

CANADA / JUDGMENT

J.L.M. v. G.G.M.

2024 BCSC 1643

COURT

Supreme Court of British Columbia

DECIDED

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2024 BCSC 1643 J.L.M. v. G.G.M.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

J.L.M. v. G.G.M.,

2024 BCSC 1643

Date: 20240905

Docket: E128404

Registry: Kelowna

Between:

J.L.M.

Claimant

And

G.G.M.

Respondent

Before: The Honourable Justice Hardwick

Reasons for Judgment Re Costs

The Claimant on her own behalf:

J.L.M.

The Respondent on his own behalf:

G.G.M.

Claimant's Written Submissions received:

Kelowna, B.C.

July 9, 2024

No other written submissions received:

Place and Date of Judgment:

Kelowna, B.C.

September 5, 2024

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Overview

- [1] This is a complicated family law matter which proceeded before me at various dates comprising approximately one month of judicial sitting time in total between the primary evidentiary phase, submissions, post-trial issues and a reopening application between June of 2023 and present date.
- [2] Further adding to the difficulty level of this family law matter is that the claimant had one counsel through the evidentiary portion, was briefly self-represented and then engaged counsel on a partially limited retainer basis thereafter. This counsel has appeared in court on behalf of the claimant. The respondent had the same counsel throughout the evidentiary

portion and pending delivery of reserve judgment but counsel provided notice of intention to withdraw and then formally withdrew. The respondent has elected to be self-represented since the withdrawal. No counsel has appeared for the respondent since trial counsel went off the record on or about April 29, 2024.

- [3] There are two written sets of reasons published.
- [4] The first is the reasons for judgment on what I will broadly describe as the parenting time and ancillary parenting issues. These reasons are indexed as 2024 BCSC 908 (the "Parenting Reasons").
- [5] The second is reasons for judgment on what I will describe as the financial issues. These reasons are indexed as 2024 BCSC 999 (the "Financial Reasons").
- [6] In the Parenting Reasons, which were released first on the basis of priority, I deferred the issue of costs to delivery of the Financial Reasons.
- [7] In the Financial Reasons, I stated as follows at para. 86-89:
 - [86] Costs pursuant to R. 16 of the Supreme Court Family Rules are always at the discretion of the trial judge.
 - [87] In a lengthy trial such as this, it is difficult for the parties to make fulsome submissions on costs given that the outcome of the trial is unknown to the parties at the conclusion of submissions. This is even more so when there have been changes and withdrawals of counsel following trial.
 - [88] Further, it is possible that there are submissions to be made with respect to formal offers that may have been exchanged pursuant to R. 11-1.
 - [89] The schedule I will set to deal with costs is thus as follows:
 - a) Counsel for the claimant shall submit written submissions on costs, through Supreme Court Scheduling, within 30 days of issuance of these reasons for judgment.
 - b) Counsel for the respondent shall submit written submissions for costs, through Supreme Court Scheduling, within 60 days of issuance of these reasons for judgment.
 - c) Counsel for the claimant and the respondent may agree, by consent, to extend these deadlines to account for other trial obligations or scheduled vacations, but confirmation of any adjusted schedule for submissions must be provided to the Court, through Supreme Court Scheduling, before the 30-day deadline for receipt of the claimant's submissions.
 - d) Following receipt of submissions from both parties, an oral hearing on costs shall be scheduled at a date convenient to counsel and the Court. In the event it is necessary to facilitate an earlier date, leave is presumptively granted for counsel to appear at the cost hearing(s) via MS Teams.

