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CANADA / JUDGMENT

## H(N.L.) v. H(S.H.)

2009 BCSC 609

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COURT

Supreme Court of British Columbia

DECIDED

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2009 BCSC 609 H.(N.L.) v. H.(S.H.)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

H(N.L.) v. H(S.H.),

2009 BCSC 609

Date: 20090504

Docket: E029292

Registry: New Westminster

Between:

N.L.H.

Plaintiff

And

S.H.H.

Defendant

Before: The Honourable Mr. Justice Williamson

Reasons for Judgment

Counsel for the Plaintiff:

B. Thompson

Counsel for the Defendant:

D.J. McLellan

**Date and Place of Trial/Hearing:**

March 30, 31, 2009 and

April 1, 2, 3, and 6, 2009

New Westminster, B.C.

- [1] The plaintiff, N.L.H., and the defendant, S.H.H. met in 1993. They married in 1996. They separated January 23, 2008. There are three children of the marriage: a girl K, born September 2, 1999, a boy E, born March 27, 2003, and a girl B, born August 27, 2008, seven months after the parties separated.
- [2] During the marriage, the plaintiff and defendant ran a martial arts business in Langley, the Langley Martial Arts Centre. The business was reasonably successful.
- [3] The plaintiff seeks a divorce, sole custody of the children, joint guardianship, spousal and child support, specified access for the defendant, and rulings with respect to property. The defendant seeks sole custody of the children on the basis of a co-parenting arrangement, with the children residing with each parent fifty per cent of the time.

**Divorce**

- [4] I am satisfied that the statutory requirements for a divorce have been met. There will be a divorce subject only to s. 12 of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.). In addition, the legal last name of the plaintiff will be changed, as requested.

**Custody**

- [5] I accept that the plaintiff should have sole custody of the children and that there should be joint guardianship pursuant to a slightly modified version of the "Joyce" model. I reject the recommendation of the s. 15 report, prepared by psychologist Dr. Alan Posthuma, that should the parents not be able to agree on a co-parenting plan, the defendant should have sole custody with the children spending equal time with each parent.
- [6] In considering custody, guardianship and primary residence for the children, I have in mind that the court must consider the best interests of the children free of any presumption, legal otherwise, for or against joint responsibilities: see *Robinson v. Filyk* (1996), 28 B.C.L.R. 21 (C.A.).
- [7] I reject the co-parenting suggestion for a number of reasons. There is a history of a violent relationship between the plaintiff and the defendant. The plaintiff testified that violence was common during the marriage in that the defendant would push and shove her, or would grab her by the shoulders and shake her.

- [8] Furthermore, she placed in evidence a number of photographs showing damage to the matrimonial home and its contents that can only have been caused by considerable force. These include the corner of a desk broken off, holes in various walls, damaged furniture, and two holes in a bathroom door; one, according to the evidence, caused by the defendant's fist and one by his foot.
- [9] I accept that the defendant is given to outbursts of anger that are significant enough to result in the damage described in these photographs. Indeed, in testifying, the defendant did not deny that the damage was caused by him. He also agreed with the plaintiff's testimony that when he was angry he often threw anything that was at hand.
- [10] The end of the marriage on January 23, 2008 was precipitated by an incident in which the defendant assaulted the plaintiff. The circumstances are exacerbated by the fact that the plaintiff was ill and pregnant at the time, and had just been released from hospital. As a result of this incident, the defendant was charged with assault.
- [11] The plaintiff testified that in that altercation she was restrained and thrown to the floor by the defendant. She had bruises on her arm and across her buttocks. The two older children, who were in the basement at the time, came upstairs in response to the noise. While they did not witness the physical assault, they can hardly have been unaware of the violence.
- [12] The defendant was convicted for that assault by a Provincial Court Judge. In reasons for judgment dated May 30, 2008, the judge rejected the testimony of the defendant on a number of points. At para. 26 she concluded:
- Mr. [H] came to her, restrained her by grabbing her wrist and shoulder and pushed her to the ground. After this he hit the floor with his hand three times out of frustration. I find Mr. [H's] behaviour was aggressive throughout this incident and constitutes an assault
- [13] The defendant does not accept this description of the assault. Having heard the parties testify in this trial with respect to that incident, I agree with the findings of the learned trial judge.
- [14] I also reject the comment in Dr. Posthuma's report that "the father is more likely, given the present circumstances, to foster a shared custody arrangement with the mother than the reverse" (p. 9). Given the difficulties with access and, in particular, access transfers since the separation, as well as the tone of the defendant's many emails, I conclude that statement is inconsistent with the evidence before the court.
- [15] Dr. Posthuma, in cross-examination, defended his position by saying that the history of violence and disagreement between the parties was a result of their intimate marital relationship and that such violence would disappear once the marriage was dissolved. There is little in his report, or in the evidence at trial, that would support that suggestion.

