

CANADA / JUDGMENT

A.J.B.B. v. B.B.M.

2023 BCSC 2431

COURT

Supreme Court of British Columbia

DECIDED

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2023 BCSC 2431 A.J.B.B. v. B.B.M.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

A.J.B.B. v. B.B.M.,

2023 BCSC 2431

Date: 20231030

Docket: E59240

Registry: New Westminster

Between:

A.J.B.B.

Claimant

And

B.B.M.

Respondent

Before: The Honourable Justice Schultes

(appearing by videoconference)

Oral Reasons for Judgment

In Chambers

Counsel for the Claimant:

R.P. Dueckman

The Respondent, Appearing on his own behalf:

B.B.M.

Place and Date of Hearing:

New Westminster, B.C.

April 28, July 4,

August 21, 2023

Place and Date of Judgment:

New Westminster, B.C.

October 30, 2023

Introduction

- [1] In this summary trial application, the claimant is seeking final orders with respect to divorce, parenting of and support for the parties' two children, and spousal support. The support aspects include addressing accumulated arrears and seeking security for future payments.
- [2] The parties began a marriage-like relationship in 2005, married in 2015, and separated in 2019. Their children are 14 and 12 years old.
- [3] The former family home has already been sold, and the proceeds divided equally between them, and the claimant is not currently seeking any orders with respect to property. This includes any orders with respect to the respondent's alleged dissipation or concealment of the substantial assets of a company of which he was the principal, which is the subject of a still-unfulfilled disclosure order. Her position is that without knowing the extent of his actual assets, there is not a proper basis on which to divide them. Instead, she relies on the respondent's income while operating that company as the basis for imputing income to him for support purposes.
- [4] During the hearing on July 4, with the consent of the respondent, I made some interim orders assigning most parenting responsibilities to the claimant, subject to the respondent being informed of and consulted about certain crucial matters.

Procedural History

- [5] The summary trial application was originally set to be heard in regular chambers on April 28 of this year. The respondent was not represented by counsel at that time, although he had been previously. He did not file a response to the application. Before the hearing he advised the claimant's counsel that he was in Ukraine and wished to make a video appearance from there, but had not filed the requisition necessary to do so. He was requesting a 10-day adjournment in order to file material in response.
- [6] Out of fairness, the claimant's counsel passed this information on to me at the hearing, but took the position that the application should proceed nonetheless, given the respondent's failure to respond properly and the prejudice to the claimant from further delay.
- [7] Given this apparent intention by the respondent to appear, albeit imperfectly carried out, I did not consider it appropriate to proceed in his absence. I adjourned the application on terms that included the next date being peremptory on him. I also ordered that he pay a costs order from a previous application that remained outstanding, and costs thrown away for this adjourned date, both as preconditions to being allowed to appear on the new hearing date.
- [8] A lack of clarity of a further term of adjourning the matter that I imposed ended up causing confusion. I ordered that the respondent would have 10 days to file responsive materials, after which the claimant was permitted to reset her application whether or not those materials had been filed. The intent of that term was to allow the claimant to proceed with her application without further delay, even if the respondent did not take advantage of the opportunity he had been given to file material. It was not intended by me to be an absolute deadline for him to file any material. Unfortunately, it was understood in that way by the judge who presided over the subsequent hearing, and by the claimant's counsel.
- [9] That led to an extended dispute during that next hearing over the admissibility of the material that had been filed after the 10 days had expired by the respondent's recently-retained counsel, and the propriety of that counsel's actions in filing it. The matter was ultimately referred back to me and we have since proceeded with the actual summary trial application on the merits[1].
- [10] An unfortunate consequence of the focus on procedural issues in the respondent's amended application response is that there was not a current affidavit from him on the merits, only one from August 2022, an updated financial statement from June of this year that contains some limited narrative information as well, and affidavits by a legal assistant in May and June, which simply attached documents.
- [11] One of the questions that will have to be resolved when deciding whether this matter is suitable for resolution in a summary trial is whether the respondent has failed to put his best foot forward in responding to the claimant's application, as the cases require, or whether his lack of a complete response is due to matters beyond his control.

