

CANADA / JUDGMENT

N.S. v. H.S.P.

2025 BCSC 811

COURT

Supreme Court of British Columbia

DECIDED

30 April 2025

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2025 BCSC 811 N.S. v. H.S.P.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

N.S. v. H.S.P.,

2025 BCSC 811

Date: 20250430

Docket: E67773

Registry: New Westminster

Between:

N.S

Claimant

And

H.S.P.

Respondent

Before: Associate Judge Krentz

Reasons for Judgment on Costs

In Chambers

Counsel for the Claimant:

R. Choudhry

Counsel for the Respondent:

S. Oberoi, appearing as Agent

for S. Das

Places and Dates of Hearing:

Chilliwack B.C.

August 26-27, 2024

Abbotsford, B.C.

September 11, 2024

January 17, 2025

New Westminster, B.C.

February 4, 2025

Written Submissions Received:

February 21, 2025

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New Westminster, B.C.

April 30, 2025

Table of Contents

BACKGROUND.. 3

HISTORY OF THE LITIGATION.. 4

ANALYSIS. 8

OFFERS TO SETTLE. 10

BACKGROUND

- [1] The parties were married in February 2019 and separated in March 2023. There is one child of the marriage, "E.", currently age 4.
- [2] Shortly after the marriage, the parties began living with the respondent's parents in Calgary, Alberta, and then moved into their own home in September 2020, also in Calgary.
- [3] In May 2022, the parties moved into a rental home in Surrey, BC. They remained there until their separation, at which time the respondent moved out of the rental home.

- [4] From November 2021 until March 2024, the respondent was an independent contractor working as an electrical engineer for BC Hydro. He would generally work from Monday to Friday, either at an office or remotely.
- [5] In March 2024, the respondent moved to a permanent position with BC Hydro as an employee, doing similar work as he did when he was an independent contractor. His base salary is \$120,000 per year minus union dues.
- [6] At the time of the marriage, the claimant was residing in India and employed in a sales position with a company called Anton Paar. Upon immigrating to Canada, she was able to transfer to a position with the same company. When the parties were in Calgary, her salary was approximately \$68,000 per year plus commissions.
- [7] However, in August 2023, the claimant took a position with another company as a sales development specialist and started at a base salary of \$75,000 per year. Her salary was increased to \$78,000 in February 2024. The claimant deposes she was terminated from that position in April 2024.
- [8] After the separation and until June 2023, the parties attempted a reconciliation, including attending marriage counselling but it was not successful. In late June 2023, the claimant began insisting that the respondent's parenting time be either in a public location and/or supervised. The respondent deposes that the claimant began making false allegations against him, including that he was abusive to them and he did not properly care for E. However, by August 2023, the parties were able to agree on the respondent having parenting time overnight on Tuesdays and Thursdays, plus alternate weekends.

HISTORY OF THE LITIGATION

- [9] The claimant commenced this proceeding on June 29, 2023. On September 12, 2023, the respondent filed a notice of application seeking shared parenting time.
- [10] On October 12, 2023, Associate Judge Nielsen made an order as follows:

Parenting Time

1. On an interim and without prejudice basis, commencing forthwith, the parties will exercise parenting time with [E.] as follows:
 - a. Tuesdays and Thursdays with the Respondent;
 - b. Mondays and Wednesdays with the Claimant;
 - c. Saturdays from 10:00 a.m. until Sunday at 10:00 a.m. with the Respondent commencing on October 14, 2023 until November 1, 2023;
 - d. Saturday to Monday (drop off at daycare) with the Respondent commencing on November 1, 2023; and

- e. When [E.] is not attending daycare the transition time will be 2:00 p.m.
- 2. The parties will review the parenting time schedule in place on January 1, 2024.
- 3. On an interim and without prejudice basis, when [E.] participates in soccer during the Claimant's parenting time, the Respondent will not attend and when [E.] participates in soccer during the Respondent's parenting time the Claimant will not attend.
- 4. On an interim and without prejudice basis, FaceTime calls with [E.] are to be facilitated by the non-custodial parent at 6:30 p.m. and for a period of no longer than ten (10) minutes.
- 5. On an interim and without prejudice basis, the exchanges of [E.] for parenting time will take place as follows:
 - a. at [E.]'s daycare if applicable; or
 - b. at Starbucks located at in Surrey or as agreed.
- 6. On an interim and without prejudice basis, if either party is unable to care for [E.] during his or her parenting time for a period of time that extends over twelve (12) hours, he or she will offer the other party the option of caring for [E.] before arranging third party care.

