court to fix lump sum costs to avoid the further expense of an assessment of costs before the Registrar.

[21] With respect to the disbursements claimed by the plaintiff, each party initially paid half of the cost of Dr. Elterman's report. However, the plaintiff bore the full cost of Dr. Elterman's attendance for cross-examination before the court, in the amount of $2,000. The plaintiff acknowledges that it may not be reasonable to charge the defendant with the full cost of the disbursement he claims, in the amount of $2,550, for the affidavit of the plaintiff's accountant. That affidavit provided expert opinion evidence respecting the financial structure of the plaintiff's family's company, which the plaintiff adduced for the purpose of explaining his financial circumstances as an employee of the family company.

[22] The plaintiff also requests a ruling on whether he is permitted to set-off against any costs awarded to him any portion of his monthly child support payments.

[23] For her part, the defendant submits that she was substantially successful on her application. Ms. A. submits that following release of the reasons for judgment, she chose to remain in North Vancouver, and now has an order for joint custody and joint guardianship, whereas before she made her application, the plaintiff had sole custody of the children. The defendant says that she also succeeded on her application for the appointment of a parenting coordinator, and in obtaining orders requiring the plaintiff to pay child support of $1,721 per month, and for the parties to pay s. 7 expenses in proportion to their respective *Guidelines* incomes.

[24] Alternatively, the defendant submits that success was divided, and that each party should bear their own costs. In the further alternative, the defendant argues that if the court finds that the plaintiff was substantially successful, she should not have to pay costs because her application concerned the welfare of the children of the marriage. The defendant also submits that an order requiring her to pay costs would cause her hardship. Ms. A. requested and I granted her the opportunity to file an affidavit respecting her current financial circumstances. The defendant filed that affidavit on December 31, 2010.

[25] The defendant submits that costs should be assessed by the Registrar, rather than fixed by the court. Ms. A. also submits that her application was an interlocutory application for which the only applicable tariff item under the *Supreme Court Family Rules* is tariff item 4. Under that item, $1,000 is allowed for each half day of attendance at a contested application.

[26] Finally, if the court does order costs in favour of the plaintiff, the defendant submits that there should be no set-off of those costs against the money payable by the plaintiff to her for child support.

ISSUES

[27] The submissions of the parties on costs raise the following issues:

(a) Are costs in this matter to be determined under the *Supreme Court Family Rules*, or under the former *Rules of Court*?

(b) Has either party achieved success on this application?

(c) How should the court exercise its discretion to award costs?

(d) Should the court make a lump sum award of costs, and if so, in what amount?

(e) If the plaintiff is awarded costs, should there be any set-off against the plaintiff's child support payments to the defendant?

DISCUSSION

Supreme Court Family Rules Apply

[28] Sections 3 and 4 of Appendix B of the *Supreme Court Family Rules* contain transitional provisions which define those orders, settlements and costs to which the former *Supreme Court Rules* apply. Section 3 of Appendix B deals with orders for costs, settlements reached, and offers to settle made in a family law case before January 1, 2007. That section has no application to this case.

[29] Section 4 of Appendix B provides:

> 4 Without limiting section 3, Appendix B of the Supreme Court Rules, B.C. Reg. 221/90, as it read on June 30, 2010, applies to
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> (a) orders for costs made in a family law case after December 31, 2006 and before July 1, 2010,
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> (b) settlements reached in a family law case after December 31, 2006 and before July 1, 2010 under which payment of assessed costs is agreed to,
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> (c) costs payable on acceptance of an offer to settle made in a family law case under Rule 37 or 37B, if that offer to settle was made after December 31, 2006 and before July 1, 2010, ...

[30] Here, the reasons for judgment were issued on May 13, 2010. However, although the reasons for judgment invited submissions on costs, they contained no order for costs.

[31] Accordingly, the costs of this application are to be determined in accordance with Appendix B of the *Supreme Court Family Rules*.

Substantial success in the litigation

[32] The principles governing the award of costs in family law proceedings are the same as those applicable to other civil litigation. Costs normally follow the event unless the court orders otherwise: *Gold v.*

Gold (1993), 82 B.C.L.R. (2d) 180 (C.A.) at para. 19; *Karpodinis v. Kantas*, 2006 BCCA 400 at para. 4. *Gold* applies to custody cases; there is no general principle that costs should not be awarded in a case where custody is in issue: *C. (S.J.) v. A. (S.C.)*, 2010 BCCA 31 at para. 62, and *Reis v. Bucholtz*, 2010 BCCA 115 at para. 86.

