

CANADA / JUDGMENT

K.M.E.S. v. D.M.S.

2025 BCSC 1301

COURT

Supreme Court of British Columbia

DECIDED

11 July 2025

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2025 BCSC 1301 K.M.E.S. v. D.M.S. IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: K.M.E.S. v. D.M.S., 2025 BCSC 1301 Date: 20250711 Docket: E04064 Registry: Abbotsford Between: K.M.E.S. also known as K.M.E.H. Claimant And D.M.S. Respondent Before: The Honourable Madam Justice Sukstorf Reasons for Judgment re: Costs Counsel for the Claimant: K.E. McNeilly Counsel for the Respondent: C.D. Dreyer Written Submissions of Claimant: January 8, 2025 Written Submissions of the Respondent: January 6, 2025 Place and Date of Judgment: Abbotsford, B.C. July 11, 2025 Table of Contents Overview.. 3 Issues. 4 General Legal Framework.. 4 Discretion to "Otherwise Order" Costs. 5 Analysis. 5 A. Should the claimant be awarded Costs Thrown Away for the Respondent's Abandonment of Application #1?. 5 Law on Costs Thrown Away. 5 Positions of the Parties. 6 Application of law.. 6 B. Should K.M.E.S. be awarded Double Costs for the July 29, 2024, hearing because she previously made an "offer to settle"?. 7 Law on Double Costs. 7 Offer to Settle and Cost Consequences. 7 Positions of the Parties. 8 Application of Law.. 8 C. Who should be awarded costs for the court attendance on March 4, 2024, July 23, 2024, August 15, 2024, September 25, 2024, and October 1, 2024?. 9 Statutory Framework. 9 Positions of the Parties. 10 March 4, 2024. 10 July 23, 2024. 10 August 15, 2024. 10 September 25, 2024, and October 1, 2024. 11 Analysis. 11 March 4, 2024, July 23, 2024 and August 15, 2024. 11 September 25, 2024, and October 1, 2024. 12 Disposition.. 13 Overview

- [1] K.M.E.S. (the claimant) and D.M.S. (the respondent) were married in 2006 and separated in 2022. They have two children. Although they initially reached an informal agreement about parenting arrangements, this agreement eventually broke down. D.M.S. alleged that K.M.E.S. was unilaterally restricting his parenting time, particularly with regard to overnight access.
- [2] In the application before me, the respondent, D.M.S., sought an interim overnight parenting schedule pending the completion of a report under s. 211 of the Family Law Act, S.B.C. 2011, c. 25, typically prepared by a psychologist or social worker, which assesses the children's needs, as well as each parent's ability to meet those needs. He argued that the informal parenting arrangements, unilaterally imposed by the claimant, were harming his relationship with the children. K.M.E.S. opposed any overnight parenting time, citing concerns about past family violence and the children's safety. In K.M.E.S. v. D.M.S., 2025 BCSC 27, I granted a parenting schedule that included limited overnight time for D.M.S.,

balancing the children's need for stability and their relationship with both parents against the safety concerns raised by the claimant.

- [3] Following the release of my reasons, I invited written submissions on the issue of costs. Both parties provided submissions, each seeking costs related to that application as well as to various earlier court appearances.
- [4] After reviewing the evidence and considering the submissions of the parties, I find that D.M.S. was largely successful on the issue before me--seeking interim overnight parenting time--and is therefore entitled to recover his costs for a day and a half of hearings on September 25 and October 1, 2024, assessed under Schedule B (ordinary difficulty). No costs are awarded for the earlier appearances, which were marred by procedural inefficiencies and mixed outcomes.

Issues

- [5] In assessing the various competing claims of the parties, I examined the following questions:
- a) Should K.M.E.S. be awarded Costs Thrown Away for D.M.S's Abandonment of Application #1?
 - b) Should K.M.E.S. be awarded Double Costs for the July 29, 2024, hearing because she previously made an "offer to settle"?
 - c) Who should be awarded costs for court attendances on March 4, July 23, August 15, September 25 and October 1, 2024? General Legal Framework
- [6] In family law cases, costs are generally determined based on the outcome of the case. Rule 16-1(7) of the Supreme Court Family Rules, states that, subject to subrule (9), the costs of a family law case must be awarded to the successful party unless the court orders otherwise.
- [7] A four-step inquiry is used to determine whether substantial success has been achieved and whether costs should be awarded:
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 concerning 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. *Fotheringham v. Fotheringham*, 2001 BCSC 1321 per Bouck J., at para 46.

