

CANADA / JUDGMENT

J.C.H. v. S.M.B.-H.

2024 BCSC 54

COURT

Supreme Court of British Columbia

DECIDED

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2024 BCSC 54 J.C.H. v. S.M.B.H.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

J.C.H. v. S.M.B.H.,

2024 BCSC 54

Date: 20240112

Docket: E153011

Registry: Vancouver

Between:

J.C.H.

Claimant

And:

S.M.B.-H.

Respondent

Before: The Honourable Mr. Justice Punnett

Reasons for Judgment

Counsel for the Claimant:

E.C. Walker

Counsel for the Respondent:

S. Stanislaus

Place and Date of Hearing:

Vancouver, B.C.

September 8, 2023

Place and Date of Judgment:

Vancouver, B.C.

January 12, 2024

Introduction

[1] In a chambers judgment of August 16, 2022 (the "Chambers Decision") reported at 2022 BCSC 1403 (the "Reasons"), several child support-related issues arising from the enforcement of a separation agreement were addressed. The parties have now filed cross applications seeking to, inter alia, (i) settle the resulting order, (ii) clarify when the child L.'s support ended, and (iii) reopen the issue of the respondent's Guideline income under the Federal Child Support Guidelines, SOR/97-175 [Guidelines] given her corporation's use of a health trust.

[2] The claimant seeks:

1. Settlement of the court order;
2. Depending on the terms of the court order, and in the possible alternative, a determination of child support for 2022 and 2023 for the child L.;
3. If the Court did not end child support on L.'s 19th birthday, then an adjournment of the issue of future child support;
4. In the further alternative, an adjournment of the applications and an order for an affidavit to be sought from L.;
5. A reopening and reconsideration of the determination of the respondent's Guideline income;
6. Settlement of costs of the August 16, 2022 hearing;
7. That the affidavit response of the respondent received two days before hearing not be admitted;
8. Costs of this application.

[3] The respondent seeks:

1. A determination of the child support amounts from July 2022 through June 2024. She agrees an adjournment of that issue is required;
2. Pre- and post-judgment interest for the retroactive child support determined by the Chambers Decision;

3. The settlement of the costs award arising from the Chambers Decision as double costs;
 4. Costs of this application.
- [4] The claimant has filed an appeal, hence any clarification of the reasons must keep the concerns addressed at para. 18 of *R. v. Teskey*, 2007 SCC 25 in mind.

Preliminary Issue

- [5] The claimant objects to the admission of Affidavit #16 of the respondent, filed and served on September 6, 2023.
- [6] The claimant filed his notice of application on August 25, 2023, relying on earlier affidavits from 2020 and February 2022 and the affidavit of K. Shelkie of August 24, 2023. Ms. Shelkie is a legal assistant employed by the claimant's counsel. Her affidavit simply attaches various materials, such as emails between counsel and a transcript of the Chambers Decision proceeding.
- [7] Affidavit #16 of the respondent sworn, filed and served on September 6, 2023, was filed in response to the claimant's Affidavit #12 sworn on August 31, 2023. Affidavit #12 of the claimant was filed in response to the respondent's Affidavit #15, received August 25, 2023. The respondent concedes that the affidavit of Ms. Shelkie is sufficient to support the claimant's applications to settle the court order, settle the issue of costs and reconsideration of the Chambers Decision, but not the issue of child support.
- [8] The respondent submits the materials filed on August 25, 2023 are deficient given the claimant adduced no evidence supporting his position on child support until he filed his Affidavit #12 sworn on August 31, 2023, despite his application seeking relief regarding such support.
- [9] Rule 10-6(3)(d) of the Supreme Court Family Rules, BC Reg 169/2009, requires that a notice of application must list the affidavits and other documents the applicant intends to rely on. The notice of application and the affidavits filed in support must be served on the respondent at least eight business days before the date set for hearing (R. 10-6(6) and (7)).
- [10] The hearing was set for September 8, 2023. Affidavit #12 of the claimant was served on the respondent at 3:44 p.m. on September 1, 2023. Thus, the claimant's Affidavit #12 was not listed in the notice of application and was not served eight business days before the date set for hearing. Therefore, the application materials served on September 25, 2023 were deficient and failed to comply with the Rules. The respondent was left with two business days to respond to the late filing of the claimant's affidavit, yet the claimant now objects to the admission of Affidavit #16 of the respondent, served on September 6, 2023.

- [11] Given the lengthy history of this matter and the circumstances leading to the respondent's Affidavit #16 being filed late, rejecting Affidavit #16 or adjourning the matter would not be in the interests of justice nor the best interests of the child. See: *Strata Plan VR 2000 v. Shaw*, 1999 CanLII 6154, [1999] B.C.J. No. 28 (S.C.) at paras. 5-7 and *Dhillon v. Virk*, 2014 BCSC 745 at paras. 15-16. Affidavit #16 of the respondent is admitted.
- [12] Turning to the claimant's Affidavit #12, it contains statements of hearsay, speculation and argument. Such will not be considered. See: *Creber v. Franklin*, [1993] B.C.J. No. 890, 1993 CarswellBC 1348 (S.C.) at paras. 18-21 and *Kennedy v. Kennedy*, 2006 BCSC 190 (at paras. 3-10).

Background

- [13] A detailed review of the background, the parties' incomes and child support issues are found in the Reasons. Where necessary I will refer to them later in these reasons.
- [14] The parties cohabited from approximately 1998 until they married on May 20, 2000. They separated in November 2013 and were divorced on January 15, 2016. There are three children of the marriage. Parenting of the two youngest children is shared and there are no issues before the Court today regarding their support. The oldest child was born on July 2, 2003 and turned 19 on July 2, 2022.
- [15] The parties entered into a separation agreement on August 5, 2015 (the "Separation Agreement"). It provided that there was to be an annual review of child support, commencing on July 1, 2016. No such reviews occurred.
- [16] At the Chambers Decision hearing, the primary issue was child support for the oldest child as he attended a boarding school on Vancouver Island from September 2018 until he graduated from grade 12 in the spring of 2021. In September 2021 he commenced university in Ontario.
- [17] The notice of application of the respondent filed January 17, 2018 and re-set for hearing in April 2022 sought a review of the child support payable by the claimant retroactive to July 1, 2016 and ongoing until the next review in July 2022. The submissions focused on whether child support was payable for L. while he was attending boarding school and attending his first year of university while under 19 years of age. As noted in the Reasons:
- [2] The specific relief sought in that notice of application was:
4. A review of the child support payable by the Claimant to the respondent commencing July 1, 2016, and payable on the first day of each and every month thereafter, and a determination of the parties' Guideline incomes.
 5. An order that the Claimant pay the respondent arrears of child support for 2015, 2016 and a recalculation of the child support owing with respect to 2017 [amended at the hearing to that date].

