

# COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Musselman v. Vanderstelt*,  
2025 BCCA 289

Date: 20250808  
Docket: CA50551

Between:

**D'arcey Michelle Musselman**

Appellant  
(Respondent)

And

**William David Vanderstelt**

Respondent  
(Claimant)

Before: The Honourable Justice Gomery  
(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated  
March 13, 2025 (*Vanderstelt v. Musselman*, 2025 BCSC 442,  
New Westminster Docket E42224).

## Oral Reasons for Judgment

The Appellant, appearing in person:

D.M. Musselman

Counsel for the Respondent:

R.S. Tretiak, K.C.  
S. Choudhry, Articled Student

Place and Date of Hearing:

Vancouver, British Columbia  
August 8, 2025

Place and Date of Judgment:

Vancouver, British Columbia  
August 8, 2025

**Summary:**

*Application for security for trial and appeal costs. The appellant and respondent were married and have one child. The appellant appeals the trial judge's order dismissing her claim for retroactive section 7 expenses in respect of tuition fees paid years before to send the child to private school. The respondent seeks an order requiring the appellant to post security for trial and appeal costs.*

*Held: Application for security for appeal costs granted; application for security for trial costs dismissed.*

*An order for security for costs is no more exceptional in family law cases than in other civil litigation. The appellant is of some means, although her financial circumstances are strained. The appeal is not completely devoid of merit. Timeliness is an issue, as the respondent did not apply for security until the appellant had taken several steps to advance the appeal. Having regard to the potential for unfairness arising from the delay in applying, the interests of justice favour an order requiring the appellant to post \$3,500 rather than the \$5,000 claimed as security for appeal costs. An order for security for trial costs would not be in the interests of justice.*

**GOMERY J.A.:****Introduction**

[1] This is family litigation. The appellant is the wife and the husband is the respondent. They have been divorced since 2013. They are the parents of one child who is now a teenager. He lives with the wife.

[2] The wife applied in the court below for orders in relation to child support and s. 7 expenses. The application was heard by Baker J. There were various issues; overall, the result favoured the husband. The wife filed a notice of appeal addressing almost all of Baker J.'s order but has since filed a factum in which she has narrowed the relief sought to just one aspect of the judgment, namely, the wife's claim to require the husband to contribute pursuant to s. 7 of the *Federal Child Support Guidelines* (SOR/97-175) to a share of the expenses she incurred in sending the child to private school during grades 7 to 9. The amount in issue is \$24,182.60. The wife also challenges Baker J.'s disposition on costs.

[3] The husband applies for security for costs, both appeal costs and trial costs.

## Security for Appeal Costs

### Legal framework

[4] A justice may order security for appeal costs pursuant to s. 34(1)(a) of the *Court of Appeal Act*, S.B.C. 2021, c. 6. The order is discretionary. The onus is on the appellant to establish that the interests of justice require that security not be ordered: *Creative Salmon Company Ltd. v. Staniford*, 2007 BCCA 285 at para. 9. The ultimate question is whether the order is in the interests of justice, and the following are relevant considerations:

1. The appellant's financial means;
2. The merits of the appeal;
3. The timeliness of the application; and
4. Whether the costs will be readily recoverable:

*Lu v. Mao*, 2006 BCCA 560 at para. 6.

[5] I will deal in some detail with the criterion of timeliness later in these reasons.

[6] An order for security for costs should not deprive an appellant of the financial wherewithal to pursue a meritorious appeal: *Zen v. M.R.S. Trust Company* (1997), 88 B.C.A.C. 198 at para. 18, citing *Milina v. Bartsch* (1985), 5 C.P.C. (2d) 124 at 125–126 (B.C.C.A. Chambers). Conversely, the likelihood that an appellant may be unable to proceed in the face of an order for security for costs is no obstacle where the appeal appears to be without merit.

[7] The appellant submits that security for costs is exceptional in family law, particularly in cases involving child support. She cites two purported cases from the CanLII database for this proposition, but neither is to be found in CanLII. In response to an inquiry from the registry concerning these cases, she advised that she could not locate them and must have made an error in copying the location. I rather

suspect that the cases do not exist and the references were produced as “hallucinations” by an AI program.

