

CANADA / JUDGMENT

E.J.R. v. R.W.R.

2024 BCSC 15

COURT

Supreme Court of British Columbia

DECIDED

4 January 2024

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2024 BCSC 15 E.J.R. v. R.W.R.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

E.J.R. v. R.W.R.,

2024 BCSC 15

Date: 20240104

Docket: E60724

Registry: New Westminster

Between:

E.J.R.

Claimant

And

R.W.R.

Respondent

Before: Master Krentz

Reasons for Judgment on Costs

Counsel for the Claimant:

R.K. Diocee

Counsel for the Respondent:

S.P. Jodway

Place and Date of Original Hearing:

New Westminster, B.C.

August 10, 2023

Date of Written Submissions of the Claimant:

December 8, 2023

Dates of Written Submissions of the Respondent:

August 22, 2023

December 21, 2023

Place and Date of Judgment:

New Westminster, B.C.

January 4, 2024

- [1] On May 4, 2023, the respondent, Mr. R.W.R., filed an application seeking to vary the order made by Master Robertson on April 9, 2021, which was to terminate his obligation to pay child support to the claimant, Ms. E.J.R., for the children: R., born [D.O.B.], 2000 and J., born [D.O.B.], 2003; and that all child support arrears, accumulated interest and default fees be reduced or cancelled. With respect to the youngest child, L., born [D.O.B.], 2005, the respondent sought an order that he pay \$200 per month for child support on an ongoing basis.
- [2] On June 23, 2023, the claimant filed an application response and sought the following:
1. That the Respondent's relief sought in his Application filed May 4, 2023 be dismissed with costs.
 2. A declaration that [R.], born [D.O.B.], 2000 and [J.], born [D.O.B.], 2003 are both children of the marriage pursuant to the Divorce Act.
 3. That the Respondent's guideline income be imputed at a full-time minimum wage income of \$34,840 per year.
 4. That the Respondent pay table child support for the three children, namely [R.], [J.], and [L.], born [D.O.B.], 2005 in the amount of \$745 per month.
 5. In the alternative to paragraph 4, the Respondent will pay table child support for [L.] in the amount of \$327 per month and he will pay \$1,885 per year for each of [R.] and [J.], on account of \$1,885 being one half of the amount that [R.] and [J.]'s expenses exceed the amount they receive in Person with Disabilities Benefit.

6. That the Respondent pay one half of the children's section 7 special and extraordinary expenses.
- [3] At the hearing, the respondent acknowledged that for the purposes of this application, his Guideline income was \$34,840; and if his ongoing support obligation was with respect to L. only, his child support payment would be \$327 per month.
- [4] Also, the respondent withdrew his application to cancel arrears, as he may have either caught up on the arrears or there may have been a minimal amount owing.
- [5] At the conclusion of the hearing, I declared that both R. and J. remained 'children of the marriage' and ordered that the respondent pay the sum of \$1,885 per year as support for R. and \$1,000 per year for the support of J. I further ordered that for L., the respondent would pay \$327 per month, the Table amount based on his Guideline income.
- [6] I further invited counsel to provide written submissions with respect to costs of the application. Having received those submissions, this is my decision on costs.

BACKGROUND

- [7] The parties married in August 1997 and separated in August 2019. All three children have lived with the claimant since separation and continue to do so. All three children are on the autism spectrum. It is unlikely that R. will ever live independently and he is designated as a person with disabilities. J. is moderate on the autism spectrum and may eventually be capable of independent living but that is unknown at this time. He is also designated as a person with disabilities.
- [8] L. is mild on the autism spectrum. He graduated from high school in 2023 and it was expected that he would start post-secondary courses at a community college.
- [9] The claimant works part-time as an education coordinator with an autism support program and her hourly rate is \$30.
- [10] The respondent is self-employed. In 2017, he created a product that allegedly allows people to communicate with their own spiritual guides and deceased love ones. He has apparently been somewhat successful in selling this product. In an order made after application by Master Robertson on April 9, 2021, the respondent's Guideline income was set at \$30,000 and that retroactive to April 2020, the respondent was to pay child support in the sum of \$621 per month.
- [11] To summarize the position of the parties based on their filed materials, the respondent sought a declaration that the two older children were no longer children of the marriage and that his ongoing child support should be reduced from \$621 per month to \$200 per month.

