
CANADA / JUDGMENT

W.B.H. v. H.E.H.

2018 BCSC 1615

COURT

Supreme Court of British Columbia

DECIDED

20 September 2018

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2018 BCSC 1615 W.B.H. v. H.E.H.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

W.B.H. v. H.E.H.,

2018 BCSC 1615

Date: 20180920

Docket: E181379

Registry: Vancouver

Between:

W.B.H.

Claimant

And

H.E.H.

Respondent

Before: The Honourable Mr. Justice Gomery

On appeal from: An order of the Supreme Court of British Columbia

dated June 11, 2018 (H v. H, Unpublished, VA E181379)

Reasons for Judgment

Counsel for the Claimant:

G.K. Thomas

Counsel for Respondent:

L.A. Cruickshank

Place and Date of Hearing:

Vancouver, B.C.

August 22, 2018

Place and Date of Judgment:

Vancouver, B.C.

September 20, 2018

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Introduction

- [1] The claimant ("Mr. H") appeals an order made by Master Baker on June 11, 2018 at a very early stage of this family litigation.
- [2] The circumstances are regrettable. Until their separation on April 25, 2018, Mr. H and the respondent ("Ms. H") lived together in a blended family that included six children. After they separated, two of the children were living with her full-time and one of them part-time. On May 18, 2018, Mr. H obtained a time-limited order without notice to Ms. H that prevented her from accessing her bank accounts. The order (the "ex parte Order") was to expire on May 28, 2018, but Mr. H obtained an extension, again without notice to Ms. H. The extension expired on June 11, 2018. On that day, he sought to renew the ex parte Order before Master Baker, and Ms. H cross-applied for child support and other relief.
- [3] Master Baker:
- a) Refused to extend the ex parte Order, finding that Mr. H had failed to make full and frank disclosure of the circumstances on May 18 and 28, 2018;
 - b) Granted Ms. H leave to advance her cross-application before a Judicial Case Conference ("JCC") had taken place, and refused Mr. H's application to adjourn the cross-application;
 - c) Ordered Mr. H to pay child support of \$1,500 per month;
 - d) Ordered Mr. H to maintain his two stepchildren in Ms. H's care on his Blue Cross Benefits Plan;
 - e) Ordered Mr. H not to attend at Ms. H's residence or place of employment (the 'Conduct Order'); and
 - f) Ordered Mr. H to pay special costs of the applications.
- [4] Mr. H appeals all of these orders except the refusal to extend the ex parte Order. The ex parte Order is important to an understanding of the Master's reasons and his disposition of the issues under appeal.
- [5] For the reasons that follow, I dismiss the appeal.

Background

- [6] The parties met in February 2011. Mr. H had four children from a previous relationship, and Ms. H had two. In August 2011, Mr. H and his children moved into Ms. H's home on Carstairs Drive. Mr. H was 50 years old. Ms. H was 34. They formed a blended family. For present purposes, it is not disputed that Mr. H stands as a stepparent to Ms. H's two children, and she stands as a stepparent to Mr. H's four children.

- [7] Mr. H shares guardianship and parenting of his four biological children with his ex-wife. The eldest, his daughter EH, is estranged from her biological mother and is close to her stepmother, Ms. H. EH is 18 years old, has completed high school, and plans to begin university this fall.
- [8] Ms. H's two biological children have no relationship with their biological father, who is described as a drug addict. He is in default of an order to pay child support to Ms. H. In 2017, he paid \$2,377.42 and owed more than \$47,000 in arrears, including penalties.
- [9] Mr. and Ms. H were both employed when they began their relationship in 2011. Ms. H owned the house on Carstairs Drive, subject to a mortgage. It is clear from bank records produced by Ms. H that she continued making the mortgage payments after Mr. H moved in with his children. He contributed to the cost of renovations to accommodate the larger blended family.
- [10] Between September 2012 and June 2014, Ms. H stopped work and attended school. There is a dispute as to whether Mr. H supported her in this period. She says that she supported herself from Employment Insurance, the sale of a trailer that she owned, and money borrowed from her parents.
- [11] On August 19, 2013, Ms. H signed a land title transfer document adding Mr. H to the title of the Carstairs Drive property as a joint tenant. At the same time, the parties refinanced the property and both Mr. and Ms. H signed a mortgage as joint tenants. At this time, Mr. H began contributing to the monthly mortgage payments. There is a dispute as to whether the parties intended at this time that Mr. H would retain his joint interest in the property permanently.
- [12] On February 18, 2014, Mr. H signed a land title transfer document surrendering his interest in the Carstairs Drive property to Ms. H. There is a dispute as to why this was done. It appears that the financial institution holding the mortgage was not advised, and Mr. H remained liable under the mortgage.
- [13] In April 2015, the parties married.
- [14] On July 31, 2015, Ms. H sold the Carstairs Drive property, the mortgage was discharged, and Mr. and Ms. H purchased a replacement residence on Royston Road, as joint tenants. The net proceeds of the sale of the Carstairs Drive property were applied to the purchase price, and the balance of approximately \$16,000 was deposited into a joint bank account kept by the parties.
- [15] On April 25, 2018, the parties separated. There are substantial disputes concerning many of their dealings in this period, but it is at least clear that the triggering event was an argument or series of arguments about the family finances.