[8] In her email to the registry, the appellant offered three cases from CanLII that do exist. Two of them are unhelpful. *Han v. Cho*, 2008 BCSC 1229 [*Han*] is not a family case. Neither *Han* nor *D.B. v. C.M.*, 2007 ONCJ 515 is a case involving an application for security for costs in an appellate court. The criteria for ordering security for costs are different in trial and appellate courts.

[9] The third case, *Hughes v. Hughes*, 2013 BCCA 534 at para. 28 [*Hughes*], offers some support for the appellant’s position because D. Smith J.A. viewed the fact that an appeal involved the right of a child to child support as a consideration weighing against an order for security for costs.

[10] While I accept the reasoning in *Hughes*, I am not persuaded of the soundness of the broader proposition that orders for security for costs are exceptional in family litigation. The more pertinent proposition, which is well established in the authorities, is that the standard of appellate review in family law matters is highly deferential for reasons that include the discretionary nature of the work, the privileged position occupied by judges of first instance who hear directly from the parties, and the importance of finality and the limiting of expense in family litigation: *Liu v. Ma*, 2023 BCCA 309 at para. 22. Costs follow the event as a matter of course, unless the court otherwise orders, in family cases as in other civil cases: *Court of Appeal Act*, s. 44. The prospect that costs will be payable is a disincentive to meritless appeals. Orders for security for costs, where appropriate in the interests of justice, strengthen the disincentive, and serve a parallel purpose to the deferential standard of appellate review. This is as true in family cases as in other civil litigation.

### **Analysis**

[11] The respondent seeks security of \$5,000 for appeal costs. This is equivalent to the minimum amounts claimable for a half-day appeal. This is a conservative estimate of the likely costs payable by the appellant if her appeal fails.

***The appellant's means***

[12] The appellant earns a good income and is not devoid of means, but her financial circumstances are strained. According to her financial disclosure statement sworn in April 2024, the appellant is employed as a college instructor and self-employed as a chiropractor. Her net income for child support guideline purposes is approximately \$135,000. She claims expenses of approximately \$171,000, though these include some items such as school fees she may no longer be incurring. She has unsecured debts of about \$39,000 and spends about \$1,000 per month on debt servicing. She has RRSPs worth about \$103,000. She does not have savings, investments, or real property.

***Merits of the appeal***

[13] The merits of the appeal are doubtful, but I cannot say that the appeal is completely devoid of merit.

[14] The primary issue on appeal involves fees paid to a private school, Island Public School, attended by the child for grades 7, 8 and 9. The appellant enrolled the child in the School without consulting the respondent in advance. Then she corresponded with the respondent to seek his agreement to contribute to the fees, and he declined. The appellant applied to court after three years of fees were incurred. The judge found that the appellant unreasonably delayed in applying, and that the respondent's refusal to contribute was not unreasonable given an assurance she had given him.

[15] In her factum, the appellant submits that the judge erred in her factual assessment, failed to properly apply the legal framework established in *D.B.S. v. S.R.G.*, 2006 SCC 37 in assessing a claim for retroactive support, and failed to properly consider the child's educational needs. The overall tenor of the appellant's factum is largely an attempt to reargue matters of fact and challenge discretionary decisions of the judge. Such appeals rarely succeed.

[16] The appellant also challenges a costs order made against her by Baker J. She says that the judge mistook the degree of success she had achieved taking into account earlier decisions in her favour, whose costs were reserved to Baker J. While costs are inherently discretionary, and the scope for appellate review is limited, I cannot say that this kind of argument is bound to fail.

***Timeliness***

[17] There is an issue as to the timeliness of the application, because the appellant was obliged to take a number of steps before this application was filed, and further steps before it was brought on for hearing.

[18] The appellant filed her notice of appeal on March 20, 2025 and the appeal record when it was due on May 20. Her factum was due on June 20. The respondent filed this application on June 16, by which time her factum must have been largely prepared. She filed her factum on June 18.

[19] The application was initially set for hearing on June 30, but was adjourned generally by consent and rescheduled for hearing on this date. In the meantime, the respondent filed his factum on July 18 and the appellant filed a reply factum on July 23. The appeal has not been scheduled for hearing.

[20] In *Hayes v. Schimpf*, 2005 BCCA 413 at para. 11 [*Hayes*], Donald J.A. dismissed an application for security for costs brought only 13 weeks before the hearing date and after the expenses for the appeal book, appeal record, and factum were incurred on the ground that it was unfair to require security for costs and stay the proceedings until costs were posted at a late stage in the appeal.