- [12] Meanwhile, the position of the claimant was that income should be imputed to the respondent at a full-time minimum wage of \$34,840 and his child support payments should increase to \$745 per month; or in the alternative, that he pay \$327 per month for L. and further pay \$1,885 per year for each of R. and J., being approximately one-half of their expenses that exceeds the amount they receive as a Persons With Disabilities ("PWD") benefit.
- [13] At the commencement of the hearing before me, the respondent provided a written submission wherein he agreed that income should be imputed to him as sought by the claimant and he consented to an order that he pay child support to the claimant for L. in the sum of \$327 per month.
- [14] Furthermore, the respondent acknowledged that R. remained a child of the marriage but sought a termination of support payments for him on the basis that R.'s income covered all of his expenses.
- [15] With respect to J., in his written submission the respondent took the position that J. was no longer a child of the marriage as he had reached the age of majority and earned sufficient income to cover all of his expenses.
- [16] The respondent argued, as a basis for terminating child support for R. and J., the authorities, such as found in *Kollmuss v. Kollmuss*, 2015 BCSC 1101, indicated that child support should be reduced by comparing the child's budget to the income that they receive by way of disability payments.
- [17] The respondent further submitted that when you review the expenses incurred by the claimant for R. and J., all of those expenses are covered by the sources of income for both children. As an example, R. receives \$2,960 per month from Community Living BC ("CLBC") and \$1,413 per month from PWD. As for J., he also receives \$1,400 per month from PWD and up to \$150 per month from his job and this slightly exceeds J.'s monthly expenses.
- [18] However, the claimant submitted that the funds provided by CLBC is not a source of income but rather they are funds used for therapeutic programs for R. If these funds are not used within a certain period of time, CLBC will claw the funds back. Accordingly, his only source of income is the PWD payment and the same applies for J.
- [19] Based on the budgets proposed by the claimant for both children, there was a shortfall after deducting the PWD payments. For R., the shortfall was \$1,885 per year and for J. it was \$1,000 per year.
- [20] Although the respondent was successful in his submission that the calculation of child support for R. and J. should take into account their PWD benefits, which was conceded by the claimant, he was not successful in terminating the support payments for both of those children.

- [21] In her application response, the claimant did propose in the alternative that the respondent could pay \$1,885 per year for each of R. and J., being one-half of the amount of their expenses that exceeded the amount they received as a PWD payment. In that respect, the claimant was mostly successful, with the exception that the annual payment for J. was set at \$1,000.
- [22] With respect to the issue of child support payable for L., in his notice of application, the respondent sought an order that he pay \$200 per month. Although the amount was consented to by the respondent at the hearing, I find the claimant to be successful on that issue, as she sought in her application response that the Guideline income of the respondent be increased from \$30,000 to \$34,840 and the order made for L.'s child support was \$127 per month higher than proposed by the respondent in his notice of application.
- [23] In his notice of application, the respondent also sought an order that all child support arrears, interest and default fees be cancelled. In her application response, the claimant sought an order that the respondent pay one-half of the s. 7 expenses. As neither party proceeded with those applications, they have no effect on my decision on costs.

ANALYSIS

- [24] In interlocutory applications, costs are generally not recoverable until the conclusion of the action. At the judicial case conference before Justice Harvey on June 18, 2021, the parties agreed upon a division of the proceeds from the sale of the former family home and that all other claims set out in either the notice of family claim or the counterclaim, except for issues of parenting arrangements, were dismissed. By consent, it was also ordered that from the respondent's share of the funds in trust, \$5,000 would be allocated and paid to the claimant as a contribution to her costs.
- [25] When Master Robertson made her order on April 9, 2021, she ordered that the costs of the application before her would be in the cause. Presumably the order made by Justice Harvey covered those costs.
- [26] It is unclear to me as to whether or not there remains unresolved issues between the parties that will result in the continuation of this proceeding. It does not appear that a divorce order has even been made or a final order with respect to the parenting arrangements. Accordingly, I will make my cost order on the basis that as an interlocutory application, costs will not be recovered until the conclusion of this proceeding, whenever that may be.
- [27] On an interlocutory application, costs are generally awarded to the successful party. The discretion to award costs other than in accordance with the standard order must be exercised judicially and sparingly.
- [28] In his written submissions, the respondent submits that he was successful as the claimant insisted they must attend mediation first and that there had been no material change of circumstances and that he was successful on both of those issues.