- [16] The next day Ms. H left the family home for several days, leaving Mr. H with the children. She made arrangements to rent a basement apartment. She returned on April 29, 2018 and was away again on business from May 3 to 6, 2018. On May 8, 2018, there was a confrontation at the family home. Mr. H called the police, who declined to intervene. At the end of the evening, Ms. H left the family home with her two biological children. EH began dividing her time between the family home and Ms. H's apartment.
- [17] On May 10, 2018, Ms. H commenced a proceeding in the Provincial Court seeking spousal support, child support, the continuation of benefits coverage for her children under Mr. H's benefits plan, and a protection order preventing Mr. H from contacting her and her children other than through his lawyer.
- [18] This set the stage for the commencement of this action by Mr. H and his ex parte application of May 18, 2018.

The legal proceedings in this Court prior to the hearing before Master Baker

- [19] From the commencement of the proceedings in this Court, Mr. H has been represented by counsel.
- [20] On May 18, 2018, Mr. H filed a notice of family claim, notice of application, and an affidavit sworn by him on May 16, 2018. In the notice of application, he sought:
- a) An order pursuant to s. 90(1) and (2) of the Family Law Act (the "FLA") giving him exclusive occupation of the family home on Royston Road, and an order preventing Ms. H from entering the family home, until further order of the court;
 - b) An order pursuant to s. 91(1) to (4) of the FLA restraining Ms. H from disposing of any property at issue including funds standing to her credit in bank accounts in her name; and
 - c) A conduct order pursuant to s. 183(1) to (3) of the FLA preventing Ms. H from attending at the family home or Mr. H's "place of business" until further order of the court.
- [21] In oral submissions before Master Tokarek on May 18, 2018, Mr. H contended that Ms. H was aggressively removing property from the family home and had diverted the net proceeds of the sale of the Carstairs property to a private bank account in 2015. Mr. Thomas represented Mr. H on the application. When he was questioned as to why the application was being brought without notice, Mr. Thomas advised:

and given her conduct in terms of his joint title on the Carstairs property, I'm concerned that, without a s. 91 order, the non-dissipation order, that she will run roughshod and make it very difficult.

- [22] These submissions were based upon Mr. H's affidavit #1 of May 16, 2018. It opened with the following paragraph:

I am the claimant herein and therefore have personal knowledge of the matters hereinafter deposed to by me. Where I am advise [sic] by others as to evidence I verily believe the said statements are true.

[23] This language deviated from the customary introductory language in an affidavit. It may have been understood by Mr. H and his counsel to mean that he had personal knowledge of all statements except those based on advice provided by others, though that is not what it says. Certainly it could only be read as asserting his personal knowledge of matters not stated to be based on advice provided by others.

[24] On appeal, Mr. Thomas argued that unqualified misstatements in Mr. H's affidavit, some of which I will review below, are explained by his lack of knowledge of the couple's financial affairs. To the extent that this is so, it is no excuse. An affiant who asserts knowledge that he lacks gives false evidence.

[25] Mr. H's affidavit contained at least the following false statements of fact:

a) At para. 8:

From the day that I moved into the respondent's Carstair's [sic] home, I paid the mortgage every month

As already noted, the mortgage payments were made by Ms. H for the first two years of their cohabitation.

b) At para. 14:

I am advised that at some point unknown to me I came off title [to the Carstairs property], but I remained on the mortgage.

Mr. H signed the transfer document by which he was removed from title on February 18, 2014. In a later affidavit, he admitted as much and said that he did not understand the documents he signed. As a party to the transaction, whether or not he understood it all, he certainly knew when this occurred.

c) At para. 18:

The respondent received all of the net sale proceeds of sale [of the Carstairs property]. I received none of the sale proceeds. The respondent took all of the net sale proceeds and placed them into an account solely in her name. I had no access or signing rights on such an account. I believe that the respondent still has that account, which I understand is at the Bank of Montreal at one of the [name withheld] Bank Branches. I believe that the net sale proceeds totalled between 140,000 to 180,000.

In fact, the net sale proceeds were not received by Ms. H and deposited into her personal bank account. Roughly \$80,000 was applied to the purchase of the Royston Road property, with the balance of roughly \$16,000 being paid into a joint bank account. This particular paragraph was central to the application for a restraining order.

d) At para. 24:

The respondent provided the balance owing [on the Royston Road property] of \$80,171.37 from her personal account to complete for the sale of our new home.

The portion of the sale proceeds applied to the purchase of the Royston Road property passed through the trust account of the notary public who handled the transaction, and did not flow through Ms. H's personal bank account.

e) At para. 29:

I am employed full time as an ICU nurse at the [name withheld] Hospital. I have been employed in the noted capacity for a number of years. My usual annual income is around \$80,000.00 with the possibility of overtime. I work shifts.

Mr. H's annual income was a subject of controversy addressed by Master Baker. According to Mr. H's tax assessments, in the years 2014 through 2017, his total income (line 150) ranged between \$86,712 and \$120,586. His net income in 2017 was \$109,080. Mr. H has not pointed to any year in which it was as low as \$80,000. On this appeal, he contended that his 2018 income will be roughly \$101,000.

f) At para. 30:

The respondent works for the School Board and [name withheld] Recreation Centre and earns approximately \$59,000 per year.

