
CANADA / JUDGMENT

Johnston v. Embree

2013 BCCA 74

COURT

British Columbia Court of Appeal

DECIDED

20 February 2013

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2013 BCCA 74 Johnston v. Embree

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Johnston v. Embree,

2013 BCCA 74

Date: 20130220

Docket: CA039427

Between:

Cindy Lee Johnston

Respondent/

Respondent on Cross Appeal

(Claimant)

And

Matthew George Embree

Appellant/

Respondent on Cross Appeal

(Respondent)

And

Robert Kovacs

Respondent/

Appellant on Cross Appeal

(Respondent by Counterclaim)

Before:

The Honourable Madam Justice Saunders

The Honourable Mr. Justice Tysoe

The Honourable Madam Justice Neilson

On appeal from: Supreme Court of British Columbia, September 26, 2011

(Johnston v. Embree, Dawson Creek Registry No. 19294)

Counsel for the Appellant:

L. MacLean, Q.C.

J. Cudmore

Counsel for the Respondent,

R. Kovacs:

R. Gibbs, Q.C.

No One Appearing on Behalf of the Respondent, C. Johnston:

Place and Date of Hearing:

Vancouver, British Columbia

October 25, 2012

Place and Date of Judgment:

Vancouver, British Columbia

February 20, 2013

Written Reasons by:

The Honourable Madam Justice Neilson

Concurred in by:

The Honourable Madam Justice Saunders

The Honourable Mr. Justice Tysoe

Reasons for Judgment of the Honourable Madam Justice Neilson:

- [1] The appellant Matthew George Embree, who is the stepfather of a child, R., appeals the order of a Supreme Court judge dismissing his counterclaim for child support against the respondent, Robert Kovacs, who is the biological father of R., and awarding special costs to Mr. Kovacs.
- [2] Mr. Kovacs, by cross appeal, argues that due to procedural irregularities this Court has no jurisdiction to hear Mr. Embree's appeal.

Background

- [3] In 1994, Mr. Kovacs and the respondent Cindy Lee Johnston, who did not participate in the appeal, had a casual relationship that resulted in the birth of a son, R., on May 7, 1995.
- [4] R. lived with Ms. Johnston, and Mr. Kovacs had no involvement with them. Ms. Johnston did not seek child support from Mr. Kovacs. In July 1998, she obtained an order for custody and guardianship of R. in the Provincial Court, and Mr. Kovacs received a copy of it, but there was no further follow up.
- [5] In July 1998, Ms. Johnston and R. began to live with Mr. Embree. Ms. Johnston and Mr. Embree had a son in 1999, who plays no role in this proceeding, and married in July 2000. In 2009, they separated.
- [6] After the marriage ended, R. lived with Ms. Johnston. Mr. Embree did not pay child support for R. While he initially exercised access to R. on alternate weekends, this stopped by the end of 2010.
- [7] On February 21, 2011, Ms. Johnston filed a notice of family claim against Mr. Embree claiming, among other things, custody of and child support for both boys.
- [8] On April 5, 2011, Mr. Embree filed a response to that claim, and added Mr. Kovacs as a respondent by counterclaim. His response included a claim for joint custody and joint guardianship of R. under the Joyce model, and child support from both Ms. Johnston and Mr. Kovacs in the event R. elected to live with him. If R. resided with Ms. Johnston, Mr. Embree's response set out these requests with respect to any liability he had to pay child support for R.:
 - a) the Respondent has no liability for child support for [R.] given the natural father's obligation to pay spousal [sic] support and the fact he owes substantial arrears once his liability and quantum is properly calculated and ongoing support, which are more than sufficient to meet [R.'s] full needs under the Child Support Guidelines.
 - b) Support from [R.'s] natural father, namely Robert Kovacs under section 88, 93, 94, 95 and 95.1 of the Family Relations Act.