- [8] I received submissions on behalf of the claimant on or about July 9, 2024, in accordance with my orders set out above in the Financial Reasons (the "Claimant's Cost Submissions").
- [9] Submissions were due on behalf of the respondent by August 12, 2024, within the timeline contemplated by the orders made in the Financial Reasons. None were received.
- [10] I further expressly confirmed with Supreme Court Scheduling on August 24, 2024, before proceeding to draft these reasons, that no submissions had been received by the respondent and no communication had been received by Supreme Court Scheduling as to any adjusted schedule for same. I did so because my orders in the Financial Reasons expressly contemplate an oral hearing "following receipt of submissions from both parties".
- [11] As the respondent elected not to provide written submissions, the oral hearing that I had contemplated in the Financial Reasons is rendered, in my conclusion, unnecessary. I am simply left to decide the issue of costs on the basis of the Parenting Reasons, the Financial Reasons, the Claimant's Cost Submissions, the relevant provisions of the Supreme Court Family Rules, B.C. Reg. 169/2009 [Rules] and the governing caselaw.
- [12] In concluding to proceed in this fashion, I recognize that the respondent is representing himself. However, the respondent is employed as an aircraft maintenance engineer and thus has a clear understanding of the importance of complying with rules and directions. The respondent was also present in person for all of the days (or at least very substantially all of the days) in which evidence and oral submissions were heard by the Court and has, I accept, developed some sophistication about the litigation process in the course thereof. I thus conclude that the respondent intentionally simply elected not to provide any written submissions on costs despite being provided what I consider to be ample time to do so, even if more rudimentary than might be expected from counsel.

Relief Sought

- [13] In the Claimant's Cost Submissions, the claimant seeks an order that she:
- a) receive double costs of the proceeding;
 - b) in the alternative, costs of the proceeding; or
 - c) in the final alternative, a combination of costs and double costs.
- [14] The Claimant's Cost Submissions also include reference to and multiple case citations regarding special costs. There is no claim for special costs in this proceeding. Further, the operating terms of the order arising from the Financial Reasons, recited above, do not contemplate any consideration of special costs. Accordingly, I shall not address those portions of the Claimant's Cost Submissions in these reasons for judgment.

Background

- [15] The relevant facts of these proceedings, as I found them, are outlined in the Parenting Reasons and the Financial Reasons. It is unnecessary to review them in detail. Similarly, the multiple number of matters that were in issue between the parties are similarly articulated in said reasons.
- [16] The primary conflict was, without question, parenting time of the parties' two children as defined by the Divorce Act, R.S.C., 1985, c. 3 (2nd Supp.) (the "Children"). The very relevant and related issue was blood alcohol content monitoring in anticipation of and during the respondent's parenting time ("BAC monitoring"). This was all encompassed within the court's overarching obligation to make orders solely in the best interests of the Children.
- [17] As I concluded at paragraph 162 of the Parenting Reasons:
- [162] These parties need out of the court system sooner rather than later so that the Children who have not yet reached their teen years can enjoy their time with each parent, their extended family relationships, their activities and their peer relationships without the constant "black cloud" of parental conflict.

The Formal Offer to Settle

- [18] On May 29, 2023, counsel for the claimant served a formal offer to settle on counsel for the respondent (the "Formal Offer to Settle"). This was in close proximity to the trial which commenced, in its first incarnation, on June 5, 2023. It was a comprehensive offer to settle on all issues - including property issues which did ultimately get resolved by a consent order made at the outset of the trial and entered on June 5, 2023.
- [19] There was also other settlement correspondence exchanged following the Formal Offer to Settle on issues which did proceed to trial, but it was all "without prejudice".
- [20] Accordingly, it is only the terms of the Formal Offer to Settle which are relevant for these reasons for judgment.

Parenting Time and Ancillary Parenting Orders

- [21] The above conclusion that only the terms of the Formal Offer to Settle are relevant to my analysis is significant because the parenting time proposed in the Formal Offer to Settle is, in my calculation, somewhat less favorable to the respondent than that which was ordered in the Parenting Reasons.
- [22] The subsequent discussions about modifications to the parenting schedule and ancillary parenting terms in the ensuing without prejudice communications would, if meaningfully pursued, likely have at least truncated this lengthy and highly contested trial. This would absolutely have benefited the Children and the parties. However, the Rules do not permit formal offers to be modified or tweaked through subsequent without prejudice

communications. This is distinguishable from a not uncommon situation where there is more than one formal offer delivered in a proceeding. There is clear case authority in that regard, but it is not applicable, in my view, in this case.