[33] The court's discretion to order otherwise must be exercised judicially, and arises under Rule 16-1(7) of the *Supreme Court Family Rules*, which provides:

> (7) Subject to subrule (9), costs of a family law case must be awarded to the successful party unless the court otherwise orders.

[34] The Court of Appeal in *Gold* at para. 20 discussed the factors that a trial judge might take into account in exercising the court's discretion:

> The question, then, is: when should the Court order otherwise? With respect, when the court should order otherwise is a matter of discretion, to be exercised judicially by the trial judge, as directed by the Rules of Court. To lay down any strict guidelines or even to attempt to give exhaustive examples is not, I think, helpful because the facts and issues in each family law case vary so greatly. Factors such as hardship, earning capacity, the purpose of the particular award, the conduct of the parties in the litigation, and the importance of not upsetting the balance achieved by the award itself are all matters which a trial judge, quite properly, may be asked to take into account. Assessing the importance of such factors within the context of a particular case, however, is a matter best left for determination by the trial judge.

[35] In determining whether costs should follow the event, the court must consider whether one party has been "substantially successful", which requires an objective comparison of the relief granted and results obtained by the parties with the submissions made at trial: *Fotheringham v. Fotheringham*, 2001 BCSC 1321 at paras. 28, 60; *Rattenbury v. Rattenbury*, 2001 BCSC 593 at paras. 20, 21.

[36] In the case at bar, the plaintiff was successful in opposing the defendant's application for an order permitting her to relocate the children of the marriage to San Diego, California, and for sole custody of the children there. I found that the proposed move was not in the best interests of the children. The question of whether the defendant would be permitted to move with the children to California was the matter of greatest significance to the parties on this summary trial application. The hearing of that issue, including the history of custodial arrangements previously in place, the defendant's prior removal of the children to California without the plaintiff's consent, their subsequent return, the cross-examination of Dr. Elterman, and the *viva voce* evidence of the plaintiff and the defendant on their respective parenting and parenting plans occupied most of the four and one-half days of court time devoted to the hearing of this application.

[37] The defendant, having chosen to remain in North Vancouver, does have an order granting her the primary residence of the children, and providing for their joint custody and guardianship on the Master Joyce model. However, the plaintiff did not oppose the defendant having the primary care of the children, or the order for joint custody and guardianship if the defendant remained in North Vancouver.

[38] The defendant was successful on her application for the appointment of a parenting coordinator, and obtained an order that the expenses incurred for the services of the parenting coordinator will be shared

between the parties in proportion to their respective *Guidelines* incomes. During the course of the hearing, Ms. Thiele, counsel for the plaintiff, advised that she supported such an appointment. That does not detract from the considerable significance to the parties, and the children of the defendant seeking and obtaining this relief. In light of the elevated level of conflict between the plaintiff and the defendant in their communications respecting the children preceding and during this application, it is most unlikely that the defendant would have persuaded the plaintiff to agree to the appointment of a parenting coordinator by any means other than bringing this application. The order for the appointment of the parenting coordinator was important in that it provides the parties with assistance to improve their communications concerning the children and therefore serves the best interests of the children. The defendant is entitled to claim success on this issue.

[39] With respect to child support, the defendant obtained an order requiring the plaintiff to pay to her basic child support in the *Guidelines* amount of $1,721 commencing July 1, 2010, and an order requiring the parties to share special or extraordinary expenses in proportion to their respective *Guidelines* incomes. The parties devoted no time in their submissions to child support. The court's child support order adjusted the child support payable by the plaintiff to the defendant to reflect the change in parenting arrangements from one week on, one week off equal shared parenting to the plaintiff having the primary residence of the children.

[40] In the result, the plaintiff successfully opposed the defendant's application to relocate the children to California, and to have sole custody of the children there. The defendant obtained the order for the appointment of a parenting coordinator, and an order for child support that reflected the plaintiff's child support obligations under the *Guidelines* upon the defendant making the choice to remain in North Vancouver with the primary residence of the children.

[41] Taking into account all of the matters in dispute and weighing the mixed results, I find that the plaintiff was substantially successful. The most significant, contentious and time consuming issue was whether the defendant should have the court's permission to relocate the children to California. On this issue, which I find consumed at least 75 percent of the time of the hearing, the plaintiff prevailed.