- c) The Respondent seeks an Order calculating, Robert Kovacs, the Respondent by Counterclaim's income from all sources for the years 1995 to date to enable this Honourable Court to apply the Child Support Guidelines for the benefit of [R.], including recalculation as a consequence to the revisions of the Child Support Guidelines dated May 1, 2006 and that the Respondent by Counterclaim produce his tax returns and all the attachments required to be attached to Form 8 Financial Statement from 1995 to present.
- d) In the alternative, the Respondent seeks an Order imputing and determining that the Respondent by Counterclaim's income for the purposes of child support is the sum of \$150,000 per year.
- g) The Respondent seeks a declaration he has no further liability to make contribution to child support for [R.] given the appropriate contribution from Respondent by Counterclaim, in accordance with the Family Relations Act and Child Support Guidelines, if [R.] lives with the Claimant as primary care giver.

The Respondent seeks an Order that the Respondent by Counterclaim pay and contribute to the Special and Extraordinary Expenses with respect to and for the benefit of [R.] in accordance with the Family Relations Act and Child Support Guidelines both retroactively and prospectively.

- [9] Mr. Embree also sought paternity testing of Mr. Kovacs to confirm that he was the biological father of R., and a declaration of that fact.
- [10] Around this time, Ms. Johnston and R. initiated contact with Mr. Kovacs, who was married and had two children. Ms. Johnston advised him about Mr. Embree's claim for child support for R., and Mr. Kovacs agreed to have a DNA test. This confirmed that R. was his son.
- [11] Mr. Kovacs filed a response to Mr. Embree's counterclaim on May 20, 2011, opposing all relief sought against him. He and Ms. Johnston, however, negotiated an agreement that he would pay her \$300 monthly as child support for R. until his 18th birthday. Ms. Johnston then told Mr. Kovacs she would not claim retroactive child support from him.
- [12] In July, Mr. Embree and Ms. Johnston engaged in settlement negotiations and attended a mediation. On July 17, 2011, Ms. Johnston's counsel sent Mr. Embree's counsel an email inviting comment on a draft separation agreement, and stating:

My client, Cindy Johnston, instructs me that she intends to withdraw any claim against your client, Matt Embree, for child support with respect to [R.].

We would expect your client to withdraw claims against Robert Kovacs.

- [13] An undated draft of a consent order was produced on the application below, which included this term regarding termination of Mr. Embree's obligation to support R.:

THIS COURT FURTHER ORDERS AND DECLARES that:

5. The natural child of the Claimant and the Respondent by Counterclaim, Robert Kovacs, namely [R.], born May 7, 1995 is not a child of the marriage as far as any liability for support is concerned regarding [the Respondent] and [the Respondent] does not stand in loco parentis to [R.] and [the Respondent] is not a parent to [R.] under the Family Relations Act and [the Respondent] has no liability whether past present or future for this child.

[14] Apparently Ms. Johnston and Mr. Embree had not concluded a settlement by July 21, 2011 because they attended a judicial case conference that day with their counsel. Mr. Kovacs did not attend due to a miscommunication. The court ordered that Mr. Kovacs produce and file a Form 8 financial statement by August 26, 2011, and directed that Ms. Johnston and Mr. Embree were at liberty to apply for further production of income documents from Mr. Kovacs.

[15] Mr. Kovacs retained counsel and, on August 17, 2011, she wrote to Mr. Embree's counsel advising she intended to set aside the orders made at the judicial case conference because her client had been misinformed about having to attend. Her letter also stated:

Further, we intend to bring an application to dismiss the claim against my client. Ms. Johnston is no longer seeking child support for [R.] from your client. There is no basis in law or fact for your client to bring an action against my client, nor was there at the time of filing or since. I expect to seek an order for special costs against your client if your client does not forthwith agree to withdraw his claim and agree to a consent dismissal order against my client with costs to be assessed.

[16] On September 8, 2011, Mr. Kovacs filed a notice of application seeking to vary or set aside the order made at the judicial case conference, and to dismiss Mr. Embree's claims against him.