In 2017, Ms. H held two jobs and earned approximately \$59,000 per year. In May 2018, when Mr. H swore his affidavit, she had given up the second job and was earning approximately \$54,000 per year.

g) At para. 39:

I received a personal tax refund a few weeks ago for approximately \$7,000.00. I deposited the refund cheque into our joint account. I note that I only have the joint account, whereas the respondent enjoys the joint account and her own personal bank account that I do not have access to.

In fact, Mr. H had a personal bank account with the TD Bank that he opened in 2011. His practice was to deposit \$75 into this account from each paycheque. His tax refund was deposited into this account rather than the parties' joint account.

h) At para. 45:

I have made all mortgage payments on my own for 7 years.

As already noted, Mr. H did not contribute to mortgage payments until 2013. From that point forward, they were paid from the parties' joint account.

[26] With respect to EH, Mr. H swore at para. 6 that:

[EH] has been in my care full time for 7 years. [EH] will be attending college full time in the fall and will continue to live with me.

The evidence is that, in mid-May, EH was dividing her time between the family home, where Mr. H continues to live, and Ms. H's apartment. She stayed with Ms. H overnight May 13, 14, 15, 17, 18, 19, 20, 21 and 22, 2018. She was eating meals with Ms. H. This was not disclosed in Mr. H's affidavit. It was relevant to the court's consideration of the likely impact of an order freezing Ms. H's bank accounts.

[27] Based on this false and inadequate affidavit, Master Tokarek was persuaded to make the first two orders sought by Mr. H on May 18, 2018. The master declined to order that Ms. H could not attend at or enter the family residence or attend at Mr. H's place of business. He made it a term of the order that it would expire at 4 p.m. on May 28, 2018, unless it was extended.

[28] This order was granted at the end of the day on the Friday before a long weekend. It was sent to Ms. H's bank immediately, and her funds were frozen. On May 19, 2018, Mr. H sent Ms. H a text advising that he had a Supreme Court order saying that she was not allowed at his residence, and if she was, she would be arrested. This was false. On Tuesday, May 22, 2018, Ms. H was served with the order and the materials filed to obtain it.

[29] While the order was in effect, Ms. H had to borrow money to buy food for herself and the children she was supporting. These were EH, who was spending nights at Ms. H's apartment and eating meals there, Ms. H's two biological children, and a foreign exchange student who was boarding with them.

[30] Ms. H sent emails to Mr. Thomas, who did not reply. She retained Ms. Cruickshank as counsel. On Monday, May 28, 2018, Ms. Cruickshank wrote to Mr. Thomas advising of her retainer. She told him that she would be seeking to have the ex parte Order set aside and special costs.

[31] Earlier that day, Mr. Thomas had directed his associate, Ms. Butler, to attend before Master Taylor to obtain an extension of the order of May 18, 2018. Ms. Butler advised the court that she had attempted to obtain leave to bring the application on short notice to Ms. H the previous Friday, May 25, 2018, but had arrived at court too late and been unable to get before a Master. Master Taylor agreed to extend the order to June 11, 2018, and directed that a further application for an extension was to be brought on June 11, 2018 on notice to Ms. H.

[32] On May 29, 2018, Mr. H filed his application for an order extending the order of May 18, 2018 indefinitely. On May 30, 2018, Ms. H filed her application response and a cross-application for the relief granted by Master Baker that is in issue on this appeal. She was one day past the deadline established by Rule 10-6(7)(a) of the Supreme Court Family Rules.

[33] Ms. H's affidavit of May 30, 2018, included an email provided to her by EH at Ms. H's request. It stated:

To Whom it May Concern

I'm writing this because I was asked to explain the relationship between [HEH] and myself ([EH]). Even though [HEH] is not my biological mother she has been my mum since I first moved in with her 8 years ago. [HEH] along with several other spent months fighting to get me out of the abusive house I live in part time with my biological mother. Since that time, I have had no contact with my biological mother and I have instead formed a bond with [HEH]. We have a strong bond as mother-daughter, I have always been included and felt loved, I talk to [HEH] about all the important teenage girl things. I feel that I have both a mom and dad and I would like to spend time at both of their homes at my own discretion.

Sincerely,

[EH]

[34] On the evening of May 30, 2018, EH was expected to spend the night at Ms. H's residence but did not show up. EH texted Ms. H:

Dad says I'm not allowed to spend nights at your house but can go over during the day I don't know what to do but I can't say no to him.

[35] In a second affidavit made on June 7, 2018, Mr. H asserted:

The oldest, [EH], lives solely with me. [EH] has told me that she intends to live primarily with me. Accordingly, I deny the allegation made by the respondent that [EH] lives 50 per cent of her time with the respondent. That is not true. Further [EH] has provided to me a letter which I append hereto as Exhibit A of this my affidavit.

[36] The letter is entirely typed and states:

June 3rd 2018

To Whom It May Concern

I'm writing this letter regarding my decision with my living situation. I plan to have my full-time residence at my dad's house. I would still like to spend some time at my mum's ([HEH]'s) house with the freedom to go over there whenever I want.