- [16] Indeed there is evidence that the relationship between the parties after they separated, and therefore "post intimate relationship", was as difficult as ever. For example, the plaintiff, her mother, and an independent witness all testified about a disturbing incident on March 13, 2008. The evidence was that K, the older daughter, had to attend a physiotherapy clinic. She was accompanied by her mother and her grandmother. Because of difficulties involving access transfers, in part resulting from "no contact" orders made by the Provincial Court, the plaintiff's mother was responsible for dropping the children off that afternoon at the beginning of the defendant's access.
- [17] As the physiotherapy session for K was running a little late the plaintiff's mother telephoned the defendant to say that they might be "five minutes late". She told him she could drop the children off at his house or take them to her house, depending upon his preference.
- [18] Rather than accept either of those reasonable suggestions, the defendant went to the physiotherapy clinic. Although he did not enter, which would have been a breach of the "no contact order" as the plaintiff was still inside the premises, his subsequent actions concerned a number of persons inside the clinic. Indeed, the independent witness who testified, a male employee of the clinic, was worried enough to go outside to make sure that the defendant did not enter the premises. After some time, he defendant left.
- [19] This inappropriate behaviour is inconsistent with Dr. Posthuma's conclusion that the defendant would be more likely to foster a shared custody arrangement.
- [20] There are a number of other reasons for rejecting the s. 15 report recommendation. First, as noted above, the third child of the marriage, B, was born after the parties separated. The defendant denied paternity. He accepted that he was the father of the child only after DNA testing. Second, B, now just over seven months old, is still being breastfed. The suggestion that this Court should order that a father have sole custody of a child, after such a denial of paternity and while the child is still being breastfed, is less than persuasive.
- [21] At p. 3 of the report, Dr. Posthuma observes that a history of violence has been "alleged" by the plaintiff and a counsellor who has been seeing the two older children. The violence in this relationship is not "alleged". Violence in the relationship was well documented long before Dr. Posthuma wrote his report.
- [22] Nor do I accept Dr. Posthuma's view of the child K's wishes concerning access. He states at p. 3 that "K's position on the access arrangements were [sic] not explored extensively because of the fact that she is in fairly intensive therapy with Ms. Lauder and is in a difficult position given that her therapist is quite convinced that her father is abusive". Despite having not explored "extensively" K's wishes concerning access, the author purports to understand the child's view and would give sole custody to the defendant.
- [23] Jessica Lauder is the psychologist who was counselling the two older children. Dr. Posthuma is critical of her counselling, saying that she is "quite convinced that the father is abusive". This opinion, however, ignores the observation in Ms. Lauder's notes that "there was no

indication of abuse" by the defendant. Dr. Posthuma goes on to say that it is understandable the plaintiff would feel the way she does "given the opinions of Ms. Lauder who would reinforce her fears and her distrust of her husband". I reject Dr. Posthuma's opinion on this point. The plaintiff gave ample reasons in her testimony for her concerns about the defendant.