Conduct Orders

- 7. Pursuant to s. 225 of the Family Law Act, the parties will communicate with each other only in writing via text and only as it relates to the parenting time of [E.], except in the event of an emergency in which case the parties may phone each other.
- 8. The parties will:
 - a. put the best interest of [E.] before their own interests;
 - b. encourage [E.] to have a good relationship with the other parent and speak to [E.] about the other parent and that parent's partner in a positive and respectful manner; and
 - c. make a real effort to maintain polite, respectful communications with each other, refraining from any negative or hostile criticism, communication or argument in front of [E.].
- 9. The parties will not:
 - a. question [E.] about the other parent or time spent with the other parent beyond simple conversational questions;
 - b. discuss with [E.] any inappropriate adult, court or legal matters; and
 - c. blame, criticize or disparage the other parent to [E.].
- 10. The parties will encourage their respective families to refrain from any negative comments about the other parent and their extended family, and from discussions in front of [E.] concerning family issues or litigation.

Other

11. The balance of the relief sought in Respondent's Notice of Application filed on September 12, 2023, is adjourned generally.
- [11] A trial has been set for June 2, 2025. The parties scheduled a mediation for October 18, 2024. The applications came on for hearing before me on August 26-27 and September 11, 2024. On September 27, 2024, in view of the mediation that was scheduled, I ordered that the claimant would receive an interim distribution to cover some of her legal fees and for the mediation, to be paid from a joint account of the parties. I further directed that if the matter did not resolve, the parties were at liberty to schedule a continuation of the hearing.
- [12] Unfortunately, the parties were unable to resolve the issues at the mediation, so they appeared before me on January 17, 2025. On that date, I ordered that the s. 211 report (that was previously ordered at a Judicial Case Conference) would be prepared by Dr. Simon Elterman and to be paid from the same joint account. I reserved my decision on the remaining issues that were delivered orally on February 5, 2025.
- [13] On that date, I made the following findings and orders:
 1. the claimant's Guideline income is \$52,462;
 2. the respondent's Guideline income is \$118,986;
 3. commencing May 1, 2024, the respondent will pay child support in the sum of \$1,105 per month and the claimant will pay child support in the sum of \$492 per month, arriving at a set-off of \$613 per month payable by the respondent;
 4. commencing May 1, 2024, the respondent shall pay spousal support to the claimant in the sum of \$750 per month;
 5. commencing May 1, 2024, the respondent shall pay 63% and the claimant shall pay 37% of the s. 7 expenses, such expenses are to include daycare, soccer expenses and Punjabi dance lessons;
 6. the parties shall not enrol the child in any other activities unless with the written consent of the other party;
 7. the application of the claimant for retroactive support from the date of separation until May 2024 will be deferred to the trial judge;
 8. the respondent will provide to the claimant personal and corporate income tax returns and corporate financial statements and supporting documents from January 1, 2023 onwards;
 9. the parenting schedule as previously ordered by Associate Judge Nielsen will continue, with the variation that the respondent's weekend will start with the pickup of the child from daycare on Friday and when not in daycare, at 2:00 p.m.; and

10. from the parties' joint account, the sum of \$20,000 shall be withdrawn as a retainer for Dr. Elterman, with the balance of the funds in the account to be paid to the claimant. In the event that Dr. Elterman's fee exceeds \$20,000, the shortfall will be paid by the respondent. The ultimate determination as to sharing of the cost of the report shall be determined by the trial judge or further agreement of the parties.
- [14] When I provided my oral reasons for judgment, I further directed that the parties may make brief written submissions on the issue of costs. This is my decision with respect to costs for the applications.
- [15] Rule 16-1(7), (9) and (10) of the Supreme Court Family Rules [SCFR] provides that, unless the court otherwise orders, costs of applications are awarded to the successful party. Normally costs on family matters are assessed on the same principles as for civil matters. In the absence of special circumstances, costs on family proceedings follow the event and will favour the party who has achieved substantial success.
- [16] In *Marquez v. Zapiola*, 2014 BCCA 35 at para. 20, the Court of Appeal accepted the analysis set out in *Fotheringham v. Fotheringham*, 2001 BCSC 1321, that substantial success occurs when the level of one party's success is 75% or better.
- [17] In *Fotheringham* at para. 46, the Court said, a decision to award or not award costs may 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.
- [18] In *Litt v. Gill*, 2016 BCCA 288, the Court described the unique problems presented in family law cases involving multiple issues. At para. 53, Justice Garson pointed out that the concept of "success" may require a more flexible approach in multi-issue family cases for the purpose of assessing costs, as there may be a "panoply of claims advanced by each party" and therefore divided success.