- [8] At para. 26 of *Barnard v. Barnard*, 2017 BCSC 2162, Armstrong J. described substantial success as when one party achieves a success level of 75% or higher. However, every case is assessed on its facts. Discretion to "Otherwise Order" Costs
- [9] As set out in Rule 16-1(7), the court has the discretion to order costs differently in certain situations. However, as noted in *S.R. v. B.E.*, 2012 BCSC 807, in paras. 6-7, this discretion must be exercised with care. Factors that may influence this decision include the hardship experienced by the parties, their conduct during the litigation, their earning capacity, and whether awarding costs could disrupt the balance achieved by the original orders. The courts have recognized that the discretion to deviate from the standard costs rule is specific to the context and heavily depends on the facts of each case.

Analysis

- [10] Although both parties raised several issues throughout the various proceedings, the only matter heard by me was the allocation of the respondent's parenting time pending the completion of a section 211 report. Several issues remain outstanding between the parties that may require a trial to be resolved.
- [11] I assessed the costs based on the following submissions made by the parties. A. Should the claimant be awarded Costs Thrown Away for the Respondent's Abandonment of Application #1?
- [12] For the reasons outlined below, I find no basis to award costs incurred for the abandonment of Application #1 and therefore decline to do so. Law on Costs Thrown Away
- [13] In British Columbia family law, costs known as "thrown away" may be awarded to the opposing party when one party initiates an application and then abandons it, especially after the opposing party has spent time and money preparing to respond.
- [14] The main principle is to prevent parties from unreasonably imposing litigation costs on others by actions that hinder the orderly resolution of disputes. Positions of the Parties
- [15] The claimant argued that the respondent's Application #1, filed on January 30, 2024, seeking equal parenting time, was effectively abandoned and replaced by a new application (Application #2) filed on July 24, 2024. She contends that she is entitled to recover the costs incurred for all actions leading up to and including the July 23, 2024 appearance. She seeks costs as "thrown away." She further claims that she was required to prepare for issues that were ultimately not pursued. Application of law
- [16] Courts must distinguish between good-faith efforts to address urgent parenting issues and conduct that causes unnecessary delay or expense. I find that the respondent did not use Application #2 to change his approach or obstruct the process; instead, he adjusted his strategy to concentrate on urgent parenting matters, enabling the court to address these issues during the brief summer vacation period.

- [17] Although Application #2 superseded Application #1, there is no evidence before me that the respondent abandoned the core claims raised in the earlier application. Instead, the issues were narrowed to address interim overnight parenting time.
- [18] To their credit, both parties agree that the upcoming s. 211 report will be crucial in determining whether the respondent should be granted equal parenting time, ongoing, or expanded overnight parenting time. The issues remain closely connected, and much of the material filed will likely be relied upon or remain relevant at the next stage. In this context, the claimant's request for costs is premature. The procedural history indicates that the materials prepared for Application #1 are not lost but remain relevant to the broader parenting dispute that is still pending resolution. For these reasons, I see no basis to award costs "thrown away" and decline to do so. B. Should K.M.E.S. be awarded Double Costs for the July 29, 2024, hearing because she previously made an "offer to settle"? Law on Double Costs Offer to Settle and Cost Consequences
- [19] An offer to settle is a formal written proposal by one party to resolve all or part of a dispute. In family law proceedings in British Columbia, the treatment and consequences of such offers are governed by SCFR, Rule 11-1.
- [20] Under Rule 11-1(1) of the SCFR, an offer to settle must be made in writing, delivered or served to the other party, be capable of acceptance (i.e., it must be clear, specific, and definite in its terms) and address some or all the issues in the case.
- [21] Rule 11-1(5) allows the court to impose cost consequences where an offer is unreasonably refused. These may include depriving the rejecting party of costs, awarding costs to the offering party from the date of the offer, or awarding double costs under Rule 11-1(5)(b) where:
- a) The offer was not accepted;
 - b) The judgment obtained is as favourable or more favourable than the offer; and
 - c) It was unreasonable to reject the offer when made.
- [22] In exercising its discretion under Rule 11-1(5), the court considers the factors listed in subrule (6), including:
- a) Whether the offer ought reasonably to have been accepted;
 - b) The relationship between the offer and the final judgment;
 - c) The relative financial circumstances of the parties; and
 - d) Any other factor the court considers appropriate.