- [24] A number of Ms. Lauder's clinical notes or reports are in evidence. While they document K's concerns about the defendant, they also contain comments such as "K reports she sometimes feels a little bit silly or a little bit happy at Dad's", and "bad things do not occur during her visits with Dad". As noted above, Dr. Lauder has also written that there is "no indication of abuse or of Dad yelling a lot". These contemporaneous notations do not evidence a bias against the defendant.
- [25] Ms. Lauder testified. I observed her and listened to her testimony. I reject the suggestion that she is biased against the defendant. Rather, she has reported the observations of the two children and, at the request of the plaintiff, has assisted her in coping with the children's apprehensions. The defendant, who was asked to participate and could have participated in this process, chose not to.
- [26] I add that Ms. Lauder's reporting of K's uneasiness about her father's tendency to become angry is supported by the defendant's own notes to his psychiatrist. In comments written in 2004 by the defendant, disclosed in his psychiatrist's clinical records, the defendant wrote:

My daughter gives me treats & presents to keep me from getting mad - afraid of me when I am angry, hides, cries - I don't want my problems to affect my children any longer .

- [27] These notes were written in 2004. While one could interpret the latter part of the notes positively, these observations of the defendant are consistent with views of K as recorded by Ms. Lauder.
- [28] A number of facts of which Dr. Posthuma was not aware when he wrote his report were put to him in cross-examination. These included the fact that he did not know of the damage to the house and contents wreaked by defendant in moments of violent anger. He did not know of earlier involvement of the police in a violent altercation between the parties in 1999. He did not know that when the defendant assaulted the plaintiff in January of 2008 she was not only pregnant, but ill and had been just released from hospital where she had received intravenous treatment.
- [29] Nor did he know that in August of 2008 when the plaintiff, over eight months pregnant, retrieved from the martial arts gym an exercise ball which belonged to her, the defendant telephoned the RCMP reporting she had stolen the ball. In his testimony, the defendant attempted to deflect responsibility for this telephone call by saying he made it because "Shane (the purported new owner of the gym) told me to .I did exactly what Shane told me to do".

- [30] Dr. Posthuma wrote that the defendant told him he had been receiving psychological treatment "for five years .from January 2004 to October 2008". I find this is not true. The defendant conceded he received no psychological treatment in either 2006 or 2007. Dr. Posthuma testified this was "a puzzle" and agreed he would "certainly have to revisit the matter". But he then said "the time frame was right". In the end, it did not change his view.
- [31] Nor did any of the new information put before him in cross examination change his view.
- [32] I am not persuaded by Dr. Posthuma's opinions or his recommendation. I reject the latter.
- [33] Finally, I found the defendant's testimony with respect to his desire to cooperate in a co-parenting arrangement unpersuasive. Indeed, I found his testimony generally unreliable. He was evasive in cross-examination, giving long rambling answers that frequently never came to grips with the question posed. He was caught in a number of errors.
- [34] In addition, the defendant, in his submissions, set out numerous reasons why the Court should conclude the plaintiff must be prevented from using her custodial authority to undermine the relationship between him and the children. These include her unilaterally changing access arrangements, ignoring his requests for access to B, refusing to permit the children to attend the gym after the separation, and denying telephone access. This is only a partial list. If the defendant is correct, such behaviour suggests that the plaintiff is not a good candidate for co-parenting. If the defendant's claims are untrue, he is not a good candidate for co-parenting.
- [35] The plaintiff, although more direct in her answers on cross-examination, demonstrated considerable hostility towards the defendant. She testified that she remains concerned that the defendant is impatient and quick to become angry, factors which will, the plaintiff claims, upset the children. She testified that she remains concerned about his behaviour towards the children "without me as a buffer".
- [36] Given the defendant's record of violent, angry reactions, and the plaintiff's manifest hostility towards the defendant, I conclude these are not parents who could successfully co-parent in the foreseeable future.
- [37] If one parent is to have custody, I conclude it should be the plaintiff. The children have lived with their mother all their lives. While there is evidence, as noted above, of some concerns in the children's relationship with the defendant, there is no evidence of any difficulty in their relationship with the plaintiff.
- [38] I am satisfied in all of the circumstances that the plaintiff should have sole custody of the children and primary residence of the children, and that there should be joint guardianship in the terms of the "Joyce" model, slightly amended. The joint guardianship order will read:
- a) The parties shall be the joint guardians of the estate of the children;