- [23] Turning to the specific breakdown of the parenting schedule, as set out in the Parenting Reasons, I ordered that the respondent have parenting time as follows under the "Regular Parenting Schedule":

Every Wednesday after school (or 3:30 pm on non-school days) to Thursday morning (8:30 am on non-school days);

Alternate Mondays after school (or 3:30 on non school days) to Tuesday morning (or 8:30 am on non school days); and

Alternating weekends from Friday after school (or 8:30 am on non- school days) to Sunday at 6 pm,

- [24] Under the Formal Offer to Settle, the proposed parenting schedule during the "school year" (which I conclude is equivalent to that contemplated under the Regular Parenting Schedule) was that the Children would be with the respondent:

Alternating Thursday at 2:30 until Sunday at 6:00 p.m. unless Monday was a statutory holiday; and

Alternating Thursday at 2:30 pm until Friday at 8:30 am.

- [25] Accordingly, I conclude the respondent's ultimate outcome on parenting time in the Parenting Reasons was somewhat improved than what would have been the case if the respondent had accepted the Formal Offer to Settle save and except that the Court, in the Parenting Reasons, did not provide for a review of the parenting schedule at a specified time as contemplated in the Formal Offer to Settle.

- [26] While not obviously being previously aware of the Formal Offer to Settle, as required by the Rules, the decision not to order a specified review of the Regular Parenting Schedule was intentional.

- [27] In my view, a review order in this case would have inevitably led to a return to court, a corresponding escalation of emotions in anticipation thereof and inevitable "case building" behaviors which are not in the Children's best interests. Parenting time is obviously always variable upon a material change in circumstances but that is distinct from ordering a review which is a hearing de novo which invites the parties to effectively pitch their case again. I thus do not find the respondent, the party quite clearly, in my observation, who prefers not to be in court, would have been better off by accepting a parenting schedule with a specified review clause as contemplated in the Formal Offer to Settle than the schedule crafted by the Court in the Regular Parenting Schedule.

- [28] Moreover, the review contemplated in the Formal Offer to Settle was premised upon there being an updated s. 211 assessment prepared by Dr. Elterman. This would have further increased the cost of the review process and supports my conclusion that the Regular Parenting Schedule is a better outcome for the respondent than having accepted the Formal Offer to Settle.
- [29] On the issue of BAC monitoring, the terms with respect to same in the Formal Offer to Settle are not identical to the orders set forth in the Parenting Reasons. Primarily because as the Court took the initiative to draft its own language as opposed to simply following the language from the claimant's (then) counsel's submissions. However, this is a distinction without a difference other than that the review would have taken place earlier due to the length of the trial and the corresponding time under reserve it took to draft the Parenting Reasons.
- [30] Of note, I recognize the inclusion of a review clause regarding BAC monitoring in the Parenting Reasons is contrary to what I said above about the intentional omission of a review clause regarding parenting time generally. However, BAC monitoring is a discrete issue - one that can be reviewed based upon objective evidence as to whether the tests were performed as ordered and what the results of said tests were. Further, the BAC monitoring provisions of my orders are not necessarily suitable to variation upon a material change in circumstances threshold like parenting time.
- [31] The Formal Offer to Settle also does not contemplate a parenting coordinator which I ultimately concluded was very necessary based on the evidence which I heard throughout the course of the trial. Interestingly, the respondent was in favour of a parenting coordinator at the time of trial and so the failure to include this term is relevant to the respondent's decision whether to accept the Formal Offer to Settle when one assesses the Formal Offer to Settle in isolation as I have indicated I generally have to do.
- [32] However, without having to stray into without prejudice communication, after the Parenting Reasons were released, it was the claimant who took the initiative to bring the parenting coordinator appointment issue back before me and the respondent was generally unresponsive - even though the claimant ultimately proposed a parenting coordinator who had been suggested by the respondent back when the respondent had counsel. The respondent's lack of responsiveness/cooperation on the parenting coordinator appointment resulted in me making a procedural order on July 16, 2024 (in the absence of the respondent despite being on notice) and yet another substantive order on July 22, 2024, appointing the parenting coordinator (again in absence of the respondent despite being on notice). This conduct significantly undermines any possible argument that the lack of the inclusion of a term for the appointment of a parenting coordinator was genuinely a consideration in assessing the merits of the Formal Offer to Settle.

