
CANADA / JUDGMENT

G.S.G. v. N.C.

2020 BCSC 582

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Supreme Court of British Columbia

DECIDED

16 April 2020

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2020 BCSC 582 G.S.G. v. N.C.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

G.S.G. v. N.C.,

2020 BCSC 582

Date: 20200416

Docket: E51751

Registry: New Westminster

Between:

G.S.G.

Claimant

And

N.C.

Respondent

Before: The Honourable Madam Justice Tucker

Reasons for Judgment Re Costs

Counsel for the Claimant:

A. Kahlon

Counsel for the Respondent:

P. Virk

Place and Date of Hearing:

New Westminster, B.C.

August 29, 2019

Written Submissions of the Claimant:

September 30, 2019

November 29, 2019

Written Submissions of the Respondent:

October 8, 2019, 2019

Place and Date of Judgment:

New Westminster, B.C.

April 16, 2020

I. Introduction

- [1] On September 13, 2019, I issued oral reasons for judgment ("Application Reasons"). Consistent with the Application Reasons, I will continue to refer to the parties as "the mother" and "the father" for purposes of this decision. The Application Reasons dismissed the mother's family law application filed August 16, 2019 ("August Application").
- [2] Counsel were granted leave to file written submissions on costs. Submissions were filed through the Registry on September 27, October 8, and November 29, 2019. These are the reasons for judgment on costs.
- [3] The submissions filed addressed ordinary costs, double costs on the basis of a settlement offer and special costs. As I have determined that special costs are warranted, the arguments made in relation to ordinary and double costs will not be addressed.

II. Background

- [4] The general background was summarized as follows in the Application Reasons:
- [1] The parties married on September 27, 2013 and separated on November 15, 2015. They were granted a divorce order on November 20, 2018. There is one child of the marriage, [M], a daughter born June 8, 2016, and now three years of age. The parties are joint legal guardians.
- [5] On November 29, 2017, Justice Saunders gave oral reasons and made an order with respect to parenting arrangements ("Saunders Order"). The Saunders Order is summarized in part in the Application Reasons:

[3] That order, among other things: allocated parenting time between the parties on a 50/50 basis effective January 31, 2018, and established a schedule for the 50/50 allocation. The latter set the mother's parenting time as follows (with the remainder being the father's parenting time):

- a. From Monday at 6:00 pm to Wednesday at 6:00 pm;
- b. From Friday at 6:00 pm to Monday at 6:00 pm;
- c. From Wednesday at 6:00 pm to Friday at 6:00 pm;
- d. Repeat.

[4] The Saunders Order also included the following term significant to this application:

The Claimant may leave [M] in the care of a third party during his parenting time.

[6] The specific term regarding the father's entitlement to leave M in the care of third parties during his parenting time reflects the following exchange at the close of Saunders J.'s oral reasons:

[28] [Counsel for the father]: Because I know this might become an issue later, is that it is recognized that he, Mr. [G], is able to leave [M] in the care of a third party.

[29] THE COURT: Yes. There is no doubt about that. That is all part and parcel of the exercise of normal parenting responsibilities.

[30] [Counsel for the father]: Absolutely.

[31] THE COURT: There is no issue with respect to that and you can, if need be, you can stipulate that in the order.

[7] In his oral reasons, Saunders J. commented on the nature of the numerous allegations made by the mother regarding the father's family members, and the issue of special costs. Those comments are further discussed below.

[8] Early in the summer of 2019, the parties agreed M would attend the Wind and Tide Preschool, starting in the fall.

[9] In the August Application, the mother sought the following orders:

- i. That a s. 211 Family Law Act, S.B.C. 2011, c. 25, report be prepared to:
 - (a) assess the needs of M relative to the family law dispute; and
 - (b) assess "the ability and willingness of a party to a family law dispute to satisfy the needs of [M]".
- ii. That the father provide her with a color copy of any passport issued for M;
- iii. That a trial be scheduled to take place in New Westminster; and

iv. That the Saunders Order "regarding third party care be amended such that each party shall have the right of first refusal with respect to parenting time and/or care being provided to [M] when the other parent is not available, including for pick up and drop off from school".