- [18] As a result, the Guideline incomes of the parties were determined for the years 2016 to 2021. Counsel were left to calculate the Guideline support payable. I ordered:
- [143] Child support for L. is payable from 2016 to July 2022 when he turned 19 notwithstanding his attendance at boarding school, except for the period of March 2017 to August 2018 when he resided with his father, during which time the respondent shall pay support to him.
- [144] The claimant shall pay to the respondent arrears of child support as calculated by counsel taking into account the parties' respective Guideline incomes, shared parenting throughout except respecting L. from March 2017 to August 2018.
- [145] Child support shall next be reviewed for July 2022 to June 2023.

Position of the Claimant

- [19] The claimant submits that the intention of my order was that child support for the oldest child L. ended when he turned 19 in July 2022. If child support was to continue after L.'s 19 birthday, the claimant seeks an order that such support be paid by the respondent to the claimant because he alleges L.'s primary residence has been with him during the summer months of 2022 and 2023, when L. has been home from school .
- [20] As the issue of where L. resided when home from school is disputed and the parties do not agree on his primary residence, the claimant seeks an order that L. provide an affidavit setting out his primary residence during those summer months.
- [21] The claimant also seeks to reopen the finding of the respondent's Guideline income to address certain health expenses paid by her company.
- [22] Regarding costs of the earlier hearing payable by the claimant to the respondent, the claimant submits such should be fixed at \$10,020.81. The claimant also seeks costs for this application.

Position of the Respondent

- [23] As for the settlement of the order, the respondent argues that what was before the Court and decided was a determination of retroactive support due from July 2016 to L.'s 19th birthday on July 2, 2022. The present application seeks an order determining child support for L. from July 2022 to June 2023 and July 2023 to June 2024. The respondent submits what was to occur once L. turned 19 was not an issue before the Court, was not addressed, and was left for further agreement or application to the Court.
- [24] The respondent also seeks pre- and post-judgment interest on the retroactive amount due pursuant to the Court Order Interest Act, R.S.B.C. 1996, c. 79. As well, the respondent seeks an order for double costs pursuant to R. 11-1(5)(b) of the Supreme Court Family Rules based on her offers to settle of February 12, 2021 and April 7, 2021, plus costs of this application.

Issues

[25] I will address the issues in the following order:

1. Settlement of the order;
2. Application to reopen;
3. Pre- and post-judgment interest;
4. Application for an order that the child L. provide an affidavit;
5. Double costs; and
6. Costs of these applications.

Settlement of the August 16, 2022 Order

[26] The draft order prepared by the respondent follows:

Upon the Court being advised that there are three children of the marriage, namely:

L., born June 2, 2003 and currently 19 years of age;

THIS COURT FINDS that:

1. The pre-tax corporate income of 1.117217 B.C. Ltd. shall be included in the Claimant's Guideline income, such that his Guideline incomes are as follows:
 - (a) July 2016 Review: \$244,734.34
 - (b) July 2017 Review: \$274,346.00
 - (c) July 2018 Review: \$284,547.41
 - (d) July 2019 Review: \$284,971.01
 - (e) July 2020 Review: \$308,506.68
 - (f) July 2021 Review: \$340,407.55
2. The Respondent's income for the years 2016 to 2021 is her Guideline amount reported at line 150 of each year, subject to adjustment for adding back 75% of her vehicle-related expenses.
3. Child support of L. is payable from 2016 to July 2022; notwithstanding his attendance at boarding school, except for the period of March 2017 to August 2018 when he resided with the Claimant, during which time the Respondent shall pay child support to the Claimant.

THIS COURT ORDERS that

1. The Claimant shall pay the Respondent arrears of child support from July 2016 through June 2022 in the amount of \$98,086, based upon the following:

- (a) \$1,816 owing by the Claimant for July 2016 through June 2017;
 - (b) \$9,019 owing by the Claimant for July 2017 through June 2018;
 - (c) \$21,106 owing by the Claimant for July 2018 through June 2019;
 - (d) \$26,352 owing by the Claimant for July 2019 through June 2020;
 - (e) \$27,132 owing by the Claimant for July 2020 through June 2021;
 - (f) \$33,036 owing by the Claimant for July 2021 through June 2022; and
 - (g) \$20,375 credit to the Claimant for a lump sum payment.
2. Child support shall next be reviewed for July 2022 to June 2023.
3. If counsel do not agree as to the issue of costs, they are at liberty to apply.

[27] The claimant objected to the order, stating:

- 1. The reference to L. as a child of the marriage should be removed from the preamble; and
- 2. Para. 3 of the respondent's draft order, under the heading "this court finds", should include the phrase "when he turned 19" after the July 22, 2022 date.

[28] The respondent submits her notice of application sought a review of the child support payable by the claimant retroactive to July 1, 2016 and ongoing until the next review in July 2022. She notes the focus of the earlier application was whether child support was payable for L. while he was attending boarding school and his first year of university. The Chambers Decision did not address whether the child support for L. would terminate when he reached the age of 19, as the hearing addressed the interpretation of the Separation Agreement. The Separation Agreement provides for child support as long as a child is a "child of the marriage". There was no application to vary the Separation Agreement before the Court.

[29] Neither notice of motion sought to address whether the Separation Agreement contemplated the termination of child support for L. upon reaching 19 years of age. The claimant also did not bring an application to vary the Separation Agreement to contemplate such action.

[30] In that context I turn to the Separation Agreement.

[31] The Separation Agreement addressed the parties' obligation to pay child support:

17.7 The obligation of either party to pay child support ceases for a child when the child:

- (a) marries;
- (b) becomes self-supporting; or

(c) becomes 19 years old, unless the child remains a "child of the marriage" within the meaning of the Divorce Act (Canada) because of inability to become self-supporting due to illness, disability, the pursuit of education, or other cause.

[32] In written submissions (the "Aide Memoire"), the respondent sought retroactive child support and ongoing child support of \$4,675 per month until the next review of child support in the summer of 2022.

[33] I addressed the issue of retroactive child support from July 2016 to July 2, 2022. As I determined the parties' Guideline incomes, I left the calculation of retroactive child support for counsel. Counsel determined that a total of \$98,086 was due as of June 2022.

[34] I concluded that:

137 The rationale for child support remaining payable when a child is under the age of majority and is attending school away from home is that a child under the age of majority remains dependent on his parents, and it is in the child's best interests to have a parent or parents' homes to return to. In this case, that includes the years at boarding school and the first year at university as L. did not turn 19 until July of this year. Given the evidence establishes that joint parenting resumed in the fall of 2018, in my view that principle governs. Child support for L. is payable by the claimant for the period he attended boarding school and his first year of university. The period prior to September 2018 was addressed by the parties by their agreement that joint parenting was not in place from February 2017 to August 2018.