Sincerely,

[EH]

[37] Ms. H commented, in an affidavit made on June 7, 2018:

I verily believe, based on what [EH] advised me, that the Claimant is not allowing her to stay overnight at my home. I know from the Claimant's litigation with his first wife that he believes that the matter of where a child sleeps determines who gets child support. I have been paying to feed and house [EH] since separation up until the end of May 2018. [EH] is currently residing with her cousin, Scott. She has advised me and I verily believe it to be true that she feels caught up in the middle, as her father is telling her she cannot stay overnight with me, but she does not want to reside with him full-time.

[38] Having regard to this evidence, the Master made the following findings concerning EH:

[7] She does not spend time with her mother. She, instead, shares time between the parties, between [Mr. H], her natural father, and [Ms. H], her stepmother. I accept that [EH] wishes to continue that.

[8] I accept that currently she does not. She has been dissuaded or discouraged, rather, by her father from spending time with the respondent. I think that is unfortunate, egregious perhaps. If ever I saw a cry from the heart, it is in her email. She's very clear and succinct that the respondent, in her view, is her mother. And I think it is extremely unfortunate that she's discouraged or dissuaded from that relationship, even temporarily. I think she intends to resume it and carry on living with the parties. I hope that they can understand that perspective.

[39] On June 5, 2018, Mr. Thomas wrote to counsel for Ms. H, Ms. Cruickshank, advising that he was scheduled to start a trial on June 11, 2018. He suggested that a judicial case conference be scheduled and that the court would not hear Ms. H's application. Ms. Cruickshank replied:

The June 11, 2018 date was set by the court and we intend to proceed on that date.

My client's notice of application seeks an exemption from the JCC. Your client opened the door to having matters heard prior to a JCC when he went into court ex parte, twice, and failed to provide accurate information to the court. Your client has forced the urgency in this case.

The Hearing Before Master Baker

[40] Ms. Butler attended the hearing before Master Baker as counsel for Mr. H. Mr. Thomas was otherwise occupied with his trial. Ms. Butler was fully briefed. Ms. Cruickshank attended as counsel for Ms. H.

[41] The case was called at 11:50 a.m. and court sat until 12:20 p.m. This part of the hearing was taken up with whether Ms. H's application should proceed or be adjourned. The Master dismissed Mr. H's adjournment application and granted Ms. H leave to proceed with her cross-application before the Court rose for the luncheon recess. Court resumed at 2:05 p.m. and the Court sat without a break through the afternoon. The argument concluded at 3:40 p.m. and the Master gave oral reasons for judgment. The hearing concluded at 4:05 p.m.

[42] In view of some of the arguments advanced on appeal, I should say that, on my review of the transcript, the application was argued professionally by both counsel. The Master was courteous and attentive to the submissions he heard. Both sides were afforded a full opportunity to address the issues on the application.

The Standard of Review on Appeal from a Decision of the Master

[43] The leading decision is *Abermin Corp. v Granges Exploration Ltd.* (1990), 45 B.C.L.R. (2d) 188 (S.C.) in which Macdonald J. stated:

An appeal from a Master's order in a purely interlocutory matter should not be entertained unless the order was clearly wrong. However, where the ruling of the Master raises questions which are vital to the final issue in the case, or results in one of those final orders which a master is permitted to make, a rehearing is the appropriate form of appeal.

[44] This approach has repeatedly been endorsed by the Court of Appeal; *Sidhu v Hothi*, 2014 BCCA 510 at paras. 18-24; *Kalafchi v Yao*, 2015 BCCA 524 at para. 19.

[45] Mr. H accepts the test stated in *Abermin* and contends that various of the issues decided by the Master, though interlocutory, were vital to the final issue in the case, so that a rehearing is required. I will address this contention issue by issue.

The issues

[46] Mr. H states seven grounds of appeal. In my view, they require me to address the following five questions:

1. Did the Master err in hearing Ms. H's cross-application concurrently with Mr. H's application to extend the ex parte Order?
2. Did the Master err in ordering Mr. H to pay interim child support of \$1,500 per month?
3. Did the Master err in ordering Mr. H to maintain Ms. H's two biological children on his benefits plan?
4. Did the Master err in making a conduct order against Mr. H?
5. Did the Master err in ordering Mr. H to pay special costs of the applications?
1. Did the Master err in hearing Ms. H's cross-application concurrently with Mr. H's application to extend the ex parte Order?

- [47] The Master's decision to hear the cross-application concurrently with the main application was purely interlocutory. I may only intervene if it was clearly wrong.
- [48] When the hearing took place, a judicial case conference ("JCC") had not yet been held. Rules 7-1(2) and (3) stipulate that only certain applications may be brought as of right before a JCC is held. Mr. H's ex parte application qualified as one of these. Ms. H's application did not. She required leave of the court pursuant to subrule (4). By subrule (4)(e), the court can grant leave when it considers it appropriate. This confers a broad discretion on the court hearing the application.
- [49] Subrule (5) contemplates that an application for relief under subrule (4) will be made by requisition, with submissions in writing. It was not suggested on appeal that the procedure adopted of seeking leave from the Master in oral submissions on the day of the hearing was inappropriate, and I do not think that it was.
- [50] Ms. H also required leave to proceed because her materials had been filed one day late. Rule 21-2(2) affords the court a broad discretionary power to shorten any period of time provided for in the Rules.
- [51] In her submissions to the Master contending that Ms. H's application should not proceed at that time, Ms. Butler submitted that her client was prejudiced by the unavailability of her chosen counsel, Mr. Thomas, to argue the application that day. She also argued that Ms. H's application was substantive and should not be heard before a JCC had taken place. She noted that the materials were filed a day late. She did not advise the court that she was not in a position to argue the application.
- [52] In deciding that Ms. H's application should proceed, the Master addressed the various points Ms. Butler had raised. He noted that the matter had been pending since the hearing before Master Taylor roughly two weeks earlier, and said that if Mr. Thomas' unavailability was a problem, something should have been done then about arranging counsel. Addressing the submission that a substantive application should not be heard in advance of a JCC, he viewed the original ex parte application as substantive and said:

it wasn't the respondent that started this, not this way and not in this court. She's simply responding, and I think she has every right to do so.

He stated that he was prepared to abridge the notice period to permit Ms. H's application to be heard.

- [53] In his oral submissions on appeal, Mr. Thomas acknowledged that he could not identify prejudice arising from the Master's decision to proceed, apart from the prejudice he said was inherent in his client's inability to be represented by his counsel of choice. He argued that the Master's decision was clearly wrong because it deprived Mr. H of his counsel of choice. He said that he has more than 30 years of experience, and Ms. Butler is only recently called to the bar.

- [54] I observe, first of all, that Ms. Butler was Mr. H's counsel of choice on the application to extend the ex parte Order. It was only the cross-application, and particularly Ms. H's application for interim child support, that is said to have required representation by Mr. Thomas.
- [55] The two applications were linked. They arose out of and required an assessment of a common body of evidence. The important factual questions engaged by the application for interim child support were addressed by Mr. H in his affidavit in support of the ex parte Order, namely, the parties' respective incomes, identification of the children, and the parenting arrangements. In my view, both applications required that consideration be given to the needs of the children in Ms. H's care.
- [56] Mr. H was prepared to proceed with the application for an extension of the ex parte Order with Ms. Butler as his counsel. In the circumstances, I do not accept that the Master's decision to proceed was clearly wrong. In my view, the Master was quite right to view the fact that Mr. H had fired the first shot and was pressing the advantage he had obtained through the ex parte Order as justifying concurrent consideration of the cross-application.
- [57] Though the point was not addressed in oral submissions, in his written argument Mr. Thomas pointed to a factual error in the Master's discussion of the circumstances in his ruling. At this early stage of the hearing, the Master mistakenly understood that Ms. H and her two children had been removed or ordered out of the family home. In fact, they had left voluntarily. Reading the ruling as a whole, I do not think this error was material to the Master's decision to allow the hearing to proceed.
- [58] I conclude that the Master did not err in hearing the cross-application together with the application to extend the ex parte Order.

2. Did the Master err in ordering Mr. H to pay interim child support of \$1,500 per month?

[59] The Master's order states:

Commencing May 1, 2018 and continuing on the first of each month thereafter, the Claimant shall pay the Respondent interim child support in the amount of \$1,500 per month, in accordance with the Claimant's Guideline income of \$132,417 and the Respondent's Guideline income of \$49,321, as set-off by the following parenting arrangements and the parties' corresponding support obligations:

- a. The parties equally share parenting time in respect of [EH];
- b. The Respondent has sole care of [her two biological children]; and
- c. The Claimant has 50/50 parenting time in respect of [his three younger biological children] with their biological mother.

- [60] Mr. Thomas argued that the Master's order satisfies the Abermin test by raising issues that are vital to the final issue in this case. I do not agree. It is an interim support order. None of the findings upon which it is based, as set out in the order, will bind the trial judge. This Court has held that the "clearly wrong" test applies on appeal from a Master's decision ordering spousal support: *M. (D.R.) v M. (R.B.)*, 2006 BCSC 1921 at para. 3; *D. (T.A.) v D. (M.K.)*, 2010 BCSC 898 at para. 12. In my view, the same is true on appeal from a Master's decision ordering child support.
- [61] Appellate courts have stated a more nuanced test specific to appellate review of interim support orders generally: *Loesch v Walji*, 2008 BCCA 214 at paras. 14-15, affirming 2007 BCSC 1807. This test states that an appeal court should only intervene if the reasons disclose an error in principle, a significant misapprehension of the evidence, or if the award is clearly wrong. I take these considerations as informing my application of the "clearly wrong" test in the circumstances of this case. As Kirkpatrick J.A. put it in *Loesch*, at para. 15, the point is that: "This Court has repeatedly discouraged appeals from interim support awards".
- [62] Accordingly, the appeal of the interim child support order can only succeed if Mr. H can establish that the Master was clearly wrong in the sense that he erred in principle, significantly misapprehended the evidence or otherwise came to a conclusion that was clearly wrong.
- [63] Mr. Thomas focused his submissions on four aspects of the order:
- a) The Master's finding that Mr. H's guideline income should be taken to be \$132,417;
 - b) The Master's finding that Ms. H's guideline income should be taken to be \$49,321 as stated in her F8 Financial Statement;
 - c) The Master's finding that parenting of EH was shared equally between Mr. H and Ms. H; and
 - d) An alleged failure to treat the various children as stepchildren, in respect of whom support obligations are determined differently than is the case with natural or adopted children.