The Claimant's Position

- [12] In her materials she describes herself as having been the full-time caregiver for the children during their relationship. Her previous occupation was as a dental assistant.
- [13] She says that before forming the company in question the respondent had a well-paying job as a foreman at a shipping terminal, and before that worked for CP Rail. She was against him leaving his secure employment, but ultimately supported him in his company venture. They mutually agreed that she would stay at home and look after the children, the younger of whom turned out to be on the autism spectrum and to have attention deficit disorder (in addition, both of the children suffer from mood disorders).
- [14] While she was a shareholder and director of the company, and nominally held the position of "benefits administrator" and received a salary in that capacity, she explains that the position was attributed to her solely to reduce the respondent's income for tax purposes. She actually had little knowledge of how the company operated.
- [15] She deposes that the company was very successful. Its business was construction and maintenance of railways, and according to an unaudited financial statement for 2019 that she has attached, it had accounts receivable of more than \$600,000, and property and equipment worth more than \$1.6 million. Despite the respondent's claim that he drew a salary of only \$55,000 per year, a review that was carried out by her father (who is an accountant) of the records of the parties' joint bank accounts from the end of 2015 through 2019, showed that more than \$250,000 per year was being deposited into those accounts.
- [16] The respondent assured her that the company was "doing steady business and was very successful in peak seasons" and that it was able to ride out periods of lower business. She acknowledges that occasionally her parents assisted the company with short-term loans of up to \$25,000 to meet its payroll during the gap between completion of a job and payment by the customer, but I took the her to be saying that the company was not in a financially precarious position overall.
- [17] She also deposes that the family had a high standard of living as a result of the company's success. She drove a new vehicle provided through the company, they took multiple family vacations each year, and were in the process of purchasing a large new house. The respondent's personal pursuits, in keeping with such an income, included what she describes as purchasing "rare and expensive alcohol", amassing a large firearms collection, and owning multiple Rolex watches.
- [18] Despite these positive indications, in mid-2020, following the separation, she began receiving letters from the Canada Revenue Agency and the companies' creditors alleging, among other things, failure to remit GST and source deductions of hundreds of thousands of dollars. Based on the number of demands from creditors and the overall amounts being sought, she estimated that the shortfall was in the millions of dollars. Her understanding is that the company became effectively insolvent in mid-2021.

- [19] Of equal concern, it appeared to her that the company's funds and equipment had disappeared, leaving only those debts. She describes the respondent as being unwilling to explain to her what had happened. Her theory is that the equipment was moved to other companies that he operates, only some of which she has been able to identify. For example, she found a receipt for a cheque he appears to have cashed on behalf of one such company.
- [20] In addition to the main company and the related holding company that she was aware of during the relationship, she has been able to confirm the existence of two companies that were incorporated by him after separation in British Columbia, and one in Alberta that was founded in October 2020 and struck off the list this year.
- [21] She located an internet listing of a person who claimed to operate a specialized type of truck that is used in rail repairs on behalf of the Alberta company, which costs about \$250,000 to purchase. I took her to be suggesting that this Alberta company was either in possession of one of the main company's valuable assets, or had been able to obtain such a truck through its own resources.
- [22] A former work colleague of the respondent told her that one of the related companies had sold him another specialized type of truck that is used in their business - one that is suitable for driving on rail tracks. She was unaware how that truck, which I infer had previously been an asset of the main company controlled by the respondent, had come into the possession of the related company.
- [23] Based on her investigations of other receipts, as well as websites, signs on buildings, and the respondent's comments to her, she believes that he carries on multiple businesses and commercial rentals through these other companies.
- [24] Perhaps most seriously, in December of 2021 officers of the Canadian Border Services Agency executed a search warrant on the former family home and seized all of the respondent's firearms and related items. The search warrant alleged that he was involved in the importation, manufacture and trafficking of prohibited and restricted firearms.
- [25] Shortly after the separation, which occurred when she received a phone call from a woman with whom he was engaged in a relationship, the respondent sent her a text message advising her that he was entering into a rehabilitation program for "drinking, drug use, gambling and women, compulsive spending and lying". Although she was aware of his alcohol consumption during the relationship, other than his use of steroids she was not previously aware that he used illicit drugs.
- [26] She deposes that despite the declining state of the company, the respondent continued to spend money in a manner that suggested he had access to other funds. He leased an apartment in New Westminster with a rent in the range of \$2,500 to \$2,700 per month (which he told the claimant he had sublet to a friend after he left Canada), and told her that in 2021 he had secured a luxury apartment in Edmonton for work. He sent her a photo of large stacks of cash, and engaged in various forms of conspicuous consumption such as:

