

CANADA / JUDGMENT

Olson v. Lavallee

2025 BCSC 320

COURT

Supreme Court of British Columbia

DECIDED

23 January 2025

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2025 BCSC 320 Olson v. Lavallee

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Olson v. Lavallee,

2025 BCSC 320

Date: 20250123

Docket: E200085

Registry: Vancouver

Between:

Michelle Olson

Claimant

And

Wayne Lavallee

Respondent

Before: The Honourable Mr. Justice Branch

Oral Reasons for Judgment

Counsel for the Claimant:

S. Simpson

Counsel for the Respondent:

C. Sheppard

Place and Dates of Hearing:

Vancouver, B.C.

January 13 and 16, 2025

Place and Date of Judgment:

Vancouver, B.C.

January 23, 2025

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INTRODUCTION

- [1] THE COURT: Before me are cross-applications relating to parenting time, parenting responsibility and child support.
- [2] The issues were narrowed somewhat when the parties agreed that the older of their two children could be declared a child of the marriage, an order I am prepared to make. The respondent's concession on this point resolved paragraph 1 of the claimant's application filed on December 9, 2024.
- [3] The parties were also able to resolve an evidentiary issue that had arisen when the respondent agreed that he would not rely upon paragraphs 32-39 of his Affidavit #A sworn December 9, 2024, which paragraphs the claimant argued had the effect of waiving privilege over his solicitor's file. This agreement disposed of the need to consider the claimant's notice of application filed on December 30, 2024, which I will treat as adjourned generally in case the respondent should seek to rely on those paragraphs again on any subsequent application.
- [4] The remaining issues are contested.

BACKGROUND

- [5] The parties were married on July 30, 2002. They separated on May 27, 2018. They were divorced on January 22, 2021.
- [6] The parties have two children: K., born November 2002, and C., born June 2011.
- [7] The parties resolved the matters arising out of their separation pursuant to an agreement dated October 2, 2019, which was later confirmed by way of a final consent order dated January 22, 2021 (the "Final Order"). The parties were represented by counsel at the time they entered into the Final Order. The Final Order includes the following terms:

Para. 2: Subject to paragraph 1, for the exercise of any other parental responsibilities, both guardians must consult each other about any important decisions that [must] be made and try to reach an agreement concerning these important decisions

Para. 10: The parties will share time with the Children on the following schedule:

The Children will reside with the Respondent from Wednesday after school until Thursday night after dinner and Saturday night until noon on Sunday and they will reside with the Claimant for the remainder of the week

Para. 17: The Respondent's Guideline Income for child support purposes is agreed at \$54,000/annum, The Claimant's Guideline Income for child support purpose is agreed at \$85,000/annum.

Para. 18: Commencing October 10, 2019 and continuing on the 10th and 20th day of each and every month thereafter until the Children are no longer 'children of the marriage' as defined by the Divorce Act (Canada), or as varied from time-to-time, the Respondent will pay \$419.50 twice monthly for a total of \$839.00/month by scheduled e-transfer to the Claimant for Monthly Table child support.

Para. 20: The Children have the following special and extraordinary expenses pursuant to section 7 of the Federal Child Support Guidelines:

- (a) Medical and dental premiums and expenses not covered by the parties' extended benefits policies if agreed upon by the parties in advance of the expense being incurred;
- (b) Childcare expenses incurred to enable either party to work;
- (c) Mutually agreed upon extracurricular activities, which include dance, school fees, and parkour;
- (d) Summer camp provided they are agreed upon in advance; and
- (e) Any other expenses that are mutually agreed upon.

(the "Special Expenses")

Para. 21: The parties will share the cost of the Special Expenses in proportion to their respective incomes. At this time, the Respondent's share of the Special Expenses is 39% and the Claimant's is 61%. The Respondent will pay the Claimant \$237/month, commencing on October 20, 2019 and each month thereafter on the 20th of the month for his share of dance, school fees, and parkour and will continue to pay for [K's] cell phone. The Claimant shall pay for the Children's extended health premiums.