Mr. H's guideline income

- [64] In refusing to continue the ex parte Order, the Master found that material facts were misstated or omitted in the evidence and submissions presented to Master Tokarek. He noted, in particular, misstatements concerning the treatment of the proceeds of disposition of the Carstairs property, EH's living arrangements, Mr. H's income and Ms. H's income. This was the background to his discussion of Mr. H's guideline income. He said:
- [32] I accept her numbers concerning her income. She's corroborated her income properly. On the order of \$49,000 when one takes the appropriate deductions, as the Form 8s and the guidelines require. [H]'s income is, I was going to say problematic. I do not think it is - he says on his Form 8 - well, as Mr. Thomas told the court, "80-grand". He says \$86,000 in one part. Another part indicates \$109,000. But most, I think, compelling is one of his most recent

pay stubs. And that is the pay stub for 17th of May which indicates a year to date of \$50,929. The simple extrapolation, as Ms. Cruickshank has done it, indicates \$132,417 this year. That is roughly \$45,000 more than he's reported. Now, there is the mystery.

- [33] Ms. Butler has argued against that, says that is simply not his income. She has said, "look, he works 38 hours a week. He makes \$44 an hour. He had a workplace back injury last year, 2017". He was off, she said, for a substantial length of time. He's back at work and she says he's been unable to work overtime in 2018.
- [34] I accept that. Mr. Cruickshank has accepted that. And yet it is the old saw: Who are you going to believe, me or your eyes? I do not mean that in a critical way; I am simply saying I have a pay slip before me, it says what it says, the math is what it is. You cannot argue with math, I think. And the most recent indication is that he's on line this year to earn \$132,000. And I accept that.
- [65] In this passage, the Master addresses inconsistencies in the evidence of his income presented by Mr. H and draws a rational inference from a statement of his 2018 year to date income found in a pay slip attached to his F8 Financial Statement. He was not clearly wrong in doing so.
- [66] In Part C of his F8, Mr. H estimated his guideline income for 2018 at \$86,953.42 based on a calculation that included deductions for union dues of \$2,201.93 and unspecified other employment expenses of \$2,628.03. These deductions are not found on his pay slips.
- [67] In argument on appeal, Mr. Thomas suggested a revised calculation of Mr. H's guideline income, taking these deductions into account, of \$101,466. This revised calculation was based on a misreading of the date of the payslip and relied on Mr. H's assertions as to his weekly hours worked and blended hourly rate. Even so it is 16.7% higher than the amount put forward in argument to Master Baker.
- [68] Mr. H's estimates of his 2018 income were a moving target and fell to be considered by the Master in the light of his false sworn statements concerning various matters. His evidence lacked credibility. The Master was not obliged to take his latest income estimate at face value. He had to make his own assessment of the evidence. The conclusion he came to was rational and grounded in documentary evidence.
- [69] On appeal, both counsel referred to the established law that proceedings for an interim support order are summary in nature and provide only rough justice at best: *Newson v Newson* (1998), 65 B.C.L.R. (2d) 22 (C.A.) at para. 11. Interim orders are only intended to bridge the gap to trial when a decision may be made on the merits: *Toye v Toye*, 2010 BCSC 1118 at para. 10.
- [70] Mr. Thomas sought to draw from this a further legal principle that, in case of doubt or difficulty in the evidence, the court must act conservatively, making the order consistent with the evidence that involves a minimal intervention into the dealings between the parties. In my view, the proposed principle of conservatism is inconsistent with 'rough

justice'. As Ms. Cruickshank pointed out, it is inconsistent with the approach taken in cases such as *Loesch*, where, in the face of substantial uncertainties in the evidence, the court awarded child and spousal support in amounts exceeding the husband's admitted annual income of \$900,000 on the basis that his actual income was probably greater and his expenses were paid by corporations under his control.

- [71] I conclude that the Master was not clearly wrong in assessing Mr. H's guideline income at \$132,417 for the purpose of an interim child support order.

Ms. H's guideline income

- [72] Mr. Thomas argued that, on her own evidence, Ms. H must have earned income from her second job in 2018 and it was not reflected in her estimated 2018 income which the Master accepted. He conceded that this was a point not argued before the Master. The evidence does not disclose when she left her second job and the income she earned from it in 2018.
- [73] In *Loesch v Walji*, at paras. 32-33 (C.A.), the appellant husband wished to argue that interest and investment income should be imputed to the wife receiving spousal support for the purpose of determining the amount payable to the husband. The Court of Appeal declined to consider the argument because it had not been advanced in the court below. Likewise, I decline to consider this argument not made to the Master.

Shared parenting of EH

- [74] Mr. Thomas argued that, on the evidence, the Master should not have concluded that the parties were sharing parenting of EH. Having regard to the evidence I have reviewed in these reasons, there was an evidentiary basis for that conclusion and I do not think the Master was clearly wrong.

Treatment of the children as stepchildren

- [75] Under s. 5 of the Child Support Guidelines and s. 147(5) of the FLA, the obligation of a stepparent to contribute child support is secondary to the obligation of other parents. S. 5 of the Guidelines directs the court to award:

such amount as the court considers appropriate, having regard to these Guidelines and any other parent's legal duty to support the child.