[42] Although the defendant may claim success on the appointment of the parenting coordinator, because the plaintiff agreed during the hearing that this relief should be granted, no time was required for argument on this point. The child support order was undoubtedly important to the defendant, but this issue, including the presentation of evidence relating to respective *Guidelines* incomes of the parties, occupied no more than a half a day of court time in aggregate.

Should the court exercise its discretion against awarding costs to the plaintiff?

[43] Although the plaintiff was the successful party on this application, should the court decline to award costs to Mr. A.?

[44] The defendant submits that she had a good arguable case for relocation to California, supported by Dr. Elterman's second report. In circumstances where the court's assistance was required to resolve a difficult problem, Ms. A. says that she should be excused from having to pay costs. At para. 92 of the

reasons for judgment, I found that while the defendant wished to reduce her contact with the plaintiff, I was satisfied that her intended move to California was not motivated by a desire to reduce the children's contact with Mr. A. The avoidance or reduction of conflict with the plaintiff, the lower cost of housing in California and the potential for a higher standard of living were the factors which motivated the defendant's application.

[45] Here, both parties had an arguable case on the issue of relocation. In the circumstances of this case, the fact that the defendant did not bring this application for an improper purpose does not warrant a departure from the usual rule that costs should follow the event.

[46] The defendant submits that an order for costs would cause her hardship.

[47] The defendant is a registered nurse. At para. 8 of the reasons for judgment, I found that the defendant has a *Guidelines* income of $74,000 per annum as a nurse employed by the Vancouver Coastal Health Authority. According to the Form 89 Financial Statement filed by the defendant, her principal assets at the time of the hearing were savings of $250,000 that she retained from the net proceeds of sale of the former matrimonial home in September 2009.

[48] In her most recent affidavit, the defendant deposes that she is now employed full-time as a nurse. She retains the $250,000 in savings. Ms. A's salary of $36.24 per hour for a 36-hour work week is consistent with her 2010 *Guidelines* income of $74,000. Although the defendant now estimates her actual earnings for 2010 at $60,000, she also states that she took a four-month leave of absence last year.

[49] The defendant incurs monthly rent of $2,200, and must pay her proportionate share of daycare expenses, which currently total $550 per month. Ms. A deposes that she has outstanding liabilities for legal expenses and consumer debt totalling $86,300. She anticipates paying those debts from her savings from the sale of the former matrimonial home. After doing so, she would retain savings of approximately $163,700. She wishes to save that amount for a down-payment on the purchase of a home for herself and the children. An award of costs would reduce her remaining savings, but would still leave her with a substantial sum to apply toward the purchase of a new home.

[50] While financial hardship is a factor for the court to consider, it is insufficient on its own for a departure from the usual rule that costs follow the event: *S.D.W. v. C.E.W.W.*, 2006 BCSC 162, citing *Richter v. Richter* (2004), 6 C.P.C. (6th) 181, 2004 BCSC 214. The defendant bears the onus of showing why the court should depart from the usual rule that costs follow the event. In light of the defendant's earning capacity, and the evidence concerning her savings, I am not persuaded that this is a case where an order for costs within the range of the claim here would cause the defendant unusual hardship.

[51] I conclude that in this case, the usual rule should apply, and costs should follow the event. The plaintiff is entitled to his costs at Scale B.

Should the court fix the amount of costs and disbursements payable by the defendant to the plaintiff?

[52] Rule 16-1(1) of the *Supreme Court Family Rules* provides:

> (1) If costs are payable to a party under these Supreme Court Family Rules or by order, those costs must be assessed in accordance with Appendix B unless any of the following circumstances exist:
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> (a) the parties consent to the amount of costs and file a certificate of costs setting out that amount;
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> (b) the court orders that
>
> (i) the costs of the family law case be assessed as special costs, or
>
> (ii) the costs of an application, a step or any other matter in the family law case be assessed as special costs in which event costs in relation to all other applications, steps and matters in the family law case must be determined and assessed under this rule in accordance with this subrule;
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> (c) the court awards lump sum costs for the family law case and fixes those costs under subrule (14) in an amount the court considers appropriate;
>
> (d) the court awards lump sum costs in relation to an application, a step or any other matter in the family law case and fixes those costs under subrule (14), in which event costs in relation to all other applications, steps and matters in the family law case must be determined and assessed under this rule in accordance with this subrule.