Para. 22: The purposes of determining the parties share of the Special Expenses, the amount of the expense will be calculated by taking into account any tax benefits, deductions, or subsidies for or associated with the expense.

Para. 23: Neither party will incur new Special Expenses for the Children, in which he or she intends to seek a contribution from the other party, without first obtaining the other party's consent.

Para. 24: Commencing June 1, 2020 and continuing on or before June 1st of each year thereafter, the parties will exchange income tax returns and all information required by the Federal Child Support Guidelines to reasonably determine the parties' incomes for support purposes. If the parties do not review child support and do not vary it in writing, both parties are deemed to consider that the child support continues to satisfy the requirements of the Federal Child Support Guidelines until June of the following year.

[Emphasis added.]

[8] The respondent declared bankruptcy in 2020.

[9] Later, in 2021, the parties agreed to modify the respondent's parenting time set out in the Final Order. The current structure for C.'s parenting time with the respondent is as follows:

- a. Tuesday: Pick up at 4 p.m., drop off around 9 p.m.
- b. Wednesday: Pick up at 4 p.m., drop off at school on Thursday morning.
- c. Alternate Weekends: Pick up at 4 p.m. Friday, drop off at 9 p.m. Sunday; and
- d. Claimant weekends: A Monday dinner thereafter.

[10] This means that C. now spends about four of 14 overnights with the respondent, or about 29%.^[1]

[11] The respondent complains that this schedule results in too many back-and-forth for C., and too much driving for him. He says that C. requires greater stability, given the problems I discuss further below. K. is now at university, so she is presumably now making her own choices as to when she will spend time with the respondent.

[12] The claimant is 51 years old. She is of Indigenous heritage and a member of the Tr'ondëk Hwëch'in First Nation. The children also belong to that First Nation Band. The claimant works for the Raven Spirit Dance Society as a Co-Artistic Director. She also works for Langara College as a Movement Instructor. The claimant's income for 2023 was \$74,274.23. In her most recent F8 Financial Statement, she anticipates that her income for 2024 would be approximately \$95,000.

[13] The respondent is a 53-year-old Métis gentleman. He has re-partnered. During the parties' relationship, the respondent was self-employed doing sound scoring for projects in the theatre and film community. He also worked as a house painter and a performer (as both a singer/songwriter and actor).

[14] In the Final Order, the parties used an imputed income of \$54,000 for the respondent's Guideline Income. Given his consent, this was an income he presumably believed he could reasonably generate if he gave full effort through full-time employment. However, he has not achieved this income level since the Final Order, largely due to his decision to abandon house painting in favour of a broader pursuit of a career in the arts. The respondent reported the following amounts as his income for the next three years following the Final Order:

2021: \$46,534.88

2022: \$33,248.51

2023: \$19,766.41

[15] The respondent asserts in his December 31, 2024 F8 Financial Statement that his self-employed income is \$19,766.41, the same as he reported as his 2023 income. However, he also claims annual expenses of \$64,824.00, even though there is no evidence of his sliding into debt in recent years. There is evidence of the respondent taking trips abroad. The respondent budgets an amount for travel on his F8 Financial Statement. This is problematic because the respondent has declined to pay child support since the Final Order. The respondent declined to disclose in his F8 Financial statement whether he is receiving financial support from his new partner, or that she is sharing in any of the disclosed expenses. I note that the respondent's income is falling year over year while he pursues his "passion," as he describes it. Yet, he does not appear prepared to acknowledge the negative impact that his career choice is having on his first family first. The respondent has arrears of approximately \$41,000 inclusive of interest, which figure grows each month.

[16] Over the years, the respondent has raised concerns about the fact that he does not have shared custody. His communications often tie this concern together with child support issues. For example, in an email dated December 2, 2022, he stated: "I feel like all I am is just a cheque that you want me to pay to family services, you say that the kids have separation anxiety maybe so but you could've relieved that anxiety by giving me joint custody I want to feel like a partner in raising our kids but I don't feel like that right now because I'm having to

fight just to be recognized as a coparent I have family maintenance breathing down my neck So what do you wanna do, I'd be more than happy to pay 50% of the kids expenses .but you have to give me joint custody now and dissolve family maintenance."