- [76] In *H. (U.V.) v H. (M.W.)*, 2008 BCCA 177, Newbury J.A. addressed the approach to be taken in respect of child support for stepchildren:
- [41] Given the "children-first" perspective of the Guidelines (see *D.B.S.*, *supra*, at para. 43), primacy should be given to the children's standard of living. Where for example the stepparent provided a standard to the children during the period of cohabitation that was materially higher than that which the natural parents can provide by means of their Guidelines amounts, a court might find it appropriate to make an order against the

stepparent that is designed to provide the higher standard, or something approximating it, "on top of" the other parents' support. However, where the 'piling' of Guidelines amounts would result in a standard beyond one that is reasonable in the context of the standard the children have previously enjoyed, such a 'windfall' or "wealth transfer" (see *Francis v. Baker*, supra, at para. 41) is unlikely to be "appropriate". At the other end of the spectrum, where the three (or more) parents' Guidelines "contributions" together are needed to provide the children with a reasonable standard of living, then both the stepparent and the non-custodial parent(s) may well be required to pay full Guidelines amounts. Or, where one of the natural or adoptive parents is not present or is unable to pay any support, the stepparent may well have to pay his or her full table amount. The Legislature has left it to the judgment of trial and chambers judges in the first instance to fashion orders that are "appropriate" under s. 5. At the same time, the Guidelines system is not thereby jettisoned in favour of a 'wide open' discretion. The inquiry must, like the Guidelines themselves, focus on the children and their needs.

(emphasis added)

- [77] This law was drawn to the Master's attention in submissions and he alluded to the position of the parties as stepparents to one another's biological children in his reasons for judgment. He said:
- [30] I am in substantial agreement with her perspective and with the submissions made by Ms. Cruickshank regarding the circumstances of the children and the analysis to be brought. It is very complicated in the sense that there is an offset required. They are both stepparents. She has her children full time. I'll address that briefly. He has his children half time. And then of course [EH] is out there, as I have said, in a different place.
- [31] The natural father of her two children is in egregious default of his support obligations. He is registered with FMEP. He's approximately \$50,000 in arrears. He's drug addicted. And the children have no relationship with their dad. I think she has done everything reasonable to pursue him and to seek whatever support she can from him. So where the cases require that of a party in her position she's done it. She absolutely has done it.
- [78] Mr. Thomas submits that there was insufficient evidence before the Master of efforts to collect arrears of child support from the natural father of Ms. H's biological children. In my opinion, there was a sufficient evidentiary basis for his conclusion that, in the circumstances, Ms. H had done all that she could reasonably do to seek payment of the arrears of support owed by him. The Master was not clearly wrong.

Summary on child support

- [79] In my opinion, none of the grounds of appeal put forward has merit. The Masters order of interim child support at \$1,500 per month is not clearly wrong, and the appeal of this order must be dismissed.

3. Did the Master err in ordering Mr. H to maintain Ms. H's two biological children on his benefits plan?

[80] The Master ordered:

THIS COURT DIRECTS that the Claimant is to maintain the Respondent's two children on his Pacific Blue Cross Benefits.

[81] This issue obviously does not involve a question vital to the final issue in the case. The question is whether the Master was clearly wrong.

[82] Mr. H's position before the Master was that he was not opposed to maintaining Ms. H's two biological children on his benefits plan provided that she was directed to add his four biological children to her plan. He did not apply for an order to that effect. Addressing this dispute, the Master said:

[38] I will direct that [Mr. H] is to maintain [Ms. H's] two children on his Blue Cross. [W]hat is asked by [Mr. H] is that she keep his four children on her Blue Cross. That would put them on three Blue Cross plans, or three insurance plans: Their natural mother's, their father's, and their stepmothers. And I just cannot see that there is any benefit in that. It sounds to me like - well, it hasn't been explained to me that it is even possible to have triple medical insurance. I cannot see that is even possible. But even if it was, it seems to me they have ample insurance with both their natural father and natural mother maintaining them. So he will maintain Ms. [H's] two children on his Blue Cross or extended health.

[83] On appeal, Mr. Thomas submits that the Master erred because there was no evidence that the natural mother of Mr. H's children was in fact maintaining them on her benefits plan. Assuming this was so, it was not a point made at the hearing. It appears to have been quite reasonably assumed by counsel that the mother had declared her biological children as her dependents on her benefits plan. It would be odd if she had not.

[84] Be that as it may, the question is whether the Master erred in making the order he did. Given the position taken by Mr. H at the hearing, the alternative was to refuse to make it because Ms. H had not voluntarily undertaken to list her stepchildren as dependents on her benefits plan. That would not be in the best interests of Ms. H's biological children, who were the subject of the application. In the circumstances, the Master was not clearly wrong in making the order he did.

4. Did the Master err in making a conduct order against Mr. H?

[85] The Master ordered:

Pursuant to section 222 of the Family Law Act, the Claimant shall not attend at the Respondent's residence or place of employment, or any other place that the Claimant knows or reasonably ought to know that the Respondent will be at.