ANALYSIS

- [19] The parties sought orders with respect to the following issues that were contained in three separate applications:

- a) retroactive and ongoing child support and spousal support, both as to quantum and entitlement;
 - b) s. 7 expenses and the sharing of the same between the parties;
 - c) parenting time;
 - d) interim distribution of funds; and
 - f) selection of the psychologist and the funding for the s. 211 report.
- [20] In seeking retroactive support to the date of separation, the claimant sought to impute income to the respondent in the sum of \$145,000. For the purposes of determining quantum of support commencing May 2024, the claimant argued that the respondent's Guideline income should be set at \$125,784.
- [21] The respondent submitted that no order should be made for support retroactive to the date of separation and that for the purposes of determining support commencing May 2024, his income should be set at \$118,986. He submitted that income should be imputed to the claimant at \$70,000 arguing that she is intentionally underemployed.
- [22] On the issue of determining Guideline income for both parties, I find that there was mixed success as the respondent was successful in his argument with respect to his Guideline income but was not successful in his argument with respect to imputing income to the claimant. However, the respondent was successful in opposing the application for support retroactive to the date of separation.
- [23] With respect to the payment of child support and s. 7 expenses, the claimant argued that the respondent's share of parenting time did not meet the required 40% threshold. The claimant unsuccessfully argued that all of the hours the child spent in daycare should be allocated to her. Meanwhile, the respondent was successful in arguing that s. 9 of the Guidelines apply and that a set-off for payment of child support was appropriate. However, as indicated earlier, the respondent was not successful in imputing income to the claimant, as her income was set based on her declared income.
- [24] With respect to spousal support, the claimant was successful in her argument that she was entitled to interim support, however, the amount that was ordered was significantly lower than the amount she was claiming in her application. It was only during the hearing that the claimant significantly reduced the amount that she was seeking for ongoing spousal support.
- [25] With respect to the sharing of the s. 7 expenses, the respondent was already paying for daycare but was not contributing to the soccer and dance expenses. He further argued that the parties pay for their own extracurricular activities, as he had enrolled the child in ballet and gymnastics. The respondent did agree that his proportionate share of s. 7 expenses would be 63%.

- [26] Finally, with respect to the payment of child support, the claimant was somewhat successful as the respondent had only been paying \$366 per month in child support, which is significantly less than was ordered by the Court.
- [27] With respect to the claimant's application for an interim distribution of funds, the claimant sought approximately \$56,000 from the joint account and an additional \$27,000 to be paid to her by the respondent. The respondent opposed any interim distribution, other than what was required to pay the mediator and for the cost of the s. 211 report. There was mixed success as ultimately the interim distribution obtained by the claimant was \$28,519.55, which is significantly less than what she sought in her application.
- [28] With respect to the preparation of the s. 211 report, the respondent was largely successful as he took the position that the parties should share the cost equally or, in the alternative, that the cost be paid from the parties' joint account.
- [29] With respect to the sharing of parenting time, as indicated earlier, the claimant was unsuccessful in arguing that pursuant to the order made by Associate Judge Nielsen the parenting time of the respondent fell short of the 40% threshold. In my decision, I found that when reallocating some of the time that the child was in daycare to the respondent, his parenting time was actually 44%.
- [30] In his application, the respondent sought equal parenting time and the claimant's position was that it should remain the same, pending the receipt of a s. 211 report. During the hearing, the respondent's position changed such that he sought only one additional overnight with the child, which was granted by the Court.
- [31] In the order made by Associate Judge Nielsen on October 12, 2023, he did grant leave to the parties to review the parenting time schedule after January 1, 2024. A significant amount of time was taken to make and respond to various allegations with respect to the respondent's parenting abilities, including a seven-page written submission from the claimant opposing any increase to the parenting time. Despite the allegations, I found it appropriate to slightly increase the respondent's parenting time, so the respondent was somewhat successful on that issue.