- continuing to buy expensive liquor;
- taking several trips to Mexico with his girlfriend, as well as one to Hawaii;
- training for a pilot's licence;
- buying Vancouver Canucks season tickets;
- giving the claimant \$4,000 in cash to purchase a family dog;
- after her company vehicle was repossessed, putting \$5,000 in cash down on a replacement vehicle for her and later paying off the \$41,000 balance on it;
- buying the children various designer and luxury personal items and electronic devices, and taking them out to expensive restaurants; and
- after he relocated to Poland in March of 2022, offering to fly her and the children there for a visit.

He also put a \$55,000 down payment on the purchase of a new home, which he forfeited by failing to complete the transaction.

- [27] All of this, the claimant emphasizes, was during a period in which his only acknowledged source of income was employment insurance relating to his former employment with his company.
- [28] Although there was no order in place yet, until November 2021 the respondent effectively paid a form of combined child and spousal support to the claimant, by continuing her income for nominally working for the company. She described this as averaging \$1,300 per week, or \$5,200 per month, although the amounts she actually received came in different amounts, in the form of e-transfers or cash. (However, at a different point in her affidavit she agreed with the slightly higher figure of \$5,634 per month that the respondent had described in his affidavit.)
- [29] After the respondent had left the country, he also directed her to pick up a payment of \$3,000 through an employee at his office in Burnaby.
- [30] Before cutting support off completely in November 2021, he briefly reduced the payments to \$1000 per week.
- [31] After ceasing payments to her, he told her to draw on her RRSP and the children's RESPs for support. She had no choice but to do so. As of August of this year, the RRSP, which had contained \$22,500 when they separated, was almost completely depleted, and the RESP had been reduced to about \$9,700, to cover school fees.
- [32] According to her, the respondent never expressed any need to rein in her spending on the family's needs after separation based on the company's financial health. All of their post-separation arguments on financial issues arose from his spending habits.

- [33] She has located a listing on a business website that represented the company's revenue as in 2021 still being \$6 million per year and its business as still growing.
- [34] After the respondent stopped making these payments she had no way to cover the mortgage on the family home (which she had been doing herself since separation), and once the home fell into foreclosure she had to agree with the respondent's suggestion to sell it. They each received approximately \$263,000 from the sale, which took place in March 2022.
- [35] The withdrawal of support has had a potential impact on the well-being of the children, in addition to her obviously reduced ability to meet their material needs. In particular, their younger child received helpful support with his learning disability and other challenges from the private school that both children attend. That attendance was put at risk once the respondent stopped paying their school fees.
- [36] In March 2022 the respondent moved to Poland, with the intention of pursuing a business venture in Ukraine. He described it to her as manufacturing body armour for the military, and later advised her that "his armour plates had been accepted for manufacturing".
- [37] In June of that year she applied for interim support, as well as disclosure of information about the respondent's financial dealings. He was represented by counsel at that point, but did not respond in a timely way to her application. As a result, the hearing date in August had to be adjourned. The terms on which the adjournment was granted were that he pay combined child and spousal support of \$5,000 per month (with the specific amounts under each heading to be attributed in a subsequent order), pay costs forthwith, and complete an updated financial statement with the required attachments. That interim support order is still in effect, and payment of the costs order is the one that I referred to earlier as a term of my granting the April 2023 adjournment.
- [38] Shortly after that order was granted, the respondent sent her a text message in which he addressed her in profane terms, told her he hated her, and made the following proposal:
- Like I said, I'll pay you \$2,000 mth starting sept 1, you cripple my bank accounts or other enforcement you get NOTHING, I've exited all my assets elsewhere you have NO other options. Take it or leave it.
- He accused her of breaching their "agreement in principle [r]egarding paying your car off etc".
- [39] On September 15, 2022, the parties' counsel reached a consent order that required the respondent to disclose, among other things, all the companies that he had been in substantial control of since 2018 and the financial records of those companies that were in his possession, as well as confirmation of his requests from the relevant financial institutions for any documents of those companies that were not in his possession. He has not complied with that order.