[21] Similarly, in *Wang v. Shao*, 2019 BCCA 52 [*Wang*], Hunter J.A. dismissed an application for security for costs brought on for hearing only 31 days before the appeal was to be heard. He observed:

[10] In some cases, the fact that nearly all the costs required to prepare the case for appeal, including costs of preparing the appeal books, transcripts and factum, have been expended before the security for costs application is brought, is of itself sufficient reason to dismiss the application: see

e.g., *Grewal v. Khakh*, 2018 BCCA 3 (Chambers) at para. 13; *Hayes v. Schimpf*, 2005 BCCA 413 (Chambers) at para. 11. In other cases, security may be ordered on a late application when no unfairness would result to the appellant as a result of the lack of timeliness: e.g., *Ducharme v. Rempel*, 2015 BCCA 437 (Chambers). But bringing the application so close to the scheduled appeal date creates specific timeliness problems that mitigate against granting an order that might otherwise have been given.

[22] What distinguishes this case from both *Hayes* and *Wang* is that this appeal has not yet been set for hearing.

***Whether the costs will be readily recoverable***

[23] Given the appellant's financial circumstances, there is reason to doubt that appeal costs she may be ordered to pay, if her appeal fails, will be readily recoverable.

***The interests of justice***

[24] Taking everything into account, in my view, the interests of justice favour an order requiring security for appeal costs. The appellant says, in her memorandum of argument, that she lacks the means to post security, but has not sworn an affidavit to this effect. Given her income, I am not persuaded that an order for security for appeal costs, in a modest amount, will prevent her from pursuing the appeal. The doubtful merit of the appeal and question as to the ready recoverability of costs from the appellant favour an order. In the circumstances of this case, these considerations carry more substantial weight than the circumstance that the appeal involves reimbursement for s. 7 expenses, which are a species of child support.

[25] However, I am concerned about the untimeliness of the application. It is at least possible that the appellant would have taken a different course had this application been brought more promptly. There is a potential for unfairness. I can address that risk by reducing the amount of security to be posted, recognizing to some extent the costs incurred by the appellant before the application was brought.

[26] All in all, I conclude that an order for security for appeal costs in the amount of \$3,500 is warranted in the interests of justice.

## **Security for Trial Costs**

### **Legal framework**

[27] A justice may order security for trial costs pursuant to s. 34(1)(b) of the *Court of Appeal Act*. As with security for appeal costs, the order is discretionary, but different principles govern the discretionary exercise. Security for trial costs is ordered less readily and will not usually be ordered before the costs are assessed and certified by the registrar in the court below: *Clark v. Matossian Estate*, 2025 BCCA 274 at paras. 14–19 [*Clark*].

[28] The onus is on the applicant to show that posting security is required in the interests of justice: *Focken v. Fraser Health Authority*, 2023 BCCA 81 at para. 27 (Chambers). Consideration should be given to the merits of the appeal, the effect of such an order on the ability of the appellant to continue the appeal, and the prejudice to either party if the order is made or refused. While proof of prejudice is not essential to justify an order for security for trial costs, it is usually hard to justify requiring an appellant to post security as a condition of being permitted to proceed with an appeal for the avoidance of prejudice to the respondent that has nothing to do with the appeal: *Clark* at para. 19.

### **Analysis**

[29] The respondent claims security for trial costs of \$10,241.48 based on a draft bill of costs that has not yet been assessed.

[30] In my view, this is not one of those exceptional cases where security for trial costs should be ordered in advance of assessment. It is not possible to conclude, at this stage, that the respondent will be impaired in his ability to recover costs from the appellant by her prosecution of the appeal. I am not satisfied that posting security is required in the interests of justice at this time.

[31] In such circumstances, the court would often adjourn consideration of the application for security for trial costs until the costs are assessed. I am not going to do that because I am of the view that the application is bound to fail in any event.

The application is not timely, there is no evidence of prejudice to the respondent's ability to collect trial costs consequent on the appeal, and there is a greater likelihood that the effect of the order would be to stop the appeal. My doubts as to the viability of the appeal are not so substantial as to amount to a settled conclusion that it is bound to fail.

**Disposition**

[32] For these reasons:

1. The appellant will post \$3,500 in a form satisfactory to the Registrar within 30 days;
2. The appeal is stayed until the security is posted; and
3. The respondent's application for security for trial costs is dismissed.

"The Honourable Justice Gomery"