- [86] Again, this was an order not involving a question vital to the final issue in the case. The question is whether the Master was clearly wrong.
- [87] It will be recalled that Mr. H had sought an equivalent order from Master Tokarek, who refused it. The order sought before Master Baker was an extension of the order made by Master Tokarek. Accordingly, a conduct order was not being sought against Ms. H at the hearing before Master Baker.
- [88] No one made a point of this at the hearing. The argument proceeded on the basis that Mr. H did not object to a conduct order being made against him, but wished it to be made mutual and it was assumed that this was a possible outcome of the application.
- [89] I pause to observe that Mr. H is a nurse at the regional hospital serving the place where the parties reside. That is his "place of business". An order restraining Ms. H from attending at the hospital could have very serious consequences for her and the children in her care. While this point was not addressed at the hearing, I respectfully suggest that an unconditional order preventing a party from attending a local hospital should only be made in exceptional circumstances.
- [90] Concerning this issue, the Master said:
- [39] I will make an order that there be a non-entry term. Again, he wants that to be mutual. I accept the evidence that the fault, such as it is, lies with [Mr. H]; that there is no indication of any intention, or in fact history, of [Ms. H] inappropriately entering on the property. There was some conflict, some frustration at separation. I am not surprised. But I accept that the unfortunate and derogatory language has gone one way, and it has gone from him to her. I do not see that it is necessary to make that order mutual.
- [91] In these reasons I have not set out the disputed evidence of the parties concerning their dealings in the agony of their separation and its immediate aftermath. Mr. Thomas contended that Mr. H's account of the events of May 8, 2018, when the police were called, was essentially undisputed by Ms. H. I disagree. I am satisfied that there was a basis in the evidence for the Master to draw the conclusions he did. He did not misapprehend the evidence and was not clearly wrong. There is no legal principle or presumption that conduct orders should be mutual.
5. Did the Master err in ordering Mr. H to pay special costs of the applications?
- [92] The question is whether the Master was clearly wrong in the exercise of his broad discretion concerning costs; *Re Moody Estate*, 2008 BCSC 786 at para. 36.
- [93] The principles governing an award of special costs are well settled and undisputed by the parties. Both referred to the leading case of *Garcia v Crestbrook Forest Industries Ltd.* (1994), 119 D.L.R. (4th) 740 (B.C.C.A.). It established that special costs can be awarded for misconduct in the course of litigation that is reprehensible in the sense of "deserving of reproof or rebuke".

[94] There are cases in which a plaintiff's conduct in obtaining an ex parte Order on the basis of intentionally or carelessly false, misleading or unforthcoming materials has been found to satisfy this standard: *Bank of Credit and Commerce International (Overseas) Ltd. (Liquidator of) v Akbar*, 2001 BCCA 204 at paras. 18-19; *Money in a Minute Auto Loans Ltd. v Price*, 2001 BCSC 864 at para. 38, aff'd 2002 BCCA 507 at paras. 17-22; *Bernie's Ltd v Bykerk*, 2009 BCSC 1028 at paras. 13-14, 24; *Old Abbey Ales Ltd. v BC Packaging Service*, 2017 BCSC 1877 at paras. 9-14.

[95] In his reasons addressing costs, the Master stated:

[45] On the issue of costs, what was sought, the special costs of these proceedings are of the day. I cannot remember the last time I ordered special costs. But this is very concerning. Very concerning. I have already dealt at length about the nature of the proceedings to date; twice without notice to Ms. [H], once when she was fully in the picture, at least, attempting to email.

[96] He stated that the following passages from *Bernie's Ltd.* at para. 13 were apposite:

In the course of the oral hearing, counsel for the plaintiffs fell markedly short of fulfilling his duty of candour to the court. Specifically, and most importantly, when pressed to provide the details of the relationship and background of the parties, he failed to apprise the court that there was a familial connection I am satisfied that matters were portrayed in a light that was, in respect of relevant and material issues, neither candid nor complete. In fact, I believe that the very basis for an ex parte without notice application was absent.

[97] The Master was not clearly wrong. I agree with his decision.

[98] Mr. H had obtained and renewed the ex parte Order on the basis of a false and unforthcoming affidavit. By it, he had jeopardized Ms. H's ability to support and care for children, one his natural daughter, and the other two his stepchildren. On obtaining the order, he misrepresented it to Ms. H, telling her that he had obtained the conduct order Master Tokarek had declined to grant. All this was conduct worthy of rebuke by an order for special costs.

[99] It is important that the order was obtained without notice to Ms. H at the very commencement of the litigation. Mr. H had experience with family litigation. I infer that he sought and obtained the ex parte Order to obtain an early advantage in the lawsuit. Orders of this nature are readily subject to abuse. That is why the law imposes on a party seeking one an obligation of full and frank disclosure. A clear failure to satisfy that obligation in the circumstances of this case should attract the consequence of a punitive costs order.

[100] Mr. Thomas contended that, if special costs were to be awarded, it should only have been for that part of the hearing that concerned the extension of the ex parte Order, and not costs of the day. The application and cross-application shared a common evidentiary basis and were heard together. In my opinion, the Master was justified in ordering special costs of the entire hearing.

Disposition

[101] For these reasons, the appeal is dismissed with costs to Ms. H in any event of the cause.

"Gomery J."

The Honourable Mr. Justice Gomery

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