- [29] The respondent further submits that the claimant was seeking \$875 per month and that the order made is for \$567 per month, which is \$240 more than the respondent agreed to but \$310 less than sought by the claimant.
- [30] Therefore, based on the above, the respondent submits he was more successful than the claimant and should be awarded costs or, in the alternative, each party would bear their own costs.
- [31] In her written submissions, the claimant submits that on August 1, 2023, the claimant sent a "with prejudice" offer to settle the respondent's application, which offer was rejected by the respondent on August 4, 2023.
- [32] The claimant's settlement offer included that the respondent's Guideline income be imputed at \$34,840 and that R. and J. would continue to be entitled to support, and that the respondent would pay \$875 per month in child support calculated in the following manner:
- (a) \$190 per month for R.;
 - (b) \$158 per month for J.;
 - (c) \$200 per month to account for the claimant's caregiving role and efforts, specifically for R.; and
 - (d) \$327 per month, being the Table amount for L.
- [33] The claimant submits that the court should award double costs to her pursuant to Supreme Court Family Rule 11-1(5), as her settlement offer was one that ought reasonably to have been accepted by the respondent, for the following reasons:
- (a) at the hearing, the respondent conceded that his Guideline income should be imputed at \$34,840; and
 - (b) in her application response, the claimant agreed that in the alternative to dismissing the application the respondent could pay \$745 per month in child support or, in the alternative, \$327 per month for L. and \$1,885 per year for both R. and J.
- [34] Not all settlement offers exchanged between parties will constitute an offer to settle within the meaning of the rule. Rule 11-1(1) imposes technical requirements in the definition of an "offer to settle". In order to qualify, the offer must be made in writing by a party to the family law case, be served on all parties, and contain an express reservation of the right to bring the offer to the attention of the court for consideration in relation to costs, after the court has pronounced judgment on all other issues in the proceeding. Compliance with the essential criteria is mandatory (*Roach v. Dutra*, 2010 BCCA 264 and *M.S.G. v. S.K.R.*, 2015 BCSC 913).

- [35] The letter dated August 1, 2023, does not meet the technical requirement of containing an express reservation of the right to bring the offer to the attention of the court for consideration in relation to costs, after the court has pronounced judgment on all other issues in the proceeding. Therefore, it does not meet the definition of an "offer to settle".
- [36] However, the aforesaid letter can be considered by the court in determining if ordinary costs should be ordered in favour of a party. The court may compare the result obtained by the respondent to the offer made by the claimant, as opposed to the positions taken at the hearing. The threshold that must be satisfied is that the overall result of the hearing as it relates to the respondent was not significantly better than the offer made by the claimant. In this context, the offer is considered in its entirety and not in terms of its individual components (Paul v. Pumple, 2013 BCSC 1844).
- [37] Family law proceedings often involve different issues. The purpose of the rules is to encourage and facilitate the settlement of disputes.
- [38] Based on my review of the positions taken by the parties at this hearing and the settlement offer made by the claimant on August 1, 2023 that was rejected by the respondent, I find that the claimant was the successful party. She was successful in opposing the respondent's application to terminate child support for both R. and J. and she did propose, in the alternative to paying Table support for them, that the respondent could cover one-half of the shortfall for their expenses and, in that regard, she was largely successful.
- [39] Furthermore, with respect to child support for L., although the respondent consented to the order at the hearing, the claimant was successful in imputing income to the respondent and the amount she proposed as child support for L. was ordered by the court.
- [40] Accordingly, the claimant is entitled to the costs of this application in any event of the cause, however, her application for double costs is dismissed.
- [41] As a side-note, in his written submission the respondent noted that the claimant has not paid the costs that I ordered on June 9, 2023. Although I ordered costs of that application to the respondent in any event of the cause, I did not order that they be payable forthwith. Accordingly, there was no obligation on the claimant to pay those costs forthwith.

"Master Krentz"

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