[35] Read in the context of the application and the issues argued, the Court was only determining the retroactive support due up until L.'s 19th birthday. As a result, ongoing child support was ordered payable until his 19th birthday on July 2, 2022 and was then to be reviewed. I ordered at para. 145 that "[c]hild support shall next be reviewed for July 2022 to June 2023". That is, the obligation to pay child support continued. The amount, however, was subject to review in accordance with the Separation Agreement.

[36] The entitlement to support of L. in post-secondary education was not addressed. In light of the wording of the parties' Separation Agreement, it was not put in issue in the context of the respondent's application. At the time of the Chambers Decision hearing, he was a child of the marriage. If whether L. remains a "child of the marriage" as defined by the Divorce Act, R.S.C. 1985 (2nd Supp.), c. 3 is now in issue, that will require a further application seeking such relief.

[37] While that resolves the settlement of the order insofar as the issue of what was addressed, the application to reopen must be addressed before the remainder of the order can be settled.

Reopening the Issue of the Health Trust

[38] The claimant seeks a reconsideration of the determination of the respondent's Guideline income. Specifically, the claimant seeks a reconsideration of how the respondent's corporation's use of a health trust providing medical coverage to her and her children (the "Health Trust") affects her Guideline income. The preliminary issue here is whether reopening the issue of the Health Trust is appropriate. The claimant submits because there was time pressure on the day of the hearing and the Court sat late, the issue was not fully canvassed. The claimant also submits sufficient information was not before the Court to address the issue. The draft letter to the accountant indicates counsel was of the view the answers to the questions sought was relevant evidence to place before the Court. Counsel however chose to proceed on the basis of the information that was before the Court. On this application the answers that were sought from the accountant are not in evidence. The claimant now submits the respondent's income should be increased by the amounts below (which does not include a further gross up for the benefit of the respondent not paying income taxes on the sums):

2016 \$ 9,515

2017 \$40,789

2018 \$13,955

2019 \$10,767

2020 \$0

2021 \$19,208

2022 \$38,153

[39] The respondent submits the claimant is seeking to use this application to reopen the Chambers Decision in order to re-argue the issue of the Health Trust which was previously addressed at the Chambers Decision hearing.

[40] I addressed the Health Trust issue in the Reasons:

76 The respondent deposes she does not get Botox treatments. As for health costs generally, she provides the expert evidence of her accountant who deposes firstly it is a legitimate business deduction using a health and welfare trust that "permits business owners to use corporate dollars to pay for medical expenses relating to themselves and their families". Those expenses are tax deductible for the corporation. The accountant notes that he has not calculated the personal tax amount saved by the business owner. He states the expenses should not be treated as personal income. The net savings to the business owner of using the health and welfare trust is not calculated.

77 The respondent notes the claimant also has health benefits paid by his employer and states that the majority of those expenses claimed by her relate to the children. Given each of the parties have health benefits and their use for the children, I am not prepared to find the respondent's unreasonable. In the circumstances, I decline to add such to the respondent's Guideline income.

Law on Reopening

[41] I turn to the law on reopening an unentered order before considering the application to do so. The law on reopening a matter was recently canvassed by me in *Carpino v. Carpino*, 2023 BCSC 1518:

36 In *Hansra v. Hansra*, 2017 BCCA 199, the Court addressed the discretion of a trial judge to reopen a matter. The Court reviewed a number of authorities and the reference to a judge having an unfettered discretion first noted in *Clayton v. British American Securities Limited*, [1935] 1 D.L.R. 432, 1934 CanLII 229 (B.C.C.A.). Citing *Clayton*, the Court noted that in exercising the Court's discretion a judge "would...discourage unwarranted attempts to bring forward new evidence available at the trial to disturb the basis of the judgment delivered or to permit a litigant after discovering the effect of a judgment to re-establish a broken-down case with the aid of further proof. If the power is not exercised sparingly and with the greatest care fraud and abuse of the Court's processes would likely result".

37 Regarding the principles applicable on an application to reopen, the Court in *Hansra* referenced *Moradkhan v. Mofidi*, 2013 BCCA 132:

54 This Court remitted the matter for a new trial because the process followed by the trial judge was flawed and unfair. In summarizing the principles applicable on an application to reopen, Garson J.A. stated (at para. 31):

- * it is generally speaking in the interests of justice to consider that a trial is complete when each side has closed their case and the judge has delivered his or her judgment;
- * a judge's unfettered discretion to reopen a trial should be exercised with restraint;
- * a party may not use the rule to re-argue, re-cast, or re-state his or her case, rather the rule is available to remedy what might otherwise be a substantial injustice;
- * it is not intended that a party should be able to lead substantial new evidence, nor does the rule generally permit the leading of new expert evidence;
- * the reasons that the evidence was not led or submissions not made in the first place may be relevant to the exercise of the judge's discretion, particularly where the failure to do so in the first place was a considered or pragmatic decision; and
- * the discretion should only be exercised if the reception of the new evidence would probably change the result of the trial.

I would add to this list that a judge may reasonably exercise such discretion where a relatively discreet error in math or some mechanical consideration of the evidence is clearly in error. Finally, the overarching consideration is whether it is in the interests of justice that the court reopen the case. (See also *Brown v. Douglas*, 2011 BCCA 521, 314 B.C.A.C. 143.)

[Emphasis in original.]

...

Discussion of Reopening

- [42] The evidence at the Chambers Decision hearing relating to the respondent's Health Trust and the claimant's health insurance coverage was referenced on several occasions. In counsel for the claimant's submissions, he noted that in the Separation Agreement the parties had agreed to various provisions benefitting the children and their medical and dental coverage. He stated that he anticipated the claimant would raise the issue of medical and dental insurance as a basis for imputing income to the respondent.
- [43] During the course of submissions, counsel discussed the issue of whether there was sufficient time to complete the hearing. Counsel for the claimant adjourned his cross-application for the appointment of a parent coordinator as he wanted to "make sure we do our best to finish today".
- [44] At the Chambers Decision hearing, the claimant's counsel responded to the respondent's counsel's reference to the Health Trust, noting that while such is a legitimate business expense it is not something available to the claimant who pays his medical expenses out of after-tax dollars. The claimant submitted that it is over \$40,000 per year and should be recognized as a tax-free benefit to the respondent when fixing her Guideline income. He further noted the onus is on the respondent to establish the reasonableness of any deductions from her business income: see *Wiebe v. Treissman*, 2017 BCSC 1523 at para. 94.
- [45] The issue of the Health Trust benefit was a live issue between the parties going back several years. The respondent filed a letter from her accountant setting out why it was a legitimate corporate expense. The respondent also submitted the claimant obtained significant benefits in terms of the reimbursement he received from his health insurance. In addition, the majority of the Health Trust's benefit related to the children's medical and dental expenses. The claimant did not lead evidence that his health benefit was taxable nor any evidence of the after-tax benefits to the respondent.
- [46] There is no issue that what is deductible for income tax purposes may include "a personal benefit or constitute an ordinary living expense that would normally be paid from a party's employment income" and therefore part of the individual's Guideline income: *M.T. v. J.S.*, 2023 BCCA 64 at para. 15. However, if the business expense provides a personal benefit to the individual or constitutes an ordinary living expense, then it will not be deducted from their Guideline income: *M.T.* at paras. 15, 17.