- [17] C. has certain health challenges. He has received several diagnoses, including autism and selective mutism. He has significant challenges with reading and writing, and the claimant states that he currently reads at a grade 3 level despite being in grade 8. The claimant has been very active in seeking and securing appropriate treatment and training for C. The respondent has been more passive in his parenting style. For example, there is some evidence that C. is allowed to stay up late when he is with the respondent and that the respondent does not prioritize C.'s homework while he is in the respondent's care.
- [18] There is medical evidence supporting the claimant's position that C. would likely benefit from Orton Gillingham ("OG") tutoring to assist with his reading and writing. He has been attending such tutoring since January 2022. He attends twice a week on Wednesdays and Fridays. His sessions are reduced in the summer so that the total sessions per year is typically in the range of 68. Each session costs \$110. To date, the claimant has received financial assistance from her parents to meet the OG tutoring expense, as the respondent has failed to provide any assistance with this expense. C. receives certain funding as a result of his autism diagnosis. However, this funding is not being used for his OG tutoring because it cannot be applied to these services.
- [19] On February 10, 2024, the claimant was told by C.'s orthodontist that she recommends that C. receive orthodontic treatment, specifically braces. The claimant's extended health will not cover any of this cost. The estimated cost for the treatment is \$5,000.

ANALYSIS

Parenting Time

- [20] I begin with the issue of parenting time, as that will have the most impact on C.'s welfare, the most important issue raised by the cross-applications.
- [21] Pursuant to ss. 45 and 215 of the Family Law Act, S.B.C. 2011, c. 25, the respondent seeks court approval for a move to a shared parenting arrangement using a "one week on, one week off" structure. The respondent relies on the statement in *Barendregt v. Grebliunas*, 2022 SCC 22, that a "parenting time factor" should be applied, which factor reflects the principle that children should have as much contact with each parent as is consistent with their best interests: paras. 131-135.
- [22] The claimant opposes any increase in the respondent's parenting time.
- [23] Neither party puts forward a particularly strong evidentiary basis for their position on parenting time, leaving the Court in somewhat of an evidentiary vacuum.

- [24] First, there is no s. 211 report and no Views of the Child report. The respondent purported to file a letter from C. stating his views. The letter was prepared while C. was with the respondent and not in a neutral environment. Given that fact, the lack of detail regarding exactly how this letter was prepared, and the intellectual challenges noted throughout the record, I am not prepared to bend the usual rules of evidence to admit this letter.
- [25] As such, I am left with little concrete evidence to guide me in the determination as to whether the parenting time should be changed beyond the bald assertion of each party's own wishes and views.
- [26] The respondent does little more than argue that he is entitled to shared parenting without explaining why more time with him would be beneficial or appropriate for C. That said, I have derived at least one principled basis for his request, that being that his housing situation has improved from what it was when he agreed to the Final Order. The claimant did not contest the fact of this improvement.
- [27] For her part, the claimant does raise concerns about the respondent's level of engagement and care for C., but I find that these were somewhat overblown. For example, the claimant argued that the respondent misses appointments for C. but then offered less than a handful of real-world examples that arose over the four years since the Final Order. The claimant says that the respondent is inadequately engaged in the child's care and education. But the tone of the correspondence between the parties suggests that the claimant does little to encourage or allow productive engagement by the respondent in these decisions. For the most part, the various steps taken by the claimant are presented as a *fait accompli* to the respondent. The claimant effectively admits as much when she sought to characterize her responsibility to "consult" pursuant to the terms of the Final Order as requiring only that she present her plan, and if the respondent does not expressly object, she proceeds as she wishes. I find that the parties would benefit from more precision in relation to their consultation obligation to ensure that it is effective. Hence, I make the following direction:

Further to paragraph 2 of the Final Order, the obligation to consult referred to therein must include, at a minimum, notice in writing to the other party of any proposed material change in the child's medical care, educational plan, or extracurricular activities. If the other party does not respond in writing within seven days, the party may proceed with the proposed change. If the other party does respond with an objection, the parties will speak in person and make best efforts to arrive at a consensus. Failing agreement within 28 days of the original notice, either party may apply for directions from the court.