- [33] Lastly on the parenting issues, the Claimant's Cost Submissions note that the language in the Formal Offer to Settle regarding guardianship tracks the language in the Parenting Reasons. This is a non-issue in my view. There was absolutely no question the parties were both presumptive guardians of the Children under s. 39 of the Family Law Act. That order is made simply as the foundational basis to making the substantive orders. It was not a material term of the Parenting Reasons and was not in issue at trial.

Guideline Incomes, Child Support, and Section 7's

Incomes

- [34] In the Financial Reasons, the claimant's income was imputed pursuant to the Federal Child Support Guidelines, SOR/97-175 [Guidelines], at \$100,000 per annum, and the respondent's income was imputed at \$78,000 per annum.
- [35] Somewhat consistent to my approach to parenting time, I set those Guideline incomes as the minimum incomes for the annual reviews contemplated in the Financial Reasons. My intention being to hopefully limit the occasions that the parties would find themselves back in court for a contested child support review.
- [36] In the Formal Offer to Settle, the claimant proposed the respondent's income be set under the Guidelines at \$51,731 per annum. The claimant was clearly successful on this issue at trial, although the Formal Offer to Settle did not have equivalent terms to the Financial Reasons in terms of how child support would be dealt with prospectively.
- [37] In the Formal Offer to Settle, the claimant also did not propose a Guideline income for herself as it was premised on her being the primary resident parent. However, the claimant proposed dividing Section 7 special and extraordinary expenses equally, which one can infer means it was based upon their being comparable Guideline incomes once basic child support is factored into the net disposable income analysis.
- [38] Ultimately, I determined that the Section 7 special and extraordinary expenses were, based on my determined Guideline incomes, to be divided proportionately on a 56% and 44% basis. The respondent's somewhat lessened share of the Section 7 special and extraordinary expenses are likely, absent a significant increase in those expenses, less than the increased base child support given my imputation of a Guideline income of \$78,000 per annum as opposed to the \$51,731 per annum proposed. It was, however, only for a one year duration.
- [39] On the issue of retroactive Section 7 expenses, the claimant was prepared, as at the date of the Formal Offer to Settle, to waive this claim. In the Financial Reasons, I determined the respondent's obligation to be \$5,934.93. On its face, this would suggest that the Formal Offer to Settle was more advantageous to the respondent. However, that has to be put into context of the issue of s. 7 expenses generally. I addressed this issue in the Financial Reasons starting at paragraph 78, where I made specific orders regarding s. 7 expenses on the basis that the respondent's "position is consistent with an appropriate interpretation of s. 7 of the

Guidelines".

Legal Framework

[40] Supreme Court Family Rule 16-1(7) provides:

Costs to follow event

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

[41] There are two leading decisions interpreting Rule 16-1(7) or its predecessor: *Gold v. Gold* (1993), 82 B.C.L.R. (2d) 180 (C.A.); and *Fotheringham v. Fotheringham*, 2001 BCSC 1321, leave to appeal ref d 2002 BCCA 454.

[42] In *S.A.M. v. J.A.M.*, 2017 BCSC 2348 at para. 7, Justice Bernard helpfully summarized the principles applicable to costs awards in family cases:

- (a) The costs of a family law case must be awarded to the successful party, unless the court otherwise orders (Rule 16-1(7)) of the Supreme Court Family Rules [Rules];
- (b) The "successful party" is the party who has achieved substantial success at the trial/hearing (*Fotheringham v. Fotheringham*, 2001 BCSC 1321; *Marquez v. Zapiola*, 2014 BCCA 35);
- (c) The court's discretion to "order otherwise" must be exercised judicially, bearing in mind a non-exhaustive list of factors that includes hardship, earning capacity, the purpose of the particular award, the conduct of the parties in relation to the litigation, and the importance of not upsetting the balance achieved by the court in relation to the substantive issues (*Gold v. Gold* (1993), 106 D.L.R. (4th) 452 (B.C.C.A.));
- (d) The party who asks the court to "order otherwise" bears the onus to persuade the court why it should do so (*S.D.W. v. C.W.W.*, 2006 BCSC 162);
- (e) Financial hardship, without more, is not a sufficient basis for the court to exercise its discretion to depart from the usual rule that successful parties are entitled to their costs (*S.D.W. v. C.W.W.*, supra.; *K.D.P. v. A.R.K. aka R.K.*, 2012 BCSC 1025; *Brown v. Kucher*, 2016 BCSC 194);
- (f) Where an offer to settle a family case has been made, the court may award double costs for all or some of the steps taken after the date of delivery or service of the offer (Rule 11-1(5) of the Rules);
- (g) As a general rule, an award of double costs should be made against a party who did not accept an offer to settle that should, in all the circumstances, have been accepted (*Hartshorne v. Hartshorne*, 2011 BCCA 29); and,