[47] Applying the reopening test noted above, it is clear the issue of the Health Trust and the claimant's employment health benefits was before the Court. In support of reopening the issue, counsel for the claimant submits the concern is the issue was not fully canvassed as there was time pressure and the hearing did not end until late. Further, the claimant's counsel asserts that the letter from the respondent's accountant was a live issue which the respondent only addressed in reply. His earlier request for information regarding the letter had not been replied to. Since the letter was referenced in reply, counsel for the claimant also submits that he did not have the opportunity to raise the issues raised by the accountant's letter. The claimant relies on the Court of Appeal's statement in M.T. to submit that the respondent's health trust is a personal benefit that should not be deducted from her Guideline income.

[48] Claimant's counsel had written to then counsel for the respondent on March 9, 2020 regarding the accountant's letter. In that letter he advised that he had two follow up questions he wished to ask the accountant in writing if the respondent was relying on the accountant's letter. Counsel for the respondent by email of December 3, 2020 advised that they were relying on the letter. Counsel for the claimant responded if that was the case, he needed an answer to his request of March 9, 2020 to raise follow up questions with the accountant. Counsel for the respondent did not reply. The claimant notes as well that the formula to calculate the net savings to a business owner from the use of a health trust was put to the respondent, but the respondent failed to or refused to reply.

[49] His draft letter of March 9, 2020 to the accountant stated:

In your letter you state:

I was asked specifically to address if the medical expenses paid for utilizing an H&W Trust should be treated as personal income. The expenses should not be treated as personal income. However ... [a]s an H&W Trust is only available to business owners and not employees, there is often a benefit to the business owner. The net impact may need to be quantified to show what level of personal income would have been required to fund medical expenses in a given year at the personal level, if a business owner were an employee who did not have access to an H&W Trust.

By reply to both Mr. Stanislaus and I, would you please answer the following questions:

- 1 When you state "[t]he expenses should not be treated as personal income", are you opining on:
 - a. Whether medical expenses paid under an H&W Trust should be treated as personal income under income tax legislation; or
 - b. Whether medical expenses paid under an H&W Trust should be treated as personal income under s. 18(2) of the Federal Child Support Guidelines, which says:

Shareholder, director or officer

18 (1) Where a spouse is a shareholder, director or officer of a corporation and the court is of the opinion that the amount of the spouse's annual income as determined under section 16 does not fairly reflect all the money available to the spouse for the payment of child support, the court may consider the situations described in section 17 and determine the spouse's annual income to include

- (a) all or part of the pre-tax income of the corporation, and of any corporation that is related to that corporation, for the most recent taxation year; or
- (b) an amount commensurate with the services that the spouse provides to the corporation, provided that the amount does not exceed the corporation's pre-tax income.

Adjustment to corporation's pre-tax income

- (2) In determining the pre-tax income of a corporation for the purposes of subsection (1), all amounts paid by the corporation as salaries, wages or management fees, or other payments or benefits, to or on behalf of persons with whom the corporation does not deal at arm's length must be added to the pre-tax income, unless the spouse establishes that the payments were reasonable in the circumstances.

2. Do you agree that the following formula approximately quantifies "what level of personal income would have been required to fund medical expenses In a given year at the personal level"?

[50] Counsel for the claimant submits the questions of what portion of the benefit should have been added to the respondent's taxable income, what income would be payable on it and the resulting effect on the respondent's Guideline income were never put to the Court. He submits the Court can reopen this issue given that there was incomplete evidence before the Court.

[51] He seeks an order that the respondent's Health Trust funds be added to her Guideline income each year and grossed up for the tax benefit she derives from not having to account for this item as income.

[52] The claimant's counsel relies on *Moradkhan v. Mofidi*, 2013 BCCA 132, referenced earlier.

[53] The issue of unfettered discretion has been subsequently addressed in *Hansra v. Hansra*, 2017 BCCA 1999:

44 It is beyond doubt that a trial judge who has pronounced reasons for judgment has the ability, before a formal order has been entered, to reopen a matter. This power is often said to involve the exercise of an "unfettered discretion". Although the word "unfettered" continues to be used in the context of reopening, the discretion to do so is in fact fettered, in the sense that, "as with any exercise of discretion, it must be exercised 'judicially', in a principled and consistent way": *Fan (Guardian ad litem of) v. Chana*, 2011 BCCA 516 at para. 61, 345 D.L.R. (4th) 453 (B.C. C.A.) (per

Levine J.A.). This is reflected, in particular, in decisions of this Court in which the discretion has been held to have been exercised improperly. In my view, the time has come to jettison the adjective "unfettered" which, by definition incorrectly describes the discretion. An unfettered discretion would be one which is:

- "unrestrained, unrestricted": Canadian Oxford Dictionary, 2d ed. (Oxford University Press: 2004);
- "not confined or restricted": Concise Oxford Dictionary, 11th ed. (revised) (Oxford University Press: 2008).

[54] Also relevant is *Bajwas v. Habib* 2022, BCCA 230, where the Court of Appeal noted at para. 48:

Trial judges have a broad discretion to re-open a trial after judgment has been given, but it is a discretion that should be exercised rarely and only when the interests of justice clearly require prolonging the litigation in order to avoid a miscarriage of justice. For example, the discretion to re-open may be properly exercised by a trial judge who is satisfied that his or her original judgment contains material errors that may be corrected by further submissions, or where evidence has been overlooked or misconstrued, or where the law has been misapplied, or where the reasons for judgment failed to address an argument advanced at trial: *Grewal v. Grewal*, 2016 BCCA 237 at para. 86.

[55] In this case it is clear the Health Trust was a live issue well before the hearing. The material reveals that counsel had communicated regarding the issue. The respondent did not respond, and further questions were not put to the accountant. The claimant did not bring an application to obtain the requested answers nor did he seek to call the accountant. Rather, the claimant chose to proceed with the hearing.

[56] As noted, counsel for the claimant submits that respondent's counsel only referred to the accountant's letter in reply after he had raised the Health Trust issue and that he did not have time given the lateness in the day to respond. However, no request was made to make such reply submissions nor to adjourn the matter to enable him to do so.

[57] Nor has the issue of the impact of the majority of such expenses being those of the children been addressed as s. 7 expenses as required by the Separation Agreement. The draft letter to the accountant indicates counsel was of the view the answers to the questions sought was relevant evidence to place before the Court. Counsel however chose to proceed on the basis of the information that was before the Court. On this application the answers that were sought from the accountant are not in evidence. The claimant now submits the respondent's income should be increased by the amounts noted in paragraph 38 above (which does not include a further gross up for the benefit of the respondent not paying income taxes on the sums).