[17] Mr. Embree did not file any material in response to the application. On September 15, 2011, however, his counsel wrote to Mr. Kovacs' counsel proposing a consent order on the following terms:

There will be consent order as follows:

- a) [R.], born May 7, 1995 is a child of the marriage of Robert Kovacs and Cindy Lee Johnston;
- b) Our client Mathew Embree is not a parent of [R.] nor is [R.] a child of the marriage pursuant to the Divorce Act and he has no obligation both, present or future to contribute support under either the Family Relations Act, the Divorce Act or any successor legislation to the support of [R.];
- c) The issues of retroactive and prospective of child support for [R.] shall be dealt with between the two natural parents; and
- d) All parties shall bear their own costs related to this consent order and as between Kovacs and Embree each party shall bear their own costs of the action.

Please provide us with your response to this, failing which we intend to oppose your application, oppose any extension for the filing of financial documentation from your client and will proceed to ensure Mr. Kovacs bears his fair share of retroactive and prospective child support and seek costs against your client.

[18] On September 20, 2011, Mr. Kovacs' counsel responded that the court had no jurisdiction to make a consent order in these terms.

[19] On September 23, 2011, Mr. Embree's counsel wrote again to Mr. Kovacs' counsel with an amended proposal for a consent order. This letter stated:

There will be consent orders as follows:

- a) Robert Kovacs is a "parent" pursuant to the Family Relations Act of [R.], born May 7, 1995;
- b) Matthew Embree's claim for prospective and retroactive child support against Robert Kovacs is dismissed; and
- c) All parties shall bear their own costs of the action.

[20] There is nothing in the record indicating the parties communicated further before Mr. Kovacs' application proceeded on September 26, 2011. It appears, however, that the first two terms of the September 23 proposal were satisfactory to both Mr. Kovacs and Mr. Embree, as this exchange took place at the outset of the hearing:

MR. CUDMORE [COUNSEL FOR MR. EMBREE]: ... But as far as the substantive - substantive issues before the court as to whether the proceedings against the respondent by counterclaim should be dismissed. In my submission, what we are more dealing with today is costs as to whether there are any cost implications. Whether it is appropriate to award costs in this proceeding as I would be happy to elaborate on further. The matters have mostly settled.

THE COURT: All right. Well, let us just - let us just - okay. So you are not opposing the application to dismiss?

MR. CUDMORE: I am opposing the application to dismiss if it carries with it a finding of costs, but in practice, My Lady, no, I'm not opposing the application. Because the matter has settled between the parties, the circumstances have changed since Mr. Kovacs was added as a party in the counterclaim. And in a sense, people are happy now and we'd like the proceeding to just be concluded as between Embree and Kovacs.

THE COURT: All right. Well, I am going to grant leave to Mr. Cudmore to speak and to place before me his affidavit, but subject to any reply you may have and I may determine that I'm not going to give weight to it because of the failure to provide a response.

MS. KATERBERG [COUNSEL FOR MR. KOVACS]: Thank you, My Lady. So I will proceed then strictly on my application for special costs.

- [21] Mr. Kovacs' counsel then made submissions regarding his entitlement to special costs. Mr. Embree's counsel responded that although his client and Ms. Johnston had reached a satisfactory settlement, no consent order had yet been filed to formalize the withdrawal of her claim for child support for R., and Mr. Embree had therefore not yet consented to the dismissal of his claim against Mr. Kovacs. He affirmed, however, that Mr. Embree was prepared to consent to the dismissal of his claim against Mr. Kovacs for prospective and retrospective child support for R. on the basis that each party would bear his own costs.