- [40] Shortly before the consent order, his counsel advised that the respondent had a full-time job that required him to be in Dubai and Ukraine. Based on the company name that he provided, the claimant believes that it provides executive security. He did not follow through on his representation through counsel that he would provide a photo of the employment contract involved.
- [41] During a phone conversation between the parties that November he orally agreed to assign all parenting responsibilities to her, in light of the difficulties she was experiencing authorizing the children's travel, medical care, and school activities in his absence. Efforts to formalize that agreement through his counsel did not receive a response.
- [42] In January 2023 she sent him an email in which she asked him if he would ever return to Canada and whether he would consent to a divorce. He replied that his phone and email had been "offline", and that he had been injured "helping out with an operation", but had recovered. He promised to send updated contact information shortly after that, but did not do so.
- [43] As of the August hearing date, the claimant had been able to gain employment with a Liquor Distribution Branch and expected to receive an annual income in the \$40,000 range.
- [44] The claimant's overall position is that however laudable it may be in the abstract to pursue employment that is related to the Ukraine conflict, it cannot take precedence over fulfilling the respondent's support responsibilities. She says that income for support purposes should be imputed to him at \$250,000 per year, which represents the annual amount of deposits to their family accounts that were generated by the company before it began to encounter difficulties. Other relevant considerations are the assets that she believes have been moved elsewhere or sold, and the respondent's personal capacity to earn income based on his extensive work experience and education. For example, in addition to having an associate's degree as a civil engineering technician from BCIT, which he referred to on a business website, he is qualified as a train conductor and rail inspector.
- [45] Given his uncooperative attitude towards paying support to this point, she also submits that he should provide security for future payments in a sum equivalent to his share of the proceeds of the former family home.
- [46] The allocation of parenting responsibilities that was granted to her on an interim basis should also become part of a final order.
- [47] Following representations made by the respondent at the August hearing, the claimant's counsel has confirmed that the respondent had recently made a \$15,000 payment towards his arrears of support with the Family Maintenance Enforcement Program, which had been conducting enforcement proceedings in relation to the existing interim order, and had instructed that agency to release the money to the claimant.