- [28] While it is true that the claimant's consultation efforts have been problematic, I do accept that the respondent could have made further efforts on his own initiative to become more involved in the choices necessary to ensure that C. receives the assistance he needs to thrive despite his limitations. I am also concerned that the respondent appears to be more focused on his own perceived parental rights than C.'s best interests. His willingness to require that any payment of agreed child support be tied to an increase in his parenting time shows a

real misunderstanding of how best to promote C.'s best interests. C. should not be used as a pawn in the parent's financial dispute.

[29] As such, while I accept that the improved living situation justifies a further increase in the respondent's parenting time, the respondent's failings identified above suggest that any increase should only be incremental at this stage. As such, I make the following order designed to both affirm the current agreed regime and somewhat expand the respondent's parenting time:

Subject to the further adjustment to be agreed or determined as set out below, the respondent will have the following parenting time with C.:

- i. Tuesday: Pickup at 4 p.m., drop off at 9 p.m.
- ii. Wednesday: Pickup at 4 p.m., drop off at school on Thursday.
- iii. Alternate Weekends: Pickup at 4 p.m. Friday, drop off at 9 p.m. Sunday.
- iv. On C.'s Alternate Weekend with the claimant: Monday dinner.

Within the next two weeks, the parties shall meet and confer to select how to add one overnight for the respondent with C. during each two-week period. Best efforts should also be made by the parties to connect this additional overnight to the respondent's current parenting time. Failing agreement, the parties may arrange a further 9 a.m. MS Teams hearing before Justice Branch to determine the best means of adding the additional overnight.

[30] I note that this increase will result in the respondent having five out of 14 overnights, or about 36%.^[2]

[31] This addresses paragraph 5 of the respondent's application.

Retroactive Child Support Adjustment

[32] The respondent seeks an order forgiving or reducing his child support arrears pursuant to s. 17 of the Divorce Act, R.S.C. 1985, c. 3, and s. 152 of the Family Law Act.

[33] The principles outlining such an application are set out in *Colucci v. Colucci*, 2021 SCC 24:

[113] To summarize, where the payor applies under s. 17 of the Divorce Act to retroactively decrease child support, the following analysis applies:

- (1) The payor must meet the threshold of establishing a past material change in circumstances. The onus is on the payor to show a material decrease in income that has some degree of continuity, and that is real and not one of choice.

- (2) Once a material change in circumstances is established, a presumption arises in favour of retroactively decreasing child support to the date the payor gave the recipient effective notice, up to three years before formal notice of the application to vary. In the decrease context, effective notice requires clear communication of the change in circumstances accompanied by the disclosure of any available documentation necessary to substantiate the change and allow the recipient parent to meaningfully assess the situation.
 - (3) Where no effective notice is given by the payor parent, child support should generally be varied back to the date of formal notice, or a later date where the payor has delayed making complete disclosure in the course of the proceedings.
 - (4) The court retains discretion to depart from the presumptive date of retroactivity where the result would otherwise be unfair. The D.B.S. factors (adapted to the decrease context) guide this exercise of discretion. Those factors are: (i) whether the payor had an understandable reason for the delay in seeking a decrease; (ii) the payor's conduct; (iii) the child's circumstances; and (iv) hardship to the payor if support is not decreased (viewed in context of hardship to the child and recipient if support is decreased). The payor's efforts to pay what they can and to communicate and disclose income information on an ongoing basis will often be a key consideration under the factor of payor conduct.
 - (5) Finally, once the court has determined that support should be retroactively decreased to a particular date, the decrease must be quantified. The proper amount of support for each year since the date of retroactivity must be calculated in accordance with the Guidelines.
- [34] I find that there is no proper basis for the respondent to request a retroactive adjustment of past child support. I come to this conclusion considering the following factors:
- a) First and foremost, the respondent agreed to a term in the Final Order that expressly restricted the ability to apply for a readjustment of child support after a certain period. Paragraph 24 reads as follows:

Commencing June 1, 2020 and continuing on or before June 1st of each year thereafter, the parties will exchange income tax returns and all information required by the Federal Child Support Guidelines to reasonably determine the parties' incomes for support purposes. If the parties do not review child support and do not vary it in writing, both parties are deemed to consider that the child support continues to satisfy the requirements of the Federal Child Support Guidelines until June of the following year.

[Emphasis added.]

The respondent did not seek a review in a timely manner for the years following the Final Order until the filing his present application. I note that the respondent did not apply to remove or amend this term of the Final Order as part of his application.

While the existence of such a term may not be determinative, given that all orders are subject to possible review and variation, I find that the respondent's agreement to such a term should be given substantial weight on the present application. Indeed, I conclude that such a term should generally be enforced unless a consideration of the best interests of the child demands that the term be discounted for some reason.

- b) Second, I find that there is no qualifying material change justifying a retroactive reconsideration of child support, a necessary precondition for a variation: Colucci, para. 71. The only arguable changes since his agreement to the Final Order are that:
 - i. the respondent has chosen to follow his "passion" into a career in the arts that is not even earning the respondent a minimum wage, and which has also progressively been falling year over year: Colucci, paras. 61-62. The respondent obviously has the right to determine his career path, but he does not have the right to visit the economic effects of such a decision on his children: *Ferguson v. Ferguson*, 2019 BCSC 1946 at para. 31. The respondent has a responsibility to support his children above and beyond his right to follow his passion;
 - ii. he has re-partnered, thereby arguably providing him with access to additional financial support. There is some evidence of such support through the photos of the various vacations the respondent has taken, vacations that are not consistent with reliance on his own income alone.
- c) Third, I find that the respondent unduly delayed seeking a retroactive adjustment of support: Colucci, paras. 38, 82. There is no evidence of his having effectively raised the issue of a variation until the filing of his December 9, 2024 Notice of Application. I find that his constant refrain about his desire for more parenting time being a justification for not paying child support does not operate as "effective notice" of an intention to seek a variation of child support: Colucci, para. 39. It is not enough for a payor to merely broach the subject of a reduction: Colucci, para. 87. Effective notice must be accompanied by "reasonable proof" that is sufficient to allow the recipient to "independently assess the situation in a meaningful way and respond appropriately": Colucci, para. 88.
- d) Fourth, even if there was a material change and earlier effective notice, I find that the respondent has engaged in delay and blameworthy conduct, which conduct includes (a) the failure to disclose the details of his reduced income in a timely way, having only provided evidence of his historical earnings in November 2024, (b) his perpetual delinquency in terms of meeting his child support obligations, and (c) his intentional underemployment: Colucci, paras. 32, 40-41, 57, 71, and 103.

[35] This decision to reject the request for retroactive child support addresses paragraph 1 of the respondent's application.