The Reasons for Judgment of the Trial Judge

- [22] The trial judge gave brief oral reasons at the conclusion of the hearing that read in their entirety:
- [1] THE COURT: I am going to give a ruling now. This is an application by the respondent by counterclaim for dismissal of the claim of the respondent against him and for special costs.
- [2] I grant the application.
- [3] The evidence is clear that by at least July 2011, the respondent had notice that there was no basis in fact or law for a claim against the respondent by counterclaim. Correspondence by the counsel for the respondent by counterclaim dated August 17, 2011 to the respondent's counsel, offered to have a consent order dismissing the claim against her client. Instead of simply agreeing to this, counsel for the respondent, Mr. Embree, attempted to negotiate for terms of such a dismissal order that his client was not entitled to, and because of the positions he took, which were unreasonable, counsel for the respondent by counterclaim was forced to bring this application.
- [4] This matter should have simply been dealt with by a consent dismissal order and because of that, I order special costs in favour of the respondent by counterclaim from the date of the respondent by counterclaim's letter of August 17, 2011.

Issues on Appeal

- [23] On the appeal, Mr. Embree contends the trial judge erred by:
- providing inadequate reasons for judgment;
 - dismissing his claims against Mr. Kovacs; and
 - awarding special costs to Mr. Kovacs.
- [24] On the cross appeal, Mr. Kovacs raises three procedural points that he says demonstrate Mr. Embree's appeal is not properly brought, and maintains this Court thus has no jurisdiction to hear the appeal.

Discussion

- The Cross Appeal

- [25] Since the cross appeal raises issues of jurisdiction I will address it first.
- [26] Mr. Kovacs argues, first, that because Mr. Embree filed no response to his application in the Supreme Court as required by either R. 8-1(9) and (10) of the Supreme Court Civil Rules or R. 10-6(8) and (9) of the Supreme Court Family Rules he has no standing to bring an appeal from the order below.
- [27] I would not accede to this argument. This issue was raised before the chambers judge and she exercised her discretion to give Mr. Embree's counsel standing and permitted him to make submissions at the hearing. He clearly has a right to appeal the resulting orders made against him.
- [28] Mr. Kovacs next argues that because Mr. Embree provided no evidence at the hearing below on which he could successfully advance a claim against Mr. Kovacs, there is no evidentiary support for his arguments on appeal. This addresses the merits of the appeal, and will be dealt with later in these reasons.
- [29] Finally, Mr. Kovacs submits that this Court has no jurisdiction to grant the relief sought by Mr. Embree on appeal because it does not arise from the order below. That order states:
1. The claims of the Respondent, Matthew George Embree, against the Respondent by Counterclaim, Robert Douglas John Kovacs, be and are hereby dismissed; and
 2. Robert Douglas John Kovacs shall have his costs as special costs from August 17, 2011.
- [30] By contrast, Mr. Embree, in his factum, seeks the following relief:
- The Appellant seeks an order that:
1. The Respondent Robert Kovacs is properly a party to the proceeding of Dawson Creek Supreme Court file # 19294 as a Respondent by counterclaim;
 2. A declaration that the Appellant is not a "parent" under the Family Relations Act, and no longer stands in the place of the parent or alternatively a declaration that he has fully satisfied his obligations such that he has no further liability and the issue of retroactive child support if any be dealt with between the biological parents;
 3. The obligation of the Appellant for the support of [R.], born May 7, 1995, is secondary to that of the Respondent Robert Kovacs, and the Appellant therefore is not responsible for the support of [R.];
 4. The order of special costs against the Appellant is vacated;
 5. Costs be awarded to the Appellant for this appeal and the Summary Trial below; and
 6. Such further relief as this Honourable Court deems just be awarded to the Appellant.

