

CANADA / JUDGMENT

Olson v. Lavallee

2025 BCSC 1109

COURT

Supreme Court of British Columbia

DECIDED

16 June 2025

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2025 BCSC 1109 Olson v. Lavallee IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Olson v. Lavallee, 2025 BCSC 1109 Date: 20250616 Docket: E200085 Registry: Vancouver Between: Michelle Olson Claimant And: Wayne Lavallee Respondent Before: The Honourable Justice Branch Supplemental Reasons for Judgment Counsel for the Claimant: S. Simpson E. Glover, Articled Student Counsel for the Respondent: C. Sheppard Place and Date of Hearing: Vancouver, B.C. April 23, 2025 Written Submissions Received: May 2 and 5, 2025 Place and Date of Judgment: Vancouver, B.C. June 16, 2025

- [1] At an earlier hearing before me in this matter were cross-applications relating to parenting time, parenting responsibility and child support. I issued oral reasons reported at Olson v. Lavallee, 2025 BCSC 320 [Reasons]. I adopt the facts set out therein and will use the same defined terms.
- [2] In the Reasons, I provided for a marginal increase in parenting time for the respondent, leaving it to the parties to determine when that additional time would occur. Following the Reasons, the parties agreed that every other Thursday would be the respondent's additional overnight with C.
- [3] As discussed further below, the Reasons also left it to the parties to determine the effect of my ruling on the issue of child support. The parties were unable to agree.
- [4] My change in parenting time brought the respondent up close to the 40 percent level that could materially reduce his child support obligations pursuant to s. 9 of the Federal Child Support Guidelines, SOR/97-175 [Guidelines]. The precise calculation, therefore, became of vital importance to the parties. As discussed further below, the Reasons expressly left it to the parties to determine the effect of my parenting time ruling on the issue of child support. The parties were unable to agree. The respondent then arranged for a further attendance before me to "present and recalculate the Respondent's parenting time percentage."
- [5] The claimant opposed the issuance of any further order, purporting to rely upon the following language from my Reasons:

- [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%.
- [6] At the supplemental hearing, there was also a suggestion that the fresh attendance could be treated as a request for a "reconsideration".
- [7] I disagree with both parties' approach to this residual question. At paras. 29-30 of the Reasons, I was simply reporting at a basic factual level the percentage of overnights granted to each parent within each 14-night period. I was only dealing with that issue in the context of the "best interests of the child" test for parenting time purposes, not making specific pronouncements about the child support implications.
- [8] More specifically, I was not purporting to perform the more complex assessment required under s. 9 of the Guidelines (although, obviously, the parties could have agreed to accept it as such). This is clear from the fact that the parties made no submissions on the s. 9 calculation at the initial hearing. It is even clearer from the following extract from the Reasons:
- [42] I leave it to the parties to determine the precise amount of child support that is payable pursuant to these findings and orders.
- [9] As such, I treat the calculation issue brought before me as a supplemental application to determine the precise percentage to be used for child support calculation purposes, which became necessary given the parties' inability to agree pursuant to the Court's direction.
- [10] At the initial supplemental in-person hearing on April 23, 2025, I referred counsel to the decision in *Lekakis v. Lekakis*, 2023 BCSC 376, which provides a comprehensive, recent, and helpful treatment of the proper approach to s. 9:

- [32] Section 9 of the Guidelines provides: If each spouse exercises not less than 40% of parenting time with a child over the course of a year, the amount of the child support order must be determined by taking into account
- (a) the amounts set out in the applicable tables for each of the spouses;
 - (b) the increased costs of shared parenting arrangements; and
 - (c) the conditions, means, needs and other circumstances of each spouse and of any child for whom support is sought.
- [33] The purpose of s. 9 is to provide the Court with the discretion to ensure a fair level of support given the costs associated with shared parenting arrangements, and the needs, resources, and situations of the parties and their children: *Contino v. Leonelli-Contino*, 2005 SCC 63 at para. 27.
- [34] Much of the caselaw on s. 9 deals with the determination of whether the 40 percent threshold is met. There is no single correct method to employ to determine the amount of time a parent exercises for purposes of s. 9. However, children's hours spent sleeping and at school should be included in the calculation of time and credited to the parent having care and control of the child during the school and sleeping hours: *Crofton v. Sturko*, 1998 CanLII 3234 (BCSC); *H. v. H.*, 2003 BCSC 479; *Maultsaid v. Blair*, 2009 BCCA 102 at para. 20.
- [35] In *Maultsaid*, the Court of Appeal discussed its previous consideration of the issue in *Berry v. Hart*, 2003 BCCA 659. The following principles emerge from those cases:
- as a result of the express 40 percent threshold, a decision maker must make a finding of fact as to the amount of time over a year in which the parties exercise parenting time;
 - there is no single method to employ in determining the amount of time a parent exercises for purposes of s. 9 (in some cases it may be appropriate to consider days because that is the tenor of the order prescribing parenting time; in others a calculation of hours may be appropriate), but it is "axiomatic" (*Maultsaid*, para. 20) that where an order spells out when one party's time begins and ends, and there is no agreement that could be said to alter the terms of the order, that party does not have time beyond that specified in the order for purposes of determining whether the 40 percent threshold is met;
 - it is an error of principle to treat school time as neutral in the calculation;
 - it is not open to the Court, faced with the express wording of s. 9, an order particularizing the specific times at which each party's parenting time begins and ends, and a measure of the time that falls short of the requisite 40 percent, to ignore the mandatory requirement; and