- b) In the event of the death of either party, the remaining party shall be the sole guardian of the children;
- c) Each party shall be obliged to advise the other of any matters of a significant nature affecting the children;
- d) The plaintiff shall be obliged to discuss with the defendant significant decisions which have to be made concerning the children, including significant decisions concerning the health (except emergency decisions), education, religious instruction, and general welfare of the children;
- e) The plaintiff shall be obliged to discuss the foregoing issues with the defendant and each party shall have the obligation to try and reach agreement on those major decisions;
- f) In the event the parties cannot reach agreement with respect to any major decision despite their best efforts, the plaintiff shall have the right to make such decision;
- g) The defendant shall have the right to seek a review by a mediator, or by application to the Court, of any decision which he considers contrary to the best interest of the children;
- h) Each party shall have the right to obtain information concerning the children directly from third parties, including but not limited to teachers, counsellors, medical professionals, and third party caregivers.

## Access

- [39] On June 26, 2008, a judge of this court ordered that primary residence of the children would be with the plaintiff. Access for the two older children to the defendant continued to be problematic. As a result, on November 12, 2008, a master of this court made an order that, among other things, specified access. These orders define the status quo.
- [40] While I am of the view that the primary residence of the children should continue to be with the plaintiff, I find that the older children K and E, notwithstanding K's concerns, generally have a good relationship with their father. Most certainly E does. I also conclude that with the assistance of counselling, K's fears with respect to her father's angry outbursts have been somewhat assuaged. In the circumstances, and consistent with maximizing the amount of time the children can have with each parent, I am satisfied that although their primary residence should remain with the plaintiff, the two older children should have a longer period of time exclusively with the defendant.
- [41] I therefore order that the older two children shall have access to the defendant from Wednesday at 5:00 p.m. until the following Sunday at 6:00 p.m. every other week, and in addition for two hours from 5:00 p.m. to 7:00 pm on the alternate Wednesdays. This will give the children four nights and four full days with the defendant as well as a short visit on the alternative week. This, I conclude, is an appropriate division of time at this point in their relationship with their parents.

- [42] The situation with the third child, B, is more complicated. I am not satisfied that at this time the defendant should have overnight responsibility for B, given her age, the fact that she has always resided with the plaintiff, and the fact that she is still being breastfed.
- [43] Therefore, I order that the defendant will have access to B for two hours commencing at 5:00 p.m. every Wednesday, and for four hours from 2 pm to 6 pm on the Sunday during which the defendant has access to the two older children.
- [44] Eight months from the date of these reasons, the access for B shall changed so that the defendant will have access or two hours from 5 p.m. every Wednesday, and from 10:00 a.m. Saturday until 6:00 p.m. Sunday on the weekends during which he also has access to the older two children.
- [45] The parties will be at liberty to vary these access provisions by agreement in writing without further order of the Court.

### Child Support

- [46] The master's order of November 12, 2008, also ordered that the defendant would pay the plaintiff \$812 per month child support. At trial, the defendant submitted that his total income was \$1,950 per month from his work at the World Class Martial Arts gym, as well as a pension of \$1,027.54 from Veterans Affairs, for an annual total of \$38,220. He therefore proposed that he should pay \$771 per month child support according the Child Support Guidelines (the "Guidelines"). He submitted that if this was the child support amount awarded, he would be responsible for 100% of special and extraordinary expenses.
- [47] However, I am not satisfied that his income, apart from his military pension, is \$1,950 a month. That is the amount he says he is being paid by World Class Martial Arts gym. There was considerable evidence about how it was that the company which had been owned and operated by the parties while they were married, Langley Martial Arts, was the subject of seizure orders executed by a bailiff as a result of its debts, and how a friend of the defendant, Shane Michaloski "purchased" the assets and commenced his own business in the same gymnasium. The new arrangement, the defendant testified, was that he would be the chief instructor. He said that at the beginning he was paid \$800 per month and some expenses.
- [48] But in addition, he rented premises from Mr. Michaloski. The notional rent was \$800. This rent was never paid.
- [49] Further, the defendant was unable to explain a number of deposits in his bank accounts. Indeed, at one point in cross-examination, saying he could not explain why a cheque made out to him for \$1,000 had not been deposited in his bank account, he said "it could have been deposited in Coast Capital - you know one of my bank accounts". As well, a number of cheques from World Class Martial Arts in were put into evidence. These cheques were made out to suppliers, but had the payee's name lined out and the defendant's name substituted.