[58] This is not a case of a discreet error in math. Nor is it clear if such new evidence would change the result or amount to a substantial injustice if it were not admitted. To admit new evidence would permit the claimant the opportunity to now re-argue and supplement their application. The Health Trust was a live issue before the Chambers Hearing occurred. The issue could have been before the Court at the Chambers Decision hearing and a choice was made that it was not. More time to address the issue at the hearing was not sought nor was an adjournment requested. The claimant has not demonstrated that reopening and prolonging the litigation is in the interests of justice.

[59] As a result, I decline the request to reopen.

[60] The form of order prepared by the respondent shall be the form of order to be entered.

[61] I turn next to the additional relief sought by the respondent on this application.

Pre-Judgment and Post-Judgment Interest

[62] The claimant was found to be in arrears of child support of \$98,086. The respondent seeks interest on the arrears. The claimant submits a child support award is not a "pecuniary judgment" under the Court Order Interest Act, R.S.B.C. 1996, c. 79, hence interest does not accrue.

[63] The Court Order Interest Act provides:

1 (1) Subject to section 2, a court must add to a pecuniary judgment an amount of interest calculated on the amount ordered to be paid at a rate the court considers appropriate in the circumstances from the date on which the cause of action arose to the date of the order.

2 The court must not award interest under section 1

(a) on that part of an order that represents pecuniary loss arising after the date of the order,

(b)

[64] As observed by Justice Coultas in *Price v. Price (Estate)*, 56 B.C.L.R. (2d) 387, [1991] B.C.J. No. 3216 (S.C.), "[t]here is a paucity of law [on the issue of whether interest accrues on child support arrears]". At that time he also observed there was "no case directly on point".

[65] However, years later, in *A.E. v. L.L.*, 2023 BCPC 59, the issue was addressed. The Provincial Court judge stated:

90 Ms. L. asked this court to add interest to any support arrears under the Court Order Interest Act, RSBC 1996, c. 79. Section 1 of the Court Order Interest Act requires a court to add to a pecuniary judgment an amount of interest calculated at a rate the court considers appropriate.

91 A "pecuniary judgment" exists when a court determines a set amount payable: see for instance *Pioneer Envelopes Ltd. v. British Columbia (Finance)*, 1980 CanLII 714 (BCSC) at para. 42. Such judgments are typically found in the case of a debt claim.

92 Orders for payment of support differ in nature from a pecuniary judgment. The amounts due for support are set by agreement or court order. They remain subject to variation or cancellation by court order under Family Law Act s. 152 (Changing, suspending or terminating orders respecting child support), s. 167 (Changing, suspending or terminating orders respecting spousal support) and s. 174 (Reducing or cancelling arrears). Unlike support orders, pecuniary judgments are not subject to variation or cancellation by the court.

93 I find that an order for payment of support is not a pecuniary judgment within the meaning of the Court Order Interest Act. I draw support for this conclusion from the Family Maintenance Enforcement Act, RSBC 1996, c. 127, s. 11.1 which expressly permits the addition of interest to support arrears.

[66] The judge ordered interest pursuant to the Family Maintenance Enforcement Act, R.S.B.C. 1996, c. 127. Section. 11.1 of the Family Maintenance Enforcement Act provides:

Interest

11.1 (1) Subject to the regulations, the debtor must pay to the creditor on any arrears of maintenance that accrue before or after this section comes into force simple interest calculated from the date and in the manner determined in accordance with the regulations.

- (2) The rate of interest payable under subsection (1) must be prescribed by regulation and the date from which the interest is calculated must not be earlier than the date this section comes into force.
- (3) If interest is payable under this section on arrears under a maintenance order that is filed with the director,

[67] The Provincial Court judge makes no reference to Price, nor to the other authorities to which I will refer. For the reasons that follow, I conclude the sum due for retroactive child support in this case is a pecuniary judgement under the Court Order Interest Act, and that the Family Maintenance Enforcement Act does not preclude the respondent from claiming interest without registering her claim pursuant to that Act.

[68] The two issues then are: (i) is a judgment for arrears of child support or for retroactive child support a pecuniary judgment under the Court Order Interest Act; and (ii) whether, given the existence of the procedure in the Family Maintenance Enforcement Act, that specifically permits interest to be charged is that Act required to be invoked if a claim for interest is to be advanced?

[69] Justice Bouck reviewed the history of pre-judgment interest payable pursuant to the Court Order Interest Act in *Pioneer Envelopes Ltd. v. British Columbia (Finance)*, 24 B.C.L.R. 175, 1980 CanLII 714 (S.C.). After a review of the historical nature of interest in England and British Columbia, he addressed the nature of a "pecuniary judgment" under the Court Order Interest Act:

[40] What is a pecuniary judgment? From the Crown Zellerbach decision we know that it is not a declaratory judgment. The Shorter Oxford English Dictionary, 3rd ed. (1978), interprets "pecuniary":

"Consisting of money; exacted in money."

[41] Jowitt's Dictionary of English Law, 2nd ed. (1977), vol. 2, p. 1339, defines the root of the word "pecuniary" as follows:

"Pecunia properly money, but anciently cattle, and sometimes other goods well as money."

[42] Black's Law Dictionary, 5th ed. (1979), p. 1018, states:

"Pecuniary Monetary; relating to money; financial; consisting of money or that which can be valued in money."

All of these plainly show that a pecuniary judgment can be defined as a "money" judgment

[48] Behind the Court Order Interest Act is a very simple idea: no one should profit from his own unlawful acts. In this case the Crown assessed Pioneer for unpaid taxes in the sum of \$35,714.65. Of this \$35,321.61 was shown to have been an unlawful assessment. When the assessment was made, the Crown set in motion the machinery of the Social Service Tax Act. Obligated by statute to pay the face value of the assessment to the Crown, the appellant has been deprived of the use of \$35,321.61 since 24th May 1978. Now the law recognizes that the Crown has benefited from having this money since 24th May 1978, because it could either have earned interest on the sum it kept or it was that much less the Crown has to borrow from others to meet its own commitments. Just repaying the principal amount does not reinstate the status quo. To balance the scales the Crown should pay interest on the sum it has unlawfully held.

[70] In Price, Coultas J. noted that a decree nisi was granted in Alberta in 1980 which required the defendant to pay child support. He died in 1986 without making any payments. In 1991 a judgment was obtained in British Columbia fixing the arrears of child support and costs. The issue before the Court was whether interest accrued on the support owed and on costs.

[71] After noting the paucity of law on the issue in B.C. he stated:

The matter did arise before Andrews J. in *Newson v. Newson* [1981] 2 W.W.R. 398 (B.C.S.C.). In that case, the wife claimed for judgment interest on a lump sum maintenance award for the period between granting the decree nisi and the award of maintenance some 354 days. The wife was paid periodic maintenance over that time. The court refused to award prejudgment interest.