- [31] Mr. Kovacs correctly states that the order under appeal sets out the only two matters that this Court may address. He says the declaratory relief set out by Mr. Embree in the first three items of his prayer for relief were not before the court below and cannot properly be before this Court on appeal. He maintains that once these inappropriate matters are eliminated, as they must be, the only matter under appeal is the order for special costs. Mr. Kovacs points out that, pursuant to s. 7(2) of the Court of Appeal Act, R.S.B.C. 1996, c. 77, Mr. Embree was required to obtain leave to appeal that order and failed to do so. Thus, this Court has no jurisdiction to entertain the appeal of the order for special costs.
- [32] I agree with Mr. Kovacs that the declaratory relief Mr. Embree seeks with respect to the parties' parental standing and obligations cannot form part of this appeal as there was no application for such relief before the chambers judge. I am not convinced, however, that the relief Mr. Embree seeks as to Mr. Kovacs' status as a respondent to the counterclaim must meet the same fate. While it might have been framed more precisely, I am satisfied this may be interpreted as a request that this Court reconsider the chambers judge's finding that "there was no basis in fact or law for a claim against the respondent by counterclaim". Furthermore, if Mr. Kovacs was of the view that Mr. Embree required leave to appeal, he should have brought an application to strike the appeal at an early stage instead of putting both parties to the expense of preparing for and arguing the appeal.
- [33] I would not accede to the grounds raised on the cross appeal.

2. The Appeal

a) Did the trial judge err by providing inadequate reasons for judgment?

- [34] Mr. Embree argues the brevity of the chambers judge's reasons alone supports allowing the appeal. Referring to *Shannon v. Shannon*, 2011 BCCA 397 at paras. 4-9, 22 B.C.L.R. (5th) 296, and *Crepnjak v. Crepnjak*, 2011 BCCA 177 at para. 23, he maintains they provide no adequate indication of her rationale for dismissing his claim, or for the order for special costs. As well, he submits they are insufficient to permit meaningful appellate review.
- [35] I cannot agree. While brief, I am satisfied her reasons, read in the context of the record before her, adequately explain the foundation for her decision, and permit appropriate appellate review.

b) Did the trial judge err by dismissing Mr. Embree's claim against Mr. Kovacs?

- [36] It is useful to begin by setting out the legislative framework that governs the child support obligations of Mr. Kovacs as R.'s biological father, and Mr. Embree as his stepfather.

- [37] The Family Relations Act, R.S.B.C. 1996, C. 128, and the Divorce Act, R.S.C. 1985, c. 3, both impose an obligation on a non-custodial parent to pay child support in accordance with the Federal Child Support Guidelines (S.O.R./97-175 as amended) (the "Guidelines"), which are adopted for the purpose of the Family Relations Act by the Child Support Guidelines Regulation (British Columbia) (B.C. Reg. 61/98) with some minor linguistic differences that are irrelevant to this appeal.
- [38] Section 3(1) of the Guidelines sets out the presumptive rule that child support for children under the age of 19 is payable in the amount set out in the applicable Child Support Tables scheduled to the Guidelines. Section 5 of the Guidelines creates an exception to that rule for a stepparent:

Spouse in the place of a parent

5. Where the spouse against whom a child support order is sought stands in the place of a parent for a child, the amount of a child support order is, in respect of that spouse, such amount as the court considers appropriate, having regard to these Guidelines and any other parent's legal duty to support the child.
- [39] Because Mr. Embree and Ms. Johnston were married, his potential liability to pay child support for R. arose under the Divorce Act. R. was a "child of the marriage" under that Act, and Mr. Embree, was a person standing in the place of a parent to R. under s. 2(2). He was therefore potentially liable to pay Guideline support for R. under s. 15.1.
- [40] As well, both Mr. Embree and Mr. Kovacs were potentially liable to pay child support for R. under the Family Relations Act, which defines a parent in s. 1(1):

"parent" includes

- (a) a guardian or guardian of the person of a child, or
- (b) a stepparent of a child if
 - (i) the stepparent contributed to the support and maintenance of the child for at least one year, and
 - (ii) the proceeding under this Act by or against the stepparent is commenced within one year after the date the stepparent last contributed to the support and maintenance of the child;

- [41] Section 88 of the Family Relations Act, which imposes the obligation to pay child support, provides that an order for child support may be made against more than one parent:

88 (1) Each parent of a child is responsible and liable for the reasonable and necessary support and maintenance of the child.