- (h) In determining whether a double costs order should be made, the court may consider any factor the court considers appropriate, including whether the offer was one that ought reasonably to have been accepted upon receipt or at any later date, the relationship between the offer and the judgment, and the relative financial circumstances of the parties (Rule 11-1(6) of the Rules).
- [43] Substantial success is to be measured objectively taking into account the matters in dispute, their weight or importance to the parties, and the parties' relative success or failure with respect to those matters: *Fotheringham* at para. 60.
- [44] At para. 46 of *Fotheringham*, Justice Bouck suggested that a judge considering whether to award costs follow a four-step inquiry:
1. First, by focusing on the "matters in dispute" at the trial. These may or may not include "issues" explicitly mentioned in the pleadings.
 2. Second, by assessing the weight or importance of those "matters" to the parties.
 3. Third, by doing a global determination with respect to all the matters in dispute and determining which party "substantially succeeded," overall and therefore won the event.
 4. Fourth, where one party "substantially succeeded," a consideration of whether there are reasons to "otherwise order" that the winning party be deprived of his or her costs and each side then bear their own costs.
- [45] Substantial success is to be "measured in broad terms" and the court should not finely parse issues: *Stearman v. Powers*, 2017 BCCA 165 at para. 65.
- [46] As the Court of Appeal noted in *Marquez*, the consideration should not be an overly complicated mathematical problem:
- [16] Success in the event has been interpreted as "substantial success": see *Fotheringham v. Fotheringham*, 2001 BCSC 1321, 13 C.P.C. (5th) 302, leave to appeal ref d 2002 BCCA 454. In *Fotheringham*, Mr. Justice Bouck described this standard as follows:
- [45] Gold now seems to say that substantial success in an action should be decided by the trial judge looking at the various matters in dispute and weighing their relative importance. The words "substantial success" are not defined. For want of a better measure, since success, a passing grade, is around 50% or better, substantial success is about 75% or better. That does not mean a court must descend into a meticulous mathematical examination of the matters in dispute and assign a percentage to each matter. Rather, it is meant to serve as a rough and ready guide when [looking] at all the disputed matters globally.
- [47] In *Litt v. Gill*, 2016 BCCA 288, Justice Garson commented on the unique problem costs pose in family law cases involving multiple issues, noting that a more flexible approach may be required in assessing the concept of "success" for the purposes of assessing costs:

[53] At its most basic, the successful party is the plaintiff who establishes liability and obtains a remedy, or the defendant who obtains dismissal of the plaintiff's case: *Loft v. Nat*, 2014 BCCA 108 at para. 46. This general principle is more difficult to apply in the context of family cases, where there may be a panoply of claims advanced by each party, and divided success. There, a more flexible "substantial success" test may be more appropriate: see this Court's decisions in *Harras v. Lhotka*, 2016 BCCA 246 at para. 48 and *Marquez v. Ziapola*, 2014 BCCA 35 at para. 16.

[48] In *Reid v. Reid*, 2017 BCCA 191, the Court of Appeal said:

[9] We do not read *Marquez* as requiring that the Court, in determining "substantial success", undertake a mathematical comparison of the amount claimed to the amount awarded. Rather, the Court has broad discretion to take into account myriad considerations in assessing whether a party has been substantially successful.

The Effect of an Offer to Settle on a Costs Award

[49] Rule 11-1 deals with offers to settle in family cases.