- if the order does not specify a precise parenting time schedule and it is apparent on any view of the case that the arrangement is very close to the 40 percent threshold ("within a hair", Maultsaid at para. 19), then it is a matter of judgment, not amenable to a simple time accounting exercise, where the broader context must be considered.
- [36] Given the arbitrator's characterization of the parenting time schedule as resulting in the same number of days for each party, it is important to emphasize that, at least for the purpose of applying s. 9 of the Guidelines, accounting in days can be misleading and to find that one party has a child for a day when they only have the child for a few hours during that day is incorrect: A.D.J. v. T.D.P., 2017 BCSC 2360 at para. 13.
- [11] To assist the parties, I also prepared a draft allocation of the younger child C.'s parenting time with each parent, calculated based on both hours and days. I asked each party to provide their comments and suggestions on the draft and the appropriate methodology in writing, and granted leave to provide additional affidavit evidence relevant to the calculation. The parties each took up this invitation.
- [12] Given the complexity of the schedule involved in this case, I conclude that an approach based primarily on hours is the most appropriate method.
- [13] The respondent suggested that the proper hourly calculation was as follows: Week 1 Total Hours Times Hrs/ day Mon Tue Wed Thu Fri Sat Sun Mom Dad Mid-9 am 9 Mom Mom Mom Dad Mom Mom Mom Mom 54 9 9 am-4 pm 7 Mom Mom Mom Dad Mom Mom Mom Mom 42 7 4-9 pm 5 Mom Dad Dad Mom Mom Mom Mom Mom 25 10 9 pm-Mid 3 Mom Mom Dad Mom Mom Mom Mom 18 3 Totals 24 M 24/ D 0 M 19/ D 5 M 16/ D 8 M 8/ D 16 M 24/ D 0 M 24/ D 0 M 24/ D 0 139 29 Week 2 Total Hours Times Hrs/ day Mon Tue Wed Thu Fri Sat Sun Mom Dad Mid-9 am 9 Mom Mom Mom Dad Dad Dad Dad 27 36 9 am-4 pm 7 Mom Mom Mom Dad Dad Dad Dad 21 28 4-9pm 5 Dad Dad Dad Dad Dad Dad Dad 0 35 9pm-Mid 3 Mom Mom Dad Dad Dad Dad Mom 9 12 Totals 24 M 19/ D 5 M 19/ D 5 M 16/ D 8 M 0/ D 24 M 0/ D 24 M 0/ D 24 M 3/ D 21 57 111 14 day totals Mom Dad Week 1 139 29 Week 2 57 111 Hours 196 140 Percentage 58.33% 41.67%
- [14] In his calculation, the respondent allocated C.'s school hours to the parent with the greatest number of hours over the balance of the day. I find this approach reasonable in the context of this case. Looking to the level of responsibility over the balance of the day is a clear and practical means of determining the identity of "the parent having care and control of the child during the school hours" to apply the language from Lekakis.
- [15] I am alive to the fact that in H. v. H., 2003 BCSC 479, the Court stated at para. 15: "If the defined access period ends at the time of the drop-off, then the care and control of the children passes to the other parent at that time. I think this is so even under the umbrella of a joint custody and guardianship order where there is a clear allocation of the time during which the children are in the care and control of each parent, as there is in this case." This reference could be viewed as support for an approach that allocates the Thursday school time to the claimant rather than the respondent, since it is the respondent who is arguably

restricted to a "defined access period" when dropping off on Thursdays. However, I find that the application of such an approach in this case would be inappropriate:

- a) The concept of the parent with fewer overall hours having only a "defined access period" goes against the recent change in the statutory regimes moving towards the more neutral concept of "parenting time".
- b) The amount of time spent with each parent here is sufficiently substantial that it is unreasonable to treat the respondent's material time with his child as mere "access".
- c) I find that the respondent's approach provides more mathematical certainty and predictability.