- (2) The making of an order against one parent for the maintenance and support of a child does not affect the liability of another parent for the maintenance and support of the child or bar the making of an order against the other parent.
- [42] Section 91 of the Family Relations Act provides that any person may apply for an order for child support on his own behalf, or on behalf of a child. This right has been interpreted as limited to those who have a connection with or interest in the child's welfare: *Kasper v. Mundy* (1993), 81 B.C.L.R. (2d) 256 at para. 15 (S.C.).
- [43] Thus, if Mr. Embree was liable to pay support for R., and fell within the definition of a stepparent under s. 1(1)(b) of the Family Relations Act, he was entitled to apply for an order under ss. 88(2) and 91 that Mr. Kovacs also pay child support for R.
- [44] Section 93(1)(a) of the Family Relations Act states child support must be determined in accordance with the Guidelines. Section 93(2) provides for a variation from the Guideline amount if the court is satisfied that the terms in an order or agreement directly or indirectly benefit a child, or that special provisions made for the child render the Guideline amount inequitable. Further, s. 93.1(1) of the Act permits departure from the Guideline amount on consent of the parties if the court is satisfied reasonable arrangements have been made for child support.
- [45] Mr. Embree argues the chambers judge erred in finding there was no basis in fact or law for his claim against Mr. Kovacs. He says Ms. Johnston, in her notice of family claim, clearly sought an order against him for child support and, in issuing a counterclaim against Mr. Kovacs, he followed the accepted procedure for a stepparent to bring a biological parent into proceedings in which child support is in issue. In support, Mr. Embree points to *H. (U.V.) v. H. (M.W.)*, 2008 BCCA 177, 86 B.C.L.R. (4th) 199, a case in which this Court, at paras. 38-40, endorsed the view that when support is sought from a stepparent the natural parents should be before the court as well. Newbury J.A., writing for the Court, found that a natural parent bears the primary obligation for child support under s. 3 of the Guidelines, and a stepparent's obligation under s. 5 should only be considered after the responsibility of the biological parent has been determined.
- [46] While Mr. Embree acknowledges Ms. Johnston told him in mid-July that she would withdraw her claim against him for R.'s support, he says she had not yet taken steps to formalize this offer at the time of the hearing before the chambers judge. He also contends that withdrawal of her claim was insufficient, and a dismissal was required to ensure finality. As well, Mr. Embree says he remained concerned about releasing his claim against Mr. Kovacs for prospective child support in the event R. chose to live with him in the future, and this was why his counsel tried to negotiate declarations that he was not a parent or stepparent as a term of a settlement with Mr. Kovacs.
- [47] In response, Mr. Kovacs concedes he was initially a proper party to the counterclaim, but submits that by the time he brought his application for dismissal Mr. Embree had no remaining claim against him. Once Ms. Johnston agreed to abandon her claim for child

support for R., Mr. Embree's claim against him was limited to retroactive support. His standing to make that claim as a stepparent under s. 1(1)(b) of the Family Relations Act had expired, however, because he had not contributed to R.'s maintenance and support in the year before Ms. Johnston commenced her claim. Thus the chambers judge properly found there was no basis in fact or law for Mr. Embree's claim against Mr. Kovacs.