[10] In the Factual Basis portion of the August Application the mother asserted, among other things, that:

- a) The father had not provided a copy of the passport despite requests through counsel;
- b) The father was unreasonably failing to agree to a trial date;
- c) A s. 211 report was necessary because the father and his counsel are litigious and the father was not making an appropriate effort at co-parenting;
- d) The father had refused to allow the mother to have the right of first refusal when he is unwilling or unable to care for M; and
- e) The father had added several of his family members to the preschool list of people authorized to pick up M when he is unavailable. The father refused to provide the mother a right of first refusal to pick M up from preschool when he was not available.

[11] The parties informed me at the outset of the hearing that they had, just prior to hearing, reached agreement regarding several issues under the August Application. The following orders were then issued by consent ("Consent Order") dated August 29, 2019:

- a) That a s. 211 report be prepared addressing the matters raised in the August Application;
- b) That a trial be scheduled at the New Westminster registry, subject to further court order;
- c) That the relief requested in paragraph 2 of the August Application (seeking a color copy of M's passport) be adjourned generally; and
- d) Effective September 1, 2019, in the event either parent is going to be away for more than 24 hours during their parenting time, prior to arranging alternative childcare, the parent will first offer the other parent a right of first refusal to provide care for M.

[12] As such, the hearing and Application Reasons dealt only with the mother's application under ss. 47, 215 and 216 of the Family Law Act to vary the Saunders Order to give each party a right of first refusal with respect to parenting time whenever the other is not personally available to pick up or drop off M at school. The mother was willing to agree that M's paternal and maternal grandmothers could perform drop off and pick up without triggering the proposed right of first refusal, but objected to any of the father's other family members performing pick up or drop off. The mother asserted this should be the case because the quality of care provided by the father's other family members was unacceptable to her.

- [13] Consistent with her objection to M being cared for by the father's family, the mother refused to sign the preschool form adding his family members as people authorized to drop off and pick up M from preschool on his behalf. The preschool, in turn, took the position that unless both parents signed, the father's family members were not properly authorized and would not be permitted to drop off or pick up M.
- [14] At the hearing, the father asserted his right to place M in the care of third parties had been expressly addressed in the Saunders Order and there had been no material change since the order was made. He said it was foreseeable at the time of the Saunders Order that M would attend preschool and, further, that relying on a third party to pick up or drop off M from preschool is not materially different from relying on a third party take M elsewhere during his parenting time. The father noted his work hours were the same now as at the time of the Saunders Order and also that the mother's complaints regarding the quality of his family's care of M had been in evidence before Saunders J.
- [15] The father also argued that frequent interruptions to his parenting time with M were not in her best interests and would negatively impact her ability to bond with her paternal family.
- [16] I agreed that the Saunders Order already addressed the issue, that there had been no material change since the Saunders Order and that, in any event, the variance requested would be contrary to M's best interests.
- [17] I observed that the mother was arguing the same objections to the father's family members that she had advanced before Saunders J. and, moreover, was doing so in large part on the same evidence.
- [18] The mother's application was dismissed.
- [19] I observed that a copy of the Saunders Order, along with the Application Reasons, should satisfy the preschool that the father had the authority to designate people to pick up and drop off M on his behalf during his parenting time, and that the mother's signature on the preschool form was not required for that purpose and to that extent.

III. Issue

- [20] The father was the successful party on the August Application. The mother's application to vary the Saunders Order was dismissed.
- [21] The issue is whether the father should be awarded special costs.

IV. Argument

- [22] The father argues he is entitled to special costs. He points to Justice Saunders' comments in his oral reasons in relation to the Saunders Order:

- [14] Ms. [C] has attested to there having been numerous incidents over the previous months predating October in which she says [M] had been returned to her with possible signs of neglect or abuse. The particulars of these incidents run the gamut from the child having a runny nose or a diaper that needed changing or seeming hungry, fussy or tired, to having various scratches, bruises or abrasions. There is room, in my view, to doubt that Ms. [C]'s allegations in this regard, of [M] having suffered physical harm and of being at risk while in her father's care, were made entirely in good faith, given that many of these incidents were not reported to the claimant and that in many other cases she seems to have accepted his explanations, having taken no further actions. There is no evidence of the respondent having sought medical care for the child or otherwise reporting these events to the authorities until the October 2017 incident. Her allegations of abuse and risk are not supported by any professional opinion, and as I say, the authorities have closed their file.
- [15] There is also reason to believe, looking at the evidence as a whole, that Ms. [C]'s concerns, to the extent they are genuine and made in good faith, are rooted more in the distrust and hostility, and lack of mutual respect, that seems to permeate these parties' relationship, than in any serious reasonable apprehension that the child is somehow at risk while in her father's care.
- [23] He also relies on Justice Saunders' comments about costs:
- [37] I am concerned, as I indicated in my reasons, as to Ms. [C]'s good faith in this matter from October, in raising the issues which she did raise regarding risk while in the father's care. My concerns are magnified very significantly by the readiness with which she resiled from her position that supervised care was necessary. If she had genuinely been of the view that there was a risk to the child, I do not think her position would have changed so quickly, notwithstanding the manner in which I raised my concerns this morning. It really calls into question in my mind, very seriously, Ms. [C]'s use of litigation here as a tool to advance her own interests, and in particular, to express her apprehension and emotional issues with Mr. [G], over the interests of the child.
- [38] Having said that, I do not find that this conduct of Ms. [C], even if I were to characterize it in that manner, rises to the level of reprehensible conduct sufficient to lead to a finding of special costs. It is a bit of close thing, making that decision. To my mind, a finding of reprehensibility requires the court to be able to make a much more firmly-based finding of intentionality in a party's conduct. I recognize, as I have said earlier today, that there is an issue of emotional upset, it seems to me, emanating from the parties' own relationship with each other as husband and wife, that has spilled over into matters involving the child, and I am prepared to give Ms. [C] the benefit of the doubt and assume that or find that there is a probability that notwithstanding what I am sure is the able advice she would have had from her counsel, Mr. Virk, that there may have been or may be an issue of emotionalism creeping into the decisions she has made in instructing her counsel, that have got in the way of clear thinking.

[39] I made comment earlier about the excessive amount of affidavit evidence that has been filed. I have made comments today about the extent to which the parties have raised in the evidence their past history with each other. All that has got to stop. The parties are at risk - if there are future applications - of attracting sanction in the form of an order of special costs, but I am not making that order today.

[Emphasis added.]

[24] The father says that, despite Saunders J.'s comments and warnings, the mother has put the same and similar allegations against his family members as care providers, largely on the same or similar evidence, back before the court again in the August Application. As indicated in the Application Reasons, I agree with this characterization. He says the August Application was essentially an indirect appeal of the Saunders Order. While collateral attack is the more accurate term, the spirit of the criticism is sound.

[25] The father also submits that the August Application is in keeping with the mother's strategic and instrumental approach to litigation. He says there seems to be no end to the litigation, and no genuine attempt to resolve issues amicably, because the mother's actual goal is to use the litigation to frustrate his parenting.

[26] The mother opposes an award of special costs, arguing there was nothing reprehensible about her conduct in relation to this application. The mother argues she was seeking what she believed to be in her child's best interest. She notes that the father agreed to modify aspects of the Saunders Order in response to the August Application (i.e., the Consent Order matters), which demonstrates that the positions she took under the application were not unreasonable.

V. Analysis and Conclusion

[27] Justice Donegan provided a helpful summary of the test for special costs in *C.L.M. v. M.J.S.*, 2017 BCSC 1517, much of it gleaned from a series of leading decisions in the area by Justice Gropper. As I am unable to improve on it in any way, I will quote it at length:

[6] Rule 16-1(1) dictates that the assessment of costs occurs in accordance with Appendix B of the Family Rules unless certain circumstances exist, including a circumstance where the court orders that the costs of the case be assessed as special costs.

[7] Madam Justice Gropper considered the law of special costs in *Westsea Construction Ltd. v. 0759553 B.C. Ltd.*, 2013 BCSC 1352 at paras. 27-37, where she held, in part:

[28] The leading authority for special costs in British Columbia is the Court of Appeal's decision *Garcia v. Crestbrook Forest Industries Ltd.* (1994), 9 B.C.L.R. (3d) 242 (C.A.). There, Mr. Justice Lambert, writing for the court, determined that the threshold for awarding special costs is "reprehensible" conduct.