The cheques were not explained satisfactorily.

- [50] I note that the supposed indebtedness for rent to Mr. Michaloski, and the indebtedness to his parents which he claimed at trial, do not show up in the financial statement sworn by the defendant on March 13, 2009.
- [51] Shane Michaloski testified. He supported the defendant to the extent that he testified he paid out the bailiff in early 2009 to re-coup the assets of Langley Martial Arts and start World Class Martial Arts as a business. He said that he hired the defendant as head instructor.
- [52] However, his testimony was unsatisfactory with respect to his control of and knowledge of his new business. Particularly in cross-examination, his answers were frequently "I'm not sure", "I don't recall", or "I don't know". He testified he did not know how much his few individual employees were being paid. He did not know when his chief instructor, the defendant, received a raise in pay. He explained this lack of knowledge by saying he "hired people" to run the business. This suggests the defendant is playing a much larger role in the business than he claims.
- [53] I add that the defendant purported to not know when his salary was raised.
- [54] Having considered the evidence of these two witnesses, I am satisfied that the income the defendant has proposed, \$38,220, is inaccurate and that he is, by any understanding of what constitutes income, earning more. I must, therefore, impute income. I have discussed with counsel the difficulty in imputing income, given the state of the evidence. I am satisfied that the "rent" which the defendant did not pay to Mr. Michaloski for many months is a form of income. I am satisfied that he is earning more than \$1,950 per month as head instructor of World Class Martial Arts. I impute his income at \$43,500 per year.
- [55] Child support for three children at this income level is \$869 per month. Child support will be paid by the defendant to the plaintiff in that amount commencing May 1, 2009, and payable on the first of each month thereafter.
- [56] The parties will exchange the income tax assessment information for the 2009 taxation year on or before June 30, 2010, and on or before June 30 of each year following, and adjust the child support payments according to the Guidelines without the necessity of a further court appearance. If they fail to agree, either party will have liberty to apply.
- [57] Extraordinary expenses will be borne by the defendant until the 2009 taxation year assessment is available, and thereafter their shares will be pro-rated according to their relative incomes.

## Spousal Support

- [58] The plaintiff is not employed, having lost her source of income from the martial gym business at the time of the separation. She has since given birth to the third child of the marriage. She is now occupied full time parenting the children. She is entitled to spousal support.
- [59] The recommended spousal support guideline ranges from \$255 per month to \$455 per month. Given the unreliability and lack of information in the present case, I would opt for an amount close to the middle of the range. The November 12, 2008 order set interim spousal support at \$397. I am satisfied that amount should continue. This amount will be paid to the plaintiff by the defendant commencing May 1, 2009 and payable on the first of each month following. Should the plaintiff at some point re-enter the work force, the parties will be at liberty to amend the spousal support order by mutual agreement without further order of the Court.
- [60] I understand that other matters in dispute concerning assets have been resolved.

## Costs

- [61] I am satisfied that the parties should share the costs of the preparation of Dr. Posthuma's report and his attendance at Trial. I am told this total amount is \$6,800.
- [62] With the exception of the above, each party shall be responsible for his or her costs.
- [63] Order accordingly.

"The Honourable Mr. Justice Williamson"

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