- [23] The overarching purpose of Rule 11-1 is to encourage early settlement and discourage unreasonable litigation. Cost consequences are not automatic but may be appropriate where a party's refusal to accept a fair offer result in unnecessary trial proceedings. Positions of the Parties
- [24] The claimant seeks double costs under Rule 11-1(5)(b), arguing she made a written offer on July 25, 2024--four days before the hearing--that closely reflected the final order. She contends that the respondent's failure to accept the offer led to unnecessary litigation.
- [25] The respondent seeks ordinary costs, asserting that the hearing was necessary and urgent, as it involved overnight summer parenting time while his extended family was visiting from Ontario. Although much of the application was adjourned, the immediate issue was addressed and resolved in his favour. Application of Law
- [26] While the final order aligned with the claimant's offer, the evidence shows that the proposal lacked detail and was delivered shortly before the hearing. Even at the hearing, the claimant's counsel sought an adjournment to obtain instructions, which suggests that material aspects of the offer remained unresolved.
- [27] The issue is not simply whether the result matched the offer, but whether it was unreasonable to reject it when made: *Cottrill v. Utopia Day Spas and Salons Ltd.*, 2019 BCCA 26 at paras. 29-30; *Crossley v. Vorell*, 2022 BCSC 913 at para. 26.
- [28] The respondent argues, and I accept, that he would not have received any overnight summer holiday parenting time had the application not proceeded.
- [29] In assessing the reasonableness of declining an offer, both its content and timing are critical. A party must be given a fair opportunity to respond before facing adverse cost consequences. The fact that an offer aligns with the eventual outcome does not, on its own, make its rejection unreasonable: *D. (A.) v. P. (A.)*, 2017 BCSC 122.
- [30] Parenting issues involving holiday schedules often require urgent court intervention and are not suitable for last-minute settlement offers. In this case, the claimant's offer was made after the application was filed and the matter had become urgent. Its late timing, along with ongoing conflict and lack of detail, left little room for serious consideration.
- [31] The real question is whether the respondent acted unreasonably in continuing with the application. Given the timing and the circumstances, I find he did not. The Court's willingness to hear the matter underscores the urgency and legitimacy of his concerns.
- [32] As noted, Rule 11-1 is not intended to penalize parties for reasonably seeking urgent relief. Although the claimant's offer aligned with the eventual order, I find that the respondent did not act unreasonably in proceeding to court. I decline to award double costs and direct that each party bear their own costs for the July 29, 2024, hearing. C. Who should be awarded costs for the court attendance on March 4, 2024, July 23, 2024, August 15, 2024, September 25, 2024, and October 1, 2024? Statutory Framework

- [33] Under Rules 16-1(13) and (14) of the SCFR, the court may deny or reallocate costs when a procedural step is taken improperly or unnecessarily, including matters adjourned because they were set in a forum incapable of resolving them. Positions of the Parties March 4, 2024
- [34] The respondent claims the claimant unilaterally insisted on having her child support application heard at the same time as his parenting application, which increased the estimated time required and caused the matter to be adjourned. He seeks \$2,000 in tariff costs plus \$157.49 in court filing fees.
- [35] The claimant contends that it was the respondent who persisted in bringing a complex matter before regular chambers, despite her repeated stance that the application required a hearing in long chambers. She also claims that the respondent failed to consider availability and improperly combined matters, despite knowing they could not be completed within the available time. July 23, 2024
- [36] The respondent contends that the claimant again caused an adjournment by objecting to the hearing format and raising issues regarding the scope of relief sought. He claims \$1,000 in tariff costs, \$409.07 in disbursements (including filing fees and execution costs).
- [37] The claimant submits that the respondent filed additional affidavit evidence only two business days before the hearing and sought relief not contained in his notice of application. She argues that there was no valid application for summer parenting time before the court, and that Associate Judge Krentz granted short leave only with her consent. She characterizes the hearing as improperly framed and prematurely scheduled. August 15, 2024
- [38] The respondent seeks costs for another adjourned appearance, again blaming the claimant for failing to consent to holiday or overnight parenting time. He claims \$1,000 in tariff costs and \$61.74 in disbursements.
- [39] The claimant argues the hearing did not proceed because the respondent again scheduled a complex matter in regular chambers, contrary to prior direction. She states that she had consistently advised that a long chambers setting was required. The resulting adjournment was predictable and not her fault. September 25, 2024, and October 1, 2024
- [40] The respondent seeks \$3,000 in tariff costs for a full-day and half-day hearing, plus \$61.74 in disbursements. He argues that although not all relief was granted, the court awarded him meaningful interim overnight parenting time, marking a significant shift from daytime-only contact. He contends that narrowing his application and achieving relief on the core issue makes him the substantially successful party.
- [41] The claimant disagrees, asserting the respondent was not substantially successful. She points out that the respondent abandoned his claim for equal parenting time and a \$5,000 penalty under s. 228 of the FLA. She notes that the interim relief granted (two overnights every two weeks) was modest compared to what was originally sought, and that the resulting order was without prejudice pending a s. 211 report.