OFFERS TO SETTLE

- [32] Rule 11-1 of the SCFR permits double costs to be awarded for some or all of the steps taken after the date of delivery or service of an offer. The court may consider whether the offer should reasonably have been accepted, the relationship between the terms of the offer and the judgment of the court, the relative financial circumstances of the parties and any other factor the court considers appropriate (R. 11-1(6)).

- [33] As the respondent made several offers or proposals prior to the hearing, he seeks double costs of the applications. The offer must be made in writing by a party, be served on the other party and contain an express reservation of the right to bring the offer to the attention of the court for consideration on costs. Compliance with this criteria is essential (*M.S.G. v. S.K.R.*, 2015 BCSC 913 at para. 13).
- [34] It appears that the respondent made four written offers to settle. On July 30, 2024, the respondent proposed that on a without prejudice basis, the parties agree to equal parenting time using a 2/5/5 schedule or such other schedule provided that it results in equal parenting time.
- [35] On August 9, 2024, the respondent made another offer that included equal parenting time but with an increase in child support in the sum of \$787 per month. He further proposed that the parties would attend mediation in October or November 2024, with the cost of the mediation to be shared equally or paid from the joint account and the applications be adjourned until after the mediation.
- [36] After two days of hearing on August 26 and 27 2024, the respondent made a further offer on September 9, 2024, that again sought equal parenting time.
- [37] After the unsuccessful mediation, on November 12, 2024 the respondent made a further written offer with respect to parenting arrangements and support that was set out in a draft consent order. The draft order included interim terms related to guardianship, shared parenting responsibilities, equal parenting time and holiday parenting time, the appointment of the parenting coordinator, conduct orders, child support in the sum of \$504 per month and a sharing of s. 7 expenses with 69% paid by the respondent and 31% paid by the claimant. Unlike the previous written offers, this offer did comply with the technical requirements set out in R. 11-1(1) of the SCFR.
- [38] However, I am not satisfied that the terms that were offered by the respondent in his November 12, 2024 offer were in fact more favourable to the claimant than the result that was obtained at this hearing. The offer included equal parenting time that was not ordered and child support was in a lesser amount than was ordered. The offer also included various terms that were not included in the applications, such as the appointment of a parenting coordinator, shared parenting responsibilities, conduct orders and changing the location of the daycare. It also included terms wherein the respondent was not successful, such as imputing income to the claimant, excluding the sharing of soccer and dance expenses and it did not address the issues of interim distribution and spousal support.
- [39] Although the respondent argues that the claimant could have accepted some of the terms separately, I am not persuaded that it was an offer that ought to have been accepted and suffices to attract an award of double costs. The authorities suggest that in assessing whether an award of double costs should be made, it is the entire offer that must be compared with the overall result achieved (*M.Y.T.C. v. L.H.N.*, 2020 BCSC 729).

- [40] Accordingly, the respondent's application for double costs is dismissed.
- [41] Offers to settle that do not comply with the technical requirements cannot be considered for the purpose of seeking double costs. As noted earlier, only the last written offer complied with the technical requirements but for the reasons given it was not an offer that ought to have been accepted. However, the earlier offers could be used to determine if ordinary costs should be ordered in favour of a party (E.J.R. v. R.W.R., 2024 BCSC 15).
- [42] In one of those offers, the respondent was prepared to pay child support in an amount higher than was ordered. Furthermore, he was successful in obtaining a slight increase in his parenting time, in his selection of the author of the s. 211 report and the manner in which it was paid, in arguing that s. 9 of the Guidelines was applicable and obtaining a set-off, in opposing the significant quantum of spousal support and interim distribution sought by the claimant and in opposing any form of support retroactive to the date of separation.
- [43] Pursuant to the Rules and the jurisprudence previously noted, costs in family law proceedings follow the event and will favour the party who has achieved substantial success. I find that party is the respondent and therefore award him ordinary costs of the applications in any event of the cause.

"Krentz A.J."

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