[50] Rule 11-1(4) permits the court to consider an offer to settle when exercising its discretion in relation to costs. The options available to the court are set out in Rule 11-1(5) and the optional considerations for the court are set out in Rule 11-1(6).

[51] The options and considerations are as follows:

11-1(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 delivery or service of the offer to settle.

(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

[52] As explained in *Paul v. Pumple*, 2013 BCSC 1844, offers to settle made pursuant to Rule 11-1 are only considered after the court has first determined costs pursuant to Rule 16-1(7).

[53] In *Hartshorne*, the Court of Appeal outlined the policy reasons behind an award for double costs:

[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" [citations omitted]. 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), 37B.C.L.R. (2d) 2 at 25 (C.A.), leave ref d, [1988] S.C.C.A. No. 200

- "[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), 2 B.C.L.R. (3d) 201 at para. 28 (C.A.);

- "Encouraging 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 "requiring] 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 "discouraging] the continuance of doubtful cases or defences": *Catalyst Paper Corporation v. Companhia de Navegaçao Norsul*, 2009 BCCA 16, 88 B.C.L.R. (4th) 17 at para. 16.

Application of the Law Regarding Entitlement to Costs and Substantial Success

[54] In my view, based upon the above caselaw and the discretion provided to trial judges when addressing the issue of costs, it is clear that the claimant was the substantially successful party at trial.

- [55] As I have articulated herein, and more comprehensively in the Parenting Reasons, the core dispute was the parenting schedule and BAC monitoring relative to the respondent's parenting time under that schedule.
- [56] At trial, the claimant was successful in maintaining her position as the primary resident parent under the Regular Parenting Schedule. The respondent did obtain parenting time that was slightly more favourable than that provided in the Formal Offer to Settle, a point I will address below, but it was not markedly different.
- [57] The claimant was also successful in obtaining ongoing BAC monitoring of the respondent, which was a very significant issue from the claimant's perspective and consumed a large portion of the evidentiary portion of the trial. As noted above, I crafted some terms independently to try and minimize the conflict and difficulties that had arisen with the BAC monitoring up to and through the trial, but those variations do not undermine the fact that the claimant ultimately obtained what she was seeking - ongoing BAC monitoring.
- [58] On the financial issues, the threshold of substantial success is less obvious. I imputed the claimant a Guideline income which is higher than her reported income by a substantial margin on the grounds articulated in the Financial Reasons. I also imputed the respondent a Guideline income higher than what was submitted by his counsel, but to a lesser degree than that which I imputed to the claimant. The imputation of income to the claimant also has, as I addressed above, a more limited impact since this is not a shared parenting situation under s. 9 of the Guidelines and there is no spousal support payable. Accordingly, the claimant's income is only relevant to the proportional allocation of the s. 7 special and extraordinary expenses.
- [59] On the issue of s. 7 special and extraordinary expenses, I conclude that it was the respondent who was substantially successful when this issue is considered holistically. The respondent was ordered to pay a specified sum for retroactive s. 7 special and extraordinary expenses but that amount was based upon my acceptance of his counsel's submissions. More significantly, given the ages of the Children, the respondent obtained an order that clearly defines what the s. 7 special and extraordinary expenses shall be and precludes the use of s. 7 as a "proverbial blank cheque". This was, in my view, an important issue to the respondent.
- [60] For the reasons set out above, the issue of the parenting coordinator is somewhat unusual. The respondent sought the appointment but the claimant did not strenuously oppose it. Moreover, the claimant is the one that has actually pursued the appointment in accordance with my orders following trial. Practically speaking, the claimant has been substantially successful on this issue.

- [61] As it relates to the other orders, I conclude to say that there is effectively divided success as between the parties to such an extent that I do not think it is necessary to go through the issues individually. To do so would be contrary to the principle articulated in the often-cited decision in *Rattenbury v. Rattenbury*, 2001 BCSC 593, that the analysis of substantial success be done whilst considering substantial success on the major issues of substance not the number of issues. It is truly not a numerical analysis.
- [62] Accordingly, I am satisfied that the claimant is presumptively entitled to her costs of the proceedings in accordance with Rule 16-1(7) as the substantially successful party, subject to my consideration of the Formal Offer to Settle.