- [48] For the following reasons I am persuaded the circumstances before the chambers judge did not support her view that Mr. Embree had no remaining claim against Mr. Kovacs.
- [49] When the hearing took place, Ms. Johnston had apparently settled the issue of child support for R. to her satisfaction on terms that Mr. Kovacs would pay her \$300 monthly until R. turned 18, and she would relieve Mr. Embree of any obligation for child support.
- [50] In reaching that agreement, it appears the parties may have lost sight of three fundamental principles: first, child support is the right of the child, not the parents; second, the child is entitled to support in the amount stipulated by the Guidelines; and third, the court is charged with ensuring a child's right to Guideline support is enforced. Parents are thus constrained in reaching a settlement for child support that does not meet the Guideline amount: *Richardson v. Richardson*, [1987] 1 S.C.R. 857 at 869; *L.S. v. E.P.*, 1999 BCCA 393 at paras. 58-59, 64, 67 B.C.L.R. (3d) 254, leave to appeal ref'd [1999] S.C.C.A. No. 444.
- [51] Here, Ms. Johnston's claim against Mr. Embree was governed by the Divorce Act. Section 11(1)(b) of that Act precluded the court from granting the divorce she sought unless it was satisfied that reasonable arrangements in accord with the Guidelines had been made for the support of the children of the marriage. As well, s. 15.1(3) of the Act required the court to ensure any order for child support complied with the Guidelines. It is therefore questionable whether the court would have accepted the term in the draft consent order, set out in paragraph 13 of this decision, which exempted Mr. Embree from paying child support without an inquiry into whether reasonable child support arrangements were in place for R.
- [52] Such an inquiry would in all probability lead to an examination of the arrangement for R.'s support reached between Ms. Johnston and Mr. Kovacs under the Family Relations Act, and whether the proposed monthly payments of \$300 reflected his Guideline income. Mr. Kovacs had resisted production of any financial information, and so his Guideline income was unknown at the hearing. It was apparent, however, that the arrangement reached permitted him to terminate his child support obligations a year before R. turned 19, a term contrary to the Guidelines.
- [53] Similar concerns arise with respect to the last-minute agreement apparently reached between Mr. Embree and Mr. Kovacs before the hearing. Although the record shows no formal acceptance by Mr. Kovacs of Mr. Embree's proposal of September 23, 2011, I infer that its first two terms were acceptable to him, since Mr. Kovacs took the position at the hearing that the only remaining issue was costs. It was not open to these parties, however, to agree to dismiss Mr. Embree's claim against Mr. Kovacs for child support until the court had satisfied itself that the proposed arrangements made for R.'s support were in accordance

with the Guidelines.

- [54] Thus, at the time of the hearing Mr. Kovacs remained potentially liable as R.'s biological father for a re-examination of his obligations under the Family Relations Act and s. 3 of the Guidelines, and Mr. Embree similarly had potential obligations as a stepparent under the Divorce Act and s. 5 of the Guidelines. It was therefore incumbent on the court, before dismissing Mr. Embree's claim against Mr. Kovacs, to conduct the inquiry envisioned in H. (U.V.), and determine whether the arrangements reached by the parties for R.'s support complied with the Guidelines. If they did not, the settlement could not be approved.
- [55] I am therefore satisfied the chambers judge erred in finding there was no basis in law or fact for Mr. Embree's counterclaim against Mr. Kovacs after August 17, 2011, and in dismissing that claim. Until the court found that R.'s right to child support under the Guidelines was met by the arrangements reached by the parties, both Mr. Embree and Mr. Kovacs remained potentially liable for child support.
- [56] I would therefore set aside the chambers judge's dismissal of Mr. Embree's counterclaim and reinstate it to permit review of any agreement on child support.
- c) Did the chambers judge err in awarding special costs to Mr. Kovacs?
- [57] It follows from that conclusion that I would also accede to this ground of appeal, and set aside the order for special costs. While I appreciate it was a discretionary order, it would be clearly wrong to let it stand: *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9 at paras. 26-27, [2004] 1 S.C.R. 303. By September 26, 2011 the parties had apparently reached an agreement on child support. It remained to formalize it by submitting a consent order to the court for consideration and approval, or placing it before the chambers judge for that purpose, in accord with the principles established in H. (U.V.). Instead, Mr. Kovacs sought and obtained an order for special costs in circumstances that did not merit it.
- [58] I conclude the trial judge erred in finding Mr. Embree's conduct justified an order for special costs.

Conclusion

- [59] I would allow the appeal, and set aside the order dismissing Mr. Embree's counterclaim against Mr. Kovacs and awarding special costs to Mr. Kovacs.
- [60] I would dismiss the cross appeal.

"The Honourable Madam Justice Neilson"

I AGREE:

"The Honourable Madam Justice Saunders"

I AGREE:

"The Honourable Mr. Justice Tysoe"

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