Going Forward Child Support

- [36] The respondent also seeks an adjustment of his future child support obligations. The claimant eventually agreed that the respondent's future child support application should be considered on its merits and be treated as a review pursuant to paragraph 24 of the Final Order.
- [37] The claimant suggests that the \$54,000 originally imputed to the respondent in the Final Order should simply continue to be used in the support calculation. I find that this would be unfair to the respondent. The Court should select an income that is fair and reasonable in light of the present evidence. The fact that the respondent previously agreed to this particular figure four years ago provides little evidence in support of the determination of a reasonable figure. What matters more is his actual capacity today.
- [38] On this point, I find that the respondent is intentionally underemployed pursuant to s. 19 of the Federal Child Support Guidelines, SOR/97-175, and that he should be imputed an income well above his actual earnings. The respondent himself effectively acknowledges the need for an imputation when he proposed that the minimum wage be used to calculate his annual income, which would have yielded a figure in excess of his actual earnings.
- [39] I note that the respondent was able to earn \$46,534.88 in 2021. I see no reason why he would not have the capacity to earn that same amount today. He complains that it is difficult for him to work at the painting jobs that yielded his higher income in light of the parenting time schedule. I do not accept that challenges associated with a few drop-offs and pick ups for a 14-year-old boy over the course of a month should materially impinge on one's ability to make a living. Many families in this province navigate similar challenges on a daily basis and are able to maintain full-time work.
- [40] I find that \$50,000 is the proper figure to impute as the respondent's income for the purposes of going forward child support and for the allocation of special expenses. I base this figure on his 2021 actual \$46,534.88 earnings, adjusted upwards for inflation.
- [41] There is a complication in the child support calculation created by the fact that K. will likely only be returning home from post-secondary education for the four-month summer break. Pursuant to the discretion available under s. 3(2)(b) of the Guidelines, I find that this complication should be managed as follows:

The Guidelines table shows the amount of child support payable to the claimant, which shall be based on one child for any month where K. is a resident elsewhere for post-secondary education. The Guidelines table amount shall be based on two children for any months that K. is resident with the claimant. The claimant shall disclose to the respondent any income or grants received by K. within 30 days of the receipt of such income or grants. In September of each year, the respondent shall have a right to review the child support payable, retroactive to the preceding September and on a going-forward basis, if:

- i. K. was in receipt of any grants or income during the preceding 12 months; or
- ii. K. was resident with the respondent for any period during the preceding 12 months.

[42] I leave it to the parties to determine the precise amount of child support that is payable pursuant to these findings and orders.

[43] These findings and orders addresses paragraphs 2 and 3 of the claimant's application and paragraph 2 of the respondent's application.

Special Expenses

[44] The claimant does not seek any contribution from the respondent for past special expenses incurred, but does seek an order that the respondent pay his pro rata contribution to C.'s future OG tutoring as well as the cost of his orthodontics treatment.

[45] For his part, the respondent seeks a readjustment of the special expense contributions consistent with what he says is a proper income attribution. I confirm that the going forward percentage allocation for special expenses should be modified to be consistent with my income determination for the respondent above. For the claimant, I find that it is reasonable to use the \$95,000 she reports as her projected 2024 income in her F8 Financial Statement as her going forward income.

[46] Turning to the two specific expenses for which the claimant seeks direction, given that there is support for the use of OG tutoring in the form of Dr. Fitzgerald's report, as well as evidence from the claimant that this tutoring is benefitting C., I am prepared to direct that the OG tutoring be treated as a proper special expense up to a maximum of \$7,000 annually.

[47] I am also prepared to direct that C.'s currently recommended orthodontic treatment be treated as a special expense to a maximum of \$5,000, given the recommendation that has been received for such treatment.

[48] These findings address paragraphs 4 and 5 of the claimant's application and paragraphs 3 and 4 of the respondent's application.

Costs

[49] If the parties are unable to agree on costs within the next 30 days, they may arrange a further 9 a.m. MS Teams hearing before me. However, my preliminary view is that there was mixed success on the applications, such that I would be inclined to order each party to bear their own costs unless there are facts, issues, or relevant legal authority of which I am unaware.

[50] CNSL S. SIMPSON: Justice, if I may ask a clarifying question? For the s. 7 expenses, is it possible to include the precise figures of the monthly amounts based on the incomes the court has determined for the OG tutoring in the order so that it may be enforceable by FMEP?

[51] THE COURT: I have no objection to that precision being included in the order.

[52] THE CLERK: Order in chambers. Chambers is adjourned.

"The Honourable Mr. Justice Branch"

[1] Note: There was a mathematical error in the oral reasons, which has been corrected in this version.

[2] There was a mathematical error in the oral reasons, which has been corrected here.

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Prepared on 27 October 2026 · Esheria