[53] Rule 16-1(14) provides:

> (14) The court may award costs
>
> (a) of a family law case,
>
> (b) that relate to some particular application, step or matter in or related to the family law case, or
>
> (c) except so far as they relate to some particular application, step or matter in or related to the family law case
>
> and in awarding those costs the court may fix the amount of costs, including the amount of disbursements.

[54] In my view, this is an appropriate case for the court to exercise its discretion to fix the amount of costs payable by the defendant to the plaintiff and to thereby avoid the expenditure by the parties of further time and resources on an assessment before the Registrar.

[55] This was a summary trial application which occupied four and one-half days of court time. The defendant sought a final determination on relocation of the children to California.

[56] In *Hanson v. Hanson*, 2007 BCSC 1573, Registrar Bouck assessed costs of a summary trial application for variation of child support brought following a final order. The issue for determination was whether the application was an interlocutory application or a matter coming within items 18 and 19 of the tariff under the former *Supreme Court Rules*, which applied to summary trials under Rule 18A. In *Hanson*, at para. 6, Registrar Bouck found that the application to vary was a summary trial and that items 18 and 19 of the tariff therefore applied.

[57] At para. 7, the Registrar held:

> Second, I find that the plaintiff is entitled to claim units under items 1A and 1B as this variation application is a proceeding as defined in Rule 1(8) of the *Rules of Court*. Following *Pacific Savings & Mortgage Corp. and Can-Corp Developments Ltd.* (1982) 135 D.L.R. (3d) 623 (C.A.), I find that this application to vary a final order is a "cause" or "matter" under that definition. It is "a factual situation that entitles one person to obtain a remedy in court from another person" and "something that is to be tried and proved": *Black's Law Dictionary* (8th Ed.).

[58] Item 7 of the tariff in Appendix B of the *Supreme Court Family Rules* is for "preparation for and attendance at a trial of a family law case or of an issue in a family law case".

[59] The four and one-half day hearing of this application was a trial of the issue of the defendant's proposed relocation of the children to California, and was the culmination of almost two years of litigation which commenced when the defendant initially moved the children to California without first obtaining the court's permission to do so. The defendant brought this application by way of Rule 18A. Although matters relating to the custody of children may never be truly "final", the defendant sought an order that would permit the permanent relocation of the children to California. The hearing of this application was the trial of an issue for which the plaintiff is entitled to claim costs under item 7 of the tariff. The hearing occupied four and a half days. Under the tariff, the plaintiff is entitled to $9,000 in costs for this item.

[60] To that amount, I would add the $1,000 claimed by the plaintiff for preparation and attendance at the hearing before Mr. Justice Hinkson of December 17, 2008.

[61] The plaintiff's draft bill of costs also includes a claim under tariff item 1 for $3,000 for correspondence, conferences, instructions, investigations or negotiations and preparation, filing and service of pleadings and petitions and responses to petitions.

[62] The plaintiff has already received payment of $15,000 for costs and special costs incurred to August 27, 2008 for all steps he took in this action to obtain the return of the children from California. Those steps included instructions, preparation, filing and service of the pleadings which initiated the plaintiff's application for the return of the children from California. Accordingly, an award of $3,000 for tariff item 1 would, in my view, in part duplicate costs previously recovered by the plaintiff in this proceeding. I would therefore reduce the amount payable under tariff item 1 to $1,000, and award the plaintiff costs in the amount of $11,000.

[63] With respect to disbursements, the plaintiff and the defendant each paid one-half of the costs of Dr. Elterman's s. 15 report. Dr. Elterman was retained by the parties to provide a report for the assistance of the court. In my view, the costs of Dr. Elterman's report, and his attendance for cross-examination should be borne equally by the parties. Therefore, I would reduce the disbursements claimed by the plaintiff for Dr. Elterman to $1,000, representing one-half of the costs of his attendance at the hearing, and would award the plaintiff disbursements in the amount of $5,000. In the result, the plaintiff will have costs at Scale B, together with disbursements in the total amount of $16,000.

No set-off of costs against Child Support

[64] Finally, there will be no set-off of the award of costs to the plaintiff against any money payable by the

plaintiff to the defendant for child support. Child support is payable by the plaintiff for the benefit of the children. Their entitlement to such support should not be compromised or diminished because the defendant, their mother, is indebted in another capacity to the plaintiff: *Jamieson v. Loureiro*, 2010 BCCA 52 at para. 57.

CONCLUSION

[65] The plaintiff is entitled to the costs of this application at Scale B together with his reasonable disbursements, all of which I fix in the global amount of $16,000.

"PEARLMAN J."