Application of the Law Regarding the Formal Offer to Settle

- [63] At the time that the Formal Offer to Settle was delivered on May 29, 2023, just days before the trial commenced, virtually every issue possible in a high conflict family law case was in dispute.
- [64] The result was a comprehensive "last ditch" offer to settle which might trigger cost consequences in due course.
- [65] The effort to settle, or at least winnow, the issues as between the parties is not lost on the Court and certainly is not discouraged. However, even the timing of the delivery of the Formal Offer to Settle must factor into the exercise of the Court's discretion under the Rules. This was not a simple damages claim where, after all pre-trial procedures have been completed, a party offers a short fuse offer of "X" damages versus their anticipated position of "Y" damages at trial. The cost/risk analysis of such offers can, in most circumstances, be weighed quite quickly.
- [66] That is not the case here. The Formal Offer to Settle was extremely detailed and entailed resolution of a multitude of issues. Moreover, this was not a mediation where certain issues can be resolved in specie and certain issues can be parsed off for further discussion or alternate resolution. The Formal Offer to Settle had to be accepted in its entirety.
- [67] For the reasons I have articulated, I cannot conclude that the respondent was acting objectively unreasonably in failing to accept the terms of the Formal Offer to Settle, particularly given its timing in relation to the trial.
- [68] Obviously compromise on a without prejudice basis between the parties did take some important issues off the table (as evident from the June 5, 2023 Order) and some further compromise (which did not occur) could have reduced the trial time, cost and emotional stress to the parties and the Children. But that is not the material portion of the analysis under Rule 11-1.
- [69] I thus decline to award double costs in favour of the claimant on the basis of the Formal Offer to Settle.

Scale of Costs

- [70] Having determined that the claimant is entitled to her costs of the proceedings on the basis of substantial success, the final core issue is the scale of costs to be applied under Appendix "B".
- [71] Upon considering the overall factual matrix and the appropriate scope of my discretion in determining the scale of costs to be applied under Appendix "B" s. 1(1), I conclude that the claimant is entitled to her costs of the proceeding on the bases that the matter was of "more than ordinary difficulty", the quantum of which shall be assessed by the registrar in accordance with Appendix "B" s. 1(4).
- [72] I reach this conclusion almost exclusively on my assessment of the disproportionately large percentage of the trial, during viva voce evidence, in documentary exhibits (both Soberlink records and related Our Family Wizard communications) and in oral/written submissions, regarding the issue of BAC monitoring.
- [73] It really ought to have been apparent to the respondent that the BAC monitoring was going to be continued based upon the record before the Court. Had that issue been conceded, even for a specified period pending review as the Court ultimately concluded, I am satisfied that days of trial time would have been saved. That would, in my view, have been the case if the parties were still not able to fully reach consensus on the specific terms of a parenting schedule with the BAC monitoring issue off the table.
- [74] The only other specific factor I will identify in reaching my conclusion that costs should be assessed on the basis of the matter being of more than ordinary difficulty is the issue of the parenting coordinator. The communication skills and co-parenting of the parties was, on both of their evidence, poor in the period leading up to separation and exceedingly poor after separation. Compounding this is the fact that one of the Children has identified neurodiversity. The respondent's suggestion through his then counsel for a parenting coordinator to assist with these issues was very appropriate. It makes no sense, with that background, why the respondent has forced the claimant to take yet further steps in the litigation to facilitate the implementation of my order.

Costs regarding Claimant's Cost Submissions

- [75] The claimant did not succeed in obtaining double costs based on the Formal Offer to Settle. However, the claimant was successful in obtaining costs of the proceeding and did so on the basis of the matter being of above ordinary difficulty. The claimant was thus substantially successful on the issue of costs.
- [76] The claimant is accordingly entitled to her costs of the cost hearing (which as noted occurred through exclusively written submissions) which costs I shall fix, in my discretion, pursuant to Rule 16-1(14)(b) in the amount of \$1,500.00 plus tax but inclusive of disbursements.

"Hardwick J."

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