Analysis

March 4, 2024, July 23, 2024 and August 15, 2024

- [42] Each of the above three appearances resulted in adjournment due to a failure to schedule the matter in a forum capable of addressing its complexity. Based on the limited evidence filed before me, I find that both parties made decisions that contributed to delays or inefficiencies, whether by trying to resolve complex issues quickly in short chambers, underestimating the time needed, or submitting late or excessive materials. While each side blames the other, I conclude that neither party's conduct on these dates justifies an award of costs in their favour.
- [43] It is well established that access to extended chamber time--particularly during the summer months--is limited. Counsel on both sides would have been aware of these institutional constraints. Given that context, continued efforts to proceed in short chambers with matters that required more time show a failure to navigate the scheduling framework effectively.
- [44] While the respondent's pursuit of parenting time was urgent and sincere, urgency does not exempt a party from following proper procedural steps. His decision to proceed on August 15, despite earlier adjournments and warnings, bypassed the correct scheduling process and resulted in no meaningful progress. It also caused the claimant to prepare and attend unnecessarily, using limited court resources.
- [45] That said, the claimant also contributed to the inefficiencies by opposing format and timing in ways that extended the dispute, primarily when procedural objections could have been raised earlier or addressed more constructively.
- [46] In sum, these occurrences reflect mutual procedural errors rather than misconduct by one party. In my discretion, I determine that no costs should be awarded for March 4, July 23, or August 15, 2024. Each party will bear their own costs for those dates. September 25, 2024, and October 1, 2024
- [47] The respondent seeks costs for the appearances on September 25 and October 1, 2024, during which the court heard his narrowed application for interim overnight parenting time. Although his original application sought broader relief--including equal parenting time and a monetary penalty--he ultimately focused only on the parenting time issue. That narrowing of scope was both appropriate and efficient given the pending s. 211 report and time constraints.
- [48] The test under Rule 16-1(7) depends on whether a party was substantially successful in the outcome of the proceeding. Substantial success does not require that all relief be granted, but that the party achieved meaningful results on the issues that were argued and decided.

- [49] After applying the Fotheringham four-part inquiry, I find that the respondent achieved substantial success. The court's order marked a clear and material improvement in his parenting schedule, transitioning from daytime-only contact to alternating weekend overnight parenting time and one midweek overnight. Although the relief was interim and without prejudice, it addressed the central issue in dispute and granted the respondent the core outcome he sought at that stage.
- [50] The fact that the respondent did not pursue all of the relief requested in his initial application, such as equal parenting time or a monetary penalty, does not weigh against him in this context. Since the filing of Application #1, the parties agreed that the resolution of their circumstances would benefit from a s. 211 Report. Consequently, the narrowing of his application promoted judicial efficiency and was responsive to procedural realities that flowed from that decision.
- [51] In those circumstances, I find no reason to depart from the usual rule.

Disposition

- [52] In summary, I find that the respondent obtained the relief he sought on the issue argued and decided before me. For the hearings on September 25 and October 1, 2024, I therefore award him costs under Appendix B for ordinary difficulty, to be assessed before the Registrar.
- [53] I decline to award costs to either party for the hearings on March 4, July 23, July 29, or August 15, 2024. "Sukstorf J."

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