At p. 401, Andrews J. said:

The petitioner's claim raises several issues. In order to grant such a claim, I must find first that the granting of a decree nisi of divorce creates a "cause of action" for maintenance; second, that a lump sum maintenance award constitutes a "pecuniary judgment" within the meaning of the Act; and third, that the judgment is referable to pecuniary loss arising before the date of the order.

With respect to the third issue, and assuming for the purposes of analysis that a lump sum maintenance award is a pecuniary judgment, it is my view that such an award is intended to provide for losses that arise after the date of the order. Section 2(a) of the Court Order Interest Act has been considered by the British Columbia Court of Appeal in the context of personal injury claims. In *Robson v. Official Administrator* (1979), 12 B.C.L.R. 208 (C.A.), Taggart J.A. noted at p. 220 that Lord Denning M.R. in *Jefford v. Gee*, [1970] 2 Q.B. 130 at 146, [1970] 1 All E.R. 608n (C.A.), stated:

"Interest should not be awarded as compensation for the damage done. It should only be awarded to a plaintiff for being kept out of money which ought to have been paid to him."

In concluding that s. 2(a) of the Act precluded interest on that portion of personal injury award referable to loss of future earnings, Taggart J.A. stated at p. 221 that:

"It cannot be said that that principle applies [that is the principle stated by Lord Denning M.R.] to income which may be lost in the future because that income has not yet been earned and therefore the plaintiff has 'not been kept out of it'."

...

There are numerous reasons why a court may award lump sum maintenance. It may be that acrimony between the parties makes it desirable to sever all future contact between them. It may be that a lump sum award is appropriate to permit the recipient to secure adequate shelter. Whatever the reason, the award is prospective in nature. It is intended, like periodic maintenance, to provide for the future needs of the recipient.

And at 402:

In conclusion, it is my view that the prospective nature of maintenance, whether lump sum or periodic, precludes the court from awarding prejudgment interest thereon. The letter of the law, that is, s. 2(a) of the Court Order Interest Act, dictates this result. Further, because the petitioner has been receiving maintenance pursuant to a Provincial Court order during the relevant period, it is not open to her to argue that she has been "kept out of" maintenance. Although the amount and form of maintenance orders may vary as they have in this case, with the statute under which they are awarded, I do not think it can seriously be contended that the essential purpose of the awards differ. Therefore, the petitioner's claim does not fall within the spirit of the legislation.

For the above reasons, a consideration of whether maintenance constitutes a "pecuniary judgment" or whether the granting of a decree nisi gives rise to a "cause of action" for maintenance is unnecessary to dispose of this aspect of the claim.

The facts in *Newson* are not those before this court. Mr. Price never made any maintenance payments. But more significant, here the issue is not whether interest can attach to a maintenance order but whether interest can attach to a judgment for maintenance arrears.

In *Hampton v. Hampton* (1985) 64 B.C.L.R. 264 (B.C.C.A.) the court held that a lump sum award of spousal maintenance ordered for a wife but not paid before her death, did not survive her death.

At p. 271, Lambert J.A. said:

There is no jurisdiction under the Divorce Act to make an order for maintenance for any other purpose than the support of the recipient or the children of the marriage. The court cannot order maintenance for a recipient, to be paid after the recipient is dead. Accordingly, maintenance orders must be interpreted in such a way that they reflect this limitation on the jurisdiction of the court. Maintenance orders are spent at the date of death of the recipient, with respect to payments not yet due.

But the situation is different with respect to accumulated periodic arrears or lump sum arrears. Those accumulated arrears are judgment debts arising under valid orders, made within the jurisdiction of the court. Unless the arrears are cancelled under s. 11(2), the judgment debts will continue in favour of the deceased recipient's estate.

(Emphasis added)

I find that the application of *Newson* is limited to situations involving maintenance order which are prospective in nature.

The arrears in this case are a judgment debt arising under a valid court order (the 1980 decree) in respect of which I granted a pecuniary judgement. The Court Order Interest Act provides that a court "shall" add interest on a pecuniary judgment except in those circumstances enumerated in s. 2 of the Act. Those circumstances have no application in this case.

[72] He then noted that the issue has arisen in other provinces and, in each case, interest was awarded on maintenance arrears. See: *Zilka v. Zilka*, (1978) 5 Alta. L.R. (2d) 358, [1978] A.J. No. 636 (C.A.), *Foy v. Foy*, (1979) 14 R.F.L. (2d) 12, 1979 CanLII 1631 (O.N.C.A.) and *Allen v. Morrison*, (1986) 4 R.F.L. (3d) 113, 1986 CanLII 2441 (O.N.S.C.).

[73] In *Lombardo v. Lombardo*, 2007 BCSC 284 (at paras. 363, 364 and 373) retroactive support was found to be \$702,804. In granting judgment for that sum, Justice McEwan ordered that court order interest applied to the arrears as accrued. In *Greene v. Greene*, 2010 BCCA 595 (at para. 100) the Court of Appeal ordered court order interest on retroactive support from the date of the Court's reasons. In *Martin v. Martin*, 2021 BCSC 2015, Justice Kirchner ordered for arrears of child support to be paid, plus interest pursuant to the Court Order Interest Act (para. 110).

- [74] I fail to see how the fact a maintenance order may be varied disqualifies it from being a pecuniary judgment. In A.E., the judge, as noted, stated at para. 92 that "[u]nlike support orders, pecuniary judgments are not subject to variation or cancellation by the court". Surely as orders of the Court they remain such unless varied or cancelled. The mere possibility of variation or cancellation does not change their nature as a valid court order which is a pecuniary judgment under the Court Order Interest Act.
- [75] The parties part company as to when the interest on a judgment subject to interest arises. The claimant submits interest only accrues when a judgment is obtained, hence until the Court fixes the retroactive amount of support there is no judgment or debt. In a sense it is only then that it is crystallized. The respondent submits that interest will accrue from when the amount owed is due from. That is, it accrues each year in accordance with the Guidelines, given the parties agreed to the review and recalculation of the support payable in their Separation Agreement.
- [76] The order made in this case determined the Guideline incomes of the parties for the years 2016 to 2022. The calculation of the retroactive child support was left to counsel who have agreed on the sum totalling \$98,086. Given the purpose of court order interest as described by Bouck J. in *Pioneer*, the sums have been found due pursuant to the Separation Agreement terms for the time periods reviewed. Interest accrues during that period of time.
- [77] As for the Family Maintenance Enforcement Act governing claims for interest on child support, Coultas J. in *Price* noted:

The Public Trustee submits that the court should refuse an order of interest based on public policy, for the legislature has established a government program to assist people to recover maintenance from defaulting spouses. This submission must fail.

The program was not in place in this province from 1980 to 1986 when Mr. Price died. Now that it is in place, it is the appropriate vehicle with which to pursue a defaulting spouse.

There are no valid public policy reasons for denying interest on a pecuniary judgment for maintenance arrears. Certainly in a case of child support where it is the children who suffer the ill effects of an "unjust withholding", public policy argues in favour of awarding interest.