[30] In the decision on special costs, Lambert J.A. noted that different terms had been used to describe the appropriate circumstances for awarding special costs. In particular, he drew attention to the finding of Madam Justice McLachlin (as she then was) in the Supreme Court of Canada decision *Young v. Young*, [1993] 4 S.C.R. 3 in regard to costs (with which the majority concurred) at 134:

Solicitor-client costs are generally awarded only where there has been reprehensible, scandalous or outrageous conduct on the part of one of the parties.

[31] Lambert J.A. reviewed other decisions as well. He noted the discussion in *Leung v. Leung* (1993), 77 B.C.L.R. (2d) 314 (S.C.) at para. 5, where Chief Justice Esson (as he then was) observed that the term "reprehensible" was of wide meaning, capturing both scandalous and outrageous conduct as well as milder forms of misconduct deserving of rebuke. He also considered *Fullerton v. Matsqui* (District) (1992), 74 B.C.L.R. (2d) 305 (C.A.) at 309, which applied the standard of "misbehaviour in the conduct of this litigation" that made the award of special costs a "desirable ... form of chastisement".

[32] Lambert J.A. decided to introduce clarity into the law of special costs by synthesizing the different variations on the standard for a special costs award into a single standard, that of reprehensible conduct. He held at para. 17:

Having regard to the terminology adopted by Madam Justice McLachlin in *Young v. Young*, to the terminology adopted by Mr. Justice Cumming in *Fullerton v. Matsqui* (District), and to the application of the standard of "reprehensible conduct" by Chief Justice Esson in *Leung v. Leung* in awarding special costs in circumstances where he had explicitly found that the conduct in question was neither scandalous nor outrageous, but could only be categorized as one of the "milder forms of misconduct" which could simply be said to be "deserving of reproof or rebuke", it is my opinion that the single standard for the awarding of special costs is that the conduct in question properly be categorized as "reprehensible". As Chief Justice Esson said in *Leung v. Leung*, the word reprehensible is a word of wide meaning. It encompasses scandalous or outrageous conduct but it also encompasses milder forms of misconduct deserving of reproof or rebuke. Accordingly, the standard represented by the word reprehensible, taken in that sense, must represent a general and all-encompassing expression of the applicable standard for the award of special costs.

[33] Lambert J.A. recognized that the meaning of "reprehensible" conduct was still quite broad. In order for a special costs award to be justified, the circumstances had to be exceptional. He continued at paras. 23 and 25:

However, the fact that an action or an appeal "has little merit" is not in itself a reason for awarding special costs. ... Something more is required, such as improper allegations of fraud, or an improper motive for bringing the proceedings, or improper conduct of the proceedings themselves, before the conduct becomes sufficiently reprehensible to require an award of special costs.

...

If the proceedings are taken, not in the reasonable expectation of a satisfactory outcome, but in order to impose the burden of the proceedings themselves on the opposing party in circumstances where one party is financially much stronger than the other, then the absence of merit, coupled with the improper motive, is in my opinion a combination which may well amount to reprehensible conduct sufficient to require an award of special costs.

[Emphasis added.]

[37] More importantly, Garcia emphasizes that the purpose of a special costs award is to chastise a litigant. By rebuking reprehensible conduct, the court punishes bad behaviour and deters it. It also serves to distance the court from the conduct at issue.

[8] Madam Justice Gropper went on in *Westsea* to review the jurisprudence in respect of special costs, organizing it in the following thematic groups:

- a) Meritless claims and Improper Motive (paras. 42-52);
- b) Abuse of the Court's process (paras. 53-57);
- c) Sharp Practice Derogating from The Rules of Professional Conduct and the Rules of Court (paras. 58-64);
- d) Misleading the Court (paras. 65-72).

[9] Madam Justice Gropper then summarized her findings and derived various principles for awarding special costs at para. 73:

[73] I have undertaken a thorough review of the cases involving special costs. Having examined the authorities provided by both sides, it is apparent to me that the courts have been somewhat inconsistent in their determination of what amounts to reprehensible conduct and that those authorities must be reconciled. Based upon my review of the authorities, I have derived the following principles for awarding special costs:

- a) the court must exercise restraint in awarding special costs;
- b) the party seeking special costs must demonstrate exceptional circumstances to justify a special costs order;
- c) simply because the legal concept of "reprehensibility" captures different kinds of misconduct does not mean that all forms of misconduct are encompassed by this term;
- d) reprehensibility will likely be found in circumstances where there is evidence of improper motive, abuse of the court's process, misleading the court and persistent breaches of the rules of professional conduct and the rules of court that prejudice the applicant;
- e) special costs can be ordered against parties and non-parties alike; and