- [16] The respondent also suggested that his parenting responsibilities during the claimant's out-of-town work should further increase his parenting time percentage beyond 40 percent. The claimant responded by drawing the Court's attention to *A.D.J. v T.D.P.*, 2017 BCSC 2360, where the applicant father sought a variation in child support, arguing that his parenting time increased due to the mother travelling for work, feeling ill, or having social plans. The Court rejected this argument, stating at para. 23 that there would hopefully continue to be "flexibility and give and take in the parenting schedule to accommodate career commitments and health-related matters. There may well be times when the child is in [dad's] custody for more than 40% of the time over a specific period. It is necessary to recognize that s. 9 of the Guidelines only applies where the threshold is met 'over the course of a year.'" I agree with the claimant's proposed approach on this point and decline to incorporate into the calculation the effect that the claimant's work travel has had on parenting time, in the expectation that both parties will be reasonable in relation to such requests in the future.
- [17] The claimant argues that the respondent's calculation is flawed given that his pick-up times have generally been closer to 5 p.m. than the 4 p.m. used in his calculation. She kept track of all his pick-up and drop-off times since February 10, 2025. Her affidavit shows actual pick-up times ranging from 4 p.m. to 5:10 p.m., with most being 4:30 p.m. or later. 4:30 p.m. was the most common pick-up time.
- [18] I note that the respondent conceded that his pick-ups are "closer to 4:00p to 4:30p with drop-offs between 9:00 to 9:30p".
- [19] Given (1) the level of specificity and detail provided by the claimant and (2) the concession by the respondent, I find it appropriate to use a 4:30 p.m. pick-up time in the calculation.
- [20] I decline to incorporate a change to the respondent's drop-off time since (1) he did not suggest that this was necessary in his own proposed calculation, and (2) it is not supported by the more detailed claimant affidavit.

- [21] These findings leave me with the following calculation: Hours Mon1 Tue1 Wed1 Thu1 Fri1 Sat1 Sun1 Mon2 Tue2 Wed2 Thu2 Fri2 Sat2 Sun 2 Total % Claimant 24 19.5 16.5 8 24 24 24 19.5 19.5 16.5 0 0 0 3 198.5 59.08% Respondent 0 4.5 7.5 16 0 0 0 4.5 4.5 7.5 24 24 24 21 137.5 40.92% Total 24 24 24 24 24 24 24 24 24 24 24 24 24 24 24 24 336
- [22] As such, the calculation puts the respondent just above 40 percent in terms of parenting time with C.
- [23] I appreciate that "there is no single method to employ", and that, given that the split is "within a hair" of 40 percent, I could apply a discretionary element. However, I see no reason to deviate from the mathematical calculation. I declare that "each spouse exercises not less than 40% of parenting time" with C. for the purposes of s. 9 of the Guidelines. I do not see sufficient evidence of "increased costs of shared parenting arrangements" or "conditions, means, needs and other circumstances" meriting a calculation at anything other than the applicable table amount specified in s. 9(a) of the Guidelines.
- [24] The claimant sought to rely on the fact that the respondent is \$40,000 in arrears of child support as a reason not to consider the respondent's request for a s. 9 declaration. I decline to exercise my discretion in this regard. I previously denied the respondent's application for a retroactive adjustment of child support, so the respondent's arrears obligation to the claimant is not being eliminated. Furthermore, I do not have sufficient information to positively conclude that his failure to pay reflects actual disdain for the judicial process.
- [25] The issuance of my direction should also be beneficial to the parties in terms of setting the table for the calculation of any future accrual of arrears.
- [26] It would be problematic to allow child support to be improperly calculated on a going-forward basis in order to punish a party for not paying historical child support. There are better tools to address the arrears issue than refusing to make a declaration that reflects the true state of affairs.
- [27] The parties also sought to have the Court determine the percentage questions for the older child, K. However, at the time of the argument, K. was away at university. It was not yet known where K. would reside for the summer. I decline to make any declarations in relation to K. on the basis that such a determination would be premature and without a sufficient evidentiary basis.
- [28] Given that the outcome here is dependent on a calculation that fell on a 0.92 percent knife edge, and that I did not wholly accept either party's proposed approach, I decline to award costs to either party for this supplemental determination. "Branch J."

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