- [78] The Family Maintenance Enforcement Act sets out a program to assist people to recover maintenance due. It does not state it is compulsory. It requires a party to choose to avail themselves of its processes. Conversely, here as I have determined the arrears meet the definition of a pecuniary judgment. Interest is therefore due from when the child support amount was owed under the Separation Agreement.

Potential Affidavit by L.

- [79] As noted, the claimant seeks an order permitting him to rely upon an affidavit sworn by their son L., who is now 20 years of age. While L. is now an adult, the history of his relationship with the respondent indicates he is vulnerable. As referred to in the Reasons:

6 On March 20, 2017, Masuhara J. ordered that the regular parenting schedule was not to be enforced regarding L. as his relationship with his mother had broken down. He also ordered that L. was to continue with counselling and would have flexibility as to when he wished to see or communicate with the respondent.

100. The respondent deposes that during 2017 her relationship with L. was improving, and by the time L. commenced attending boarding school the parties had resumed shared parenting for the times L. was in Vancouver.

109 The respondent submits that before L. applied to attend boarding school she was not in communication with him, that she was informed by the claimant this was to occur and she did not consent to it. She was concerned about the cost. A parenting coordinator was involved, and they negotiated an arrangement under which the claimant would pay the private school costs except for the respondent paying \$5,000 annually, with shared parenting to resume when the child was back in Vancouver.

110 The respondent deposes that after the order of Masuhara J. she exercised parenting time informally with L. on a schedule directed him. They would chat several times a week and attended regular counselling together, one of the goals of which was to return to their regular parenting schedule. In January of 2018, they began spending more time together and by the summer of 2018, L. would sleepover at her home and the intention was to return to 50/50 parenting by September of 2018. After L. indicated he wished to attend boarding school and she ultimately agreed that he could, the respondent states she and the claimant agreed that during L.'s time at home over the school holidays parenting would revert to a 50/50 parenting schedule. She confirms that has occurred.

[80] The respondent submits that she currently enjoys a healthy relationship with L. but fears it will be threatened if he is called on to swear an affidavit. In addition, she submits that placing L. in the middle of his parent's dispute is not in his best interests particularly given he suffers from anxiety and ADHD and has been under stress due to being placed on academic probation at university (*J.E.S.D. v. Y.E.P.*, 2018 BCCA 286 at para. 55).

[81] It is concerning the claimant is willing to involve their son in the claimant's financial disputes with the respondent. To bring their son into their ongoing dispute is unacceptable. There are likely other sources of evidence of their son's residency during the periods in question. This a dispute about money, not issues relating to the best interests of L., where it may be appropriate that his voice be heard.

[82] The claimant's application for an order that an affidavit of L. setting out his primary residency during the summer months between university terms in 2022 and 2023 be admitted as new evidence is dismissed.

Costs of the April 2022 Application

[83] Counsel were given liberty to apply to address costs if they could not agree. While the claimant concedes the respondent was substantially successful on the application, he disputes the claim of the respondent for double costs. The respondent relies on two without prejudice costs offers: the first dated February 12, 2021 and the second dated April 7, 2021.

[84] The claimant submits his offer to resolve costs and disbursements in February 2023 by payment of \$10,020.81 was generous and calculated based on the respondent's proposed bill of costs after removal of the claim for double costs. He disputes certain tariff item amounts claimed but accepted them for the purposes of his offer of \$10,020.81. However, he submits that a proper calculation of the bill of costs would total \$4,421. He submits that even if double costs were awarded on his alleged correct bill of costs, the total would be \$6,661.

[85] Rule 16-1(14) provides that costs can be awarded for the whole or part of a family law case:

16-1 (14) The court may award costs

- (a) of a family law case,
- (b) that relates 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.

[86] As for the general principles respecting awarding of costs and double costs, the respondent relies on *Clarke v. Clarke*, 2015 BCSC 1005 (at paras. 7-14), *Gold v. Gold*, (1993), 82 B.C.L.R. (2d) 180, 1993 CanLII 1248 (C.A.), *Fotheringham v. Fotheringham*, 2001 BCSC 1321 and *Hartshorne v. Hartshorne*, 2011 BCCA 29 (at paras. 25-26, 35-39).

[87] In *Hartshorne*, the Court of Appeal stated:

[25] An award of double costs is a punitive measure against a litigant for that party's failure, in all of the circumstances, to have accepted an offer to settle that should have been accepted. Litigants are to be reminded that costs rules are in place "to encourage the early settlement of disputes by rewarding the party who makes a reasonable settlement offer and penalizing the party who declines to accept such an offer" (*A.E. v. D.W.J.*, 2009 BCSC 505, 91 B.C.L.R. (4th) 372 at para. 61, citing *MacKenzie v. Brooks*, 1999 BCCA 623, *Skidmore v. Blackmore* (1995), 1995 CanLII 1537 (BC CA), 2 B.C.L.R. (3d) 201 (C.A.), *Radke v. Parry*, 2008 BCSC 1397). In this regard, Mr. Justice Frankel's comments in *Giles* are apposite:

[74] The purposes for which costs rules exist must be kept in mind in determining whether appellate intervention is warranted. In addition to indemnifying a successful litigant, those purposes have been described as follows by this Court:

- "[D]eterring frivolous actions or defences": *Houweling Nurseries Ltd. v. Fisons Western Corp.* (1988), 1988 CanLII 186 (BC CA), 37 B.C.L.R. (2d) 2 at 25 (C.A.), leave ref'd, [1988] 1 S.C.R. ix;
- "[T]o encourage conduct that reduces the duration and expense of litigation and to discourage conduct that has the opposite effect": *Skidmore v. Blackmore* (1995), 1995 CanLII 1537 (BC CA), 2 B.C.L.R. (3d) 201 at para. 28 (C.A.);
- "[E]ncouraging litigants to settle whenever possible, thus freeing up judicial resources for other cases: *Bedwell v. McGill* 2008 BCCA 526, 86 B.C.L.R. (4th) 343 at para. 33;
- "[T]o have a winnowing function in the litigation process" by "requir[ing] litigants to make a careful assessment of the strength or lack thereof of their cases at the commencement and throughout the course of the litigation", and by "discourag[ing] the continuance of doubtful cases or defences": *Catalyst Paper Corporation v. Companhia de Navegação Norsul*, 2009 BCCA 16, 88 B.C.L.R. (4th) 17 at para.16.

[26] Rule 37B(6) of the Rules of Court (which is now R. 9-1(6) of the Supreme Court Civil Rules and remains the same as its predecessor) lists the following factors to be considered in making an award for double costs under R. 37B(5)(b):

- (a) whether the offer to settle was one that ought reasonably to have been accepted, either on the date that the offer to settle was delivered or on any later date;
- (b) the relationship between the terms of settlement offered and the final judgment of the court;
- (c) the relative financial circumstances of the parties;
- (d) any other factor the court considers appropriate.