- f) the successful litigant is entitled to costs in accordance with the general rule that costs follow the event. Special costs are not awarded to a successful party as a "bonus" or further compensation for that success.
- [10] Madam Justice Gropper also recently had occasion to consider the test for a special costs award in the family law context in *Friedlander v. Claman*, 2015 BCSC 482.
- [11] Relying on *Tomic v. Tough*, 2013 BCCA 355, Gropper J. confirmed that the test for a special costs award, as set out in *Garcia v. Crestbrook Forests Industries Ltd.* (1994), 9 B.C.L.R. (3d) 242 (B.C.C.A.), applies in the family law context: *Friedlander* at para. 23.
- [28] I am satisfied that special costs are warranted with respect to the August Application. The father's right to rely on third parties to assist him in exercising his parenting time was expressly addressed in both the reasons of Saunders J., and the terms of the Saunders Order.
- [29] The mother's position that she could veto the father's family members as authorized pick up and drop off persons during his parenting time because the preschool sought her signature on its form was effectively a refusal to honour the terms of the extant Saunders Order.
- [30] Having leveraged the school form as an instrument for undermining the Saunders Order, the mother then sought, by the August Application, to effectively re-litigate her objections to the father's family members as care providers.
- [31] Finally, notwithstanding Justice Saunders' clear and direct comments regarding the credibility and nature of the mother's allegations and evidence regarding care provided by the father's family members, the mother not only continued to pursue the same and similar allegations, she did so in significant part in reliance on the very evidence that was before Saunders J.
- [32] As noted in the Application Reasons:
- [17] The mother asserts her proposal is in the best interests of [M] on the basis that it is better in general for a child to be with a parent than in the care of a third party. The mother also asserts, more particularly, that she considers the quality of the care provided by the father's family unacceptable.
- [18] The latter assertion necessitates a discussion of the mother's evidence filed in support of her application.
- [19] The mother provided an affidavit, sworn August 16, 2019, containing objections to the father's use of third party care, the quality of the care received by [M] during the father's parenting time, and the father's family members. None of this evidence is specifically related to the activity of pick up and drop off in general or at Preschool in particular. Rather, it presents general complaints about third party care.
- [20] The mother's affidavit sworn November 24, 2017 in support of the application resulting in the Saunders Order was also relied upon in support of this application.

- [21] During the hearing, the mother sought to submit a further 12 paragraph affidavit sworn by her on August 29, 2019 (the day of the hearing), as an affidavit in response. Paragraphs 1 through 4 of this affidavit attach forms and policies of the Preschool and the father consented to that portion of the affidavit being considered by the Court. The father objected to the remainder of the affidavit on the basis that it sets out argument and, to the extent that argument subsumes factual assertions, those assertions are duplicative of ones already before the Court in her affidavits provided in chief. I sustained that objection on the basis that the paragraphs in issue were not proper reply evidence. The mother's August 29, 2019 affidavit was accepted into evidence, but only in relation to paragraphs 1 through 4.
- [33] Justice Saunders gave the mother the benefit of the doubt about the intentionality of her conduct at the time of the Saunders Order. She is not entitled to the same consideration again in light of the express terms of the Saunders Order and in light of his express warning about the possibility of special costs.
- [34] The father is entitled to special costs of the August Application.
- [35] There may be circumstances in which the preparation time and materials relating to settled issues arising out of the same application may be relevant to the scope or calculation of a special costs award in relation to an adjudicated application. However, I am not satisfied that is the case here. In my opinion, the issue determined by the Application Reasons was the central issue in dispute and it alone occupied more than a half-day of court time. The mother's approach to evidence in support of the August Application continued to be, as noted by Saunders J. in the earlier matters, akin to a general airing of grievances. In the circumstances, I do not see any value in attempting to characterize time or materials as exclusively related to settled matters. Further, the matters settled were not of a nature that required either much preparation time or evidence in any event.
- [36] The award of special costs includes the submissions regarding costs.
- [37] The special costs are payable forthwith and in any event of the cause.

"Tucker J."

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