[88] The factors to be considered were recently summarized by Justice Horsman (as she then was) in *Haley v. Haley*, 2023 BCSC 285:

9 The first factor requires the court to determine whether the offer was one that ought reasonably to have been accepted at the time it was open for acceptance, not by reference to the result ultimately achieved at trial. The factors relevant to the assessment of reasonableness include the timing of the offer, whether it had some relationship to the claim as opposed to being a nuisance offer, whether it could be easily evaluated, and whether some rationale for the offer was provided: *H.K. v. W.K.*, 2018 BCSC 1447 at para. 66 [H.K.].

10 The second factor is the relationship between the offer and the result at trial. In considering this factor, the court should determine whether the declining party would have been financially better off, on a global basis, if they had accepted the offer as compared to their recovery at trial. Precise alignment between an offer to settle and final judgment is not required: H.K. at para. 68.

[89] Rule 11-1 of the Supreme Court Family Rules provides:

- (1) In this rule, "offer to settle" means
 - (c)
 - (i) is made in writing by a party to a proceeding,
 - (ii) has been served on all parties of record, and
 - (iii) contains the following sentence: "The .[party(ies)] [name(s) of party(ies)] .reserve(s) the right to bring this offer to the attention of the court for consideration in relation to costs after the court has pronounced judgment on all other issues in this proceeding."
- (4) The court may consider an offer to settle when exercising the court's discretion in relation to costs.

Cost options

- (5) In a family law case in which an offer to settle has been made, the court may do one or more of the following:
 - (a) deprive a party of any or all of the costs, including any or all of the disbursements, to which the party would otherwise be entitled in respect of all or some of the steps taken in the family law case after the date of delivery or service of the offer to settle;
 - (b) award double costs of all or some of the steps taken in the family law case after the date of delivery or service of the offer to settle;
 - (c) award to a party, in respect of all or some of the steps taken in the family law case after the date of delivery or service of the offer to settle, costs to which the party would have been entitled had the offer not been made;
 - (d) if the party who made the offer obtained a judgment as favourable as, or more favourable than, the terms of the offer, award to the party the party's costs in respect of all or some of the steps taken in the family law case after the date of deliver or service of the offer to settle

Considerations of court

- (6) In making an order under subrule (5), the court may consider the following:
 - (a) whether the offer to settle was one that ought reasonably to have been accepted, either on the date that the offer to settle was delivered or served or on any later date;
 - (b) the relationship between the terms of settlement offered and the final judgment of the court;

- (c) the relative financial circumstances of the parties;
- (d) any other factor the court considers appropriate.

[90] The respondent's claim for double costs arises from two offers made dated February 12, 2021 and April 7, 2021 respectively. The without prejudice offer of February 12, 2021 offered to settle the respondent's claim on the following terms:

1. Arrears of child support to be set at \$60,679;
2. The claimant to pay child support of \$3,202 per month until the July 2021 review;
3. The parties would share special and extraordinary expenses 80/20; and
4. An amendment to the Separation Agreement clarify the determination of the claimant's income.

[91] The second offer of April 7, 2021 provided:

1. Arrears of child support to be set at \$53,027;
2. The claimant would pay child support of \$3,620 until the July 2021 review;
3. The parties would share special and extraordinary expenses 80/20;
4. There would be a minimum imputation of income of \$300,000 to the claimant and \$75,000 to the respondent at each subsequent child support review; and
5. An amendment to the Separation Agreement to clarify the determination of the claimant's income.

[92] Both without prejudice offers provided by the respondent to the claimant if accepted would have left him with a more favourable outcome than the Chambers Decision, such that the claimant ought to have accepted those offers. Specifically:

1. The Chambers Decision determined that the child support arrears up to June 2021 were \$85,425, a figure greater than the amounts contained in the without prejudice offers.
2. The child support amount prior to the July 2021 Review was found to be \$4,061 per month.
3. Based upon the Claimant having a Guideline income of \$308,507 and the Respondent having a Guideline income of \$59,560, the sharing of special and extraordinary expenses would have been 83/17.
4. There was no imputation of income to the Respondent.
5. The methodology adopted by this Honourable Court in calculating the Claimant's Guideline income effectively adopted the amendment to the Separation Agreement in the without prejudice offers.

- [93] As noted above, R. 11-1(1)(c)(iii) requires a party to include specific wording in their offer to settle. In this instance both offers contained the wording required. No issue is taken that the offers did not comply with the Rule.
- [94] Rule 11-1(6) provides that the Court may consider several factors. Here the offers were both favourable to the claimant and are ones he ought reasonably have accepted. Given the claimant's financial circumstances are significantly better than those of the respondent, he is clearly capable of paying an order for double costs. The object of R. 11-1 is to encourage settlement of family disputes. Justice Pearlman described this purpose in *Way v. Way*, 2013 BCSC 871:
- [35] The object of Rule 11-1, like Rule 9-1 of the Supreme Court Civil Rules, is to encourage the settlement of disputes by rewarding the party who makes a reasonable offer and penalizing the party who declines to accept such an offer: see *Martin v. Lavigne*, 2010 BCSC 1610 at para. 7, and *Bailey v. Jang*, 2008 BCSC 1372. Further, acceptance of the claimant's offer would have saved judicial resources and significantly reduced the costs to the parties in resolving this dispute. ...
- [95] These comments apply to this case. These factors persuade me that the Court should exercise its discretion to award to the claimant double costs from her offer of February 12, 2021.
- [96] The claimant submits the Court should fix the costs based on the draft bill of costs without reference to the registrar.
- [97] The Court of Appeal in *Gichuru v. Smith*, 2014 BCCA 414 addressed the summary assessment of an award of special costs by the trial judge. The Court stated:

Summary of General Principles

- [154] We would briefly summarize the principles as discussed above. The decision to fix the quantum of costs under R. 14-1(15) is a matter of judicial discretion that should be sparingly exercised. The court officer best placed to conduct an assessment is usually the registrar, whose knowledge and experience in assessing legal bills is extensive and seldom matched by that of a trial judge. An exception may arise in cases when the judge is intimately familiar with the litigation or the time and cost of a registrar's hearing cannot be justified or where the parties consent. The fact that a judge has heard the trial does not necessarily lead to the conclusion that the best use of judicial resources is for the judge to assess costs. A concern that a party who might have to pay costs will prolong the costs assessment by requiring a microscopic review of the services provided by counsel must be balanced against the right of that party to challenge the reasonableness of the proposed costs.
- [98] A decision to fix the quantum of costs summarily is a matter of judicial discretion to be sparingly exercised. A registrar is best placed to conduct such an assessment. I decline to fix the quantum.

Costs of Application

[99] The respondent has been successful on this application and is entitled to her costs as a matter of ordinary difficulty.

"The Honourable Mr. Justice Punnett"

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