The Respondent's Position

- [48] His essential point, as expressed in his affidavit responding to the claimant's interim support and disclosure application, is that his income from the company was never in the \$250,000 range that she alleged. He also took the position that he overpaid support after separation, by using funds that should have gone to fulfill the company's financial obligations.
- [49] He says that he and the claimant operated the company together, and had formed it with the common intention that he would make more money than he had previously as a railway construction supervisor.
- [50] The company had to borrow heavily in order to purchase the heavy equipment needed to carry out jobs, and also had to finance operations during the gaps between completion of a project and payment being received.
- [51] Over time, the company's jobs "began to become less profitable in the many months in which active operations were carried on". The company paid its management wages and maintained operations only by going into what he describes as a crisis mode, delaying its GST remittances, payroll source deductions and tax payments. As the work decreased, the heavy equipment on which it had borrowed heavily was sold, returned or repossessed.
- [52] In his view, the company balance sheet referred to by the claimant actually confirms the difficulties that he is describing. Using rounded numbers, its net capital position declined from a deficit of \$114,000 in 2018, to one of \$885,000 in 2019, and the decline in earnings in those same years went from a loss of \$26,000 to one of \$834,000.
- [53] The stress of maintaining an operation that was losing money led him to develop a drinking problem and engage in a period of cocaine use, as well as to embark on the extramarital affair that led to his separation from the claimant.
- [54] After he got his alcohol and drug use under control, he says that he began to attempt to move the company back toward solvency and manage the numerous claims from creditors.
- [55] According to him, the catalyst for the family proceedings, which were begun by the claimant, was his request to her that they cut back on expenditures and that she find work outside of what she was paid by the company. Despite repeated requests of that nature, she was unwilling to do so.
- [56] He emphatically rejects her claim that she was oblivious to the situation of the company until demands from creditors began to come in. For example, a few days before she filed her notice of family claim his counsel wrote to her current counsel's predecessor, describing "the very poor state of affairs" of the company. Her former counsel was also fully informed by his counsel of the sales, returns or repossessions of most of the company's heavy equipment.

- [57] As to the extent of the claimant's actual role in the company, his former counsel's assistant provided an affidavit attaching her LinkedIn page during the period of its operation, in which she describes herself as, "A dental assistant turned true railroader [o]versees the day to day admin operation of a leading railway contract and service company".
- [58] As an example of the measures he says he had to resort to in order to continue paying support, he sold the rail ties that were salvaged during maintenance jobs as scrap for cash on the grey market, without reporting it as the revenue of the company.
- [59] In a similar vein, he purchased multiple Rolex watches so that they could be sold for "survival money" for the family if the company's creditors seized all of its assets. He brought one of the watches on a trip to Mexico in case he was subject to false arrest as a form of shakedown by the police there. (As to the wisdom of vacationing outside of Canada while in such financial difficulties, he explains that he chose Mexico "because it was inexpensive".)
- [60] He does not deny the rampant post-separation spending that the claimant detailed in her affidavit, but explains that it occurred during a period in which he was "emotionally unbalanced and needed therapy".
- [61] To the extent that his alleged involvement in criminal activity might be relevant to support issues, he clarifies that all of the firearms that were seized in the execution of the CBSA search warrant were legally registered and stored at the time, and that he had become subject to that investigation only because he had been engaging in electronic communications with one of its main targets.
- [62] He also differs from the claimant as to the effective amount of support that he actually paid before an order was made. His position is the \$1,300 per week in support he provided, none of which was deductible to him or taxable in her hands, was in addition to the approximately \$38,000 in salary that she continued to be paid from the company. When the child credit is added to that total, he calculates that the net amount provided to her as support was the equivalent of more than \$150,000 in income.
- [63] With respect to the sale of the family home, he explains that in fact he prevented it from going into foreclosure when the mortgage matured but they lacked the ability to renew it (due to insufficient income, I took him to mean). He did this by arranging for the lender to hold off on foreclosure proceedings to give the them a chance to sell it themselves.
- [64] The \$55,000 down payment that the claimant refers to was to purchase a pre-sale home. The plan was that the proceeds of the sale of the family home would be used to complete the purchase (it was not clear from his affidavit whether this was intended to replace the family home or to be his sole purchase). In the event, he used his share of the proceeds to buy a piece of electrotherapy equipment to start a business using it to provide treatments. This involved one of the other companies that the claimant has identified.

- [65] As of his August 2022 affidavit, he described himself as volunteering in Ukraine to distribute military and humanitarian aid. He thought that with his skills and experience, which also include three years in the Canadian Armed Forces, there would be business opportunities for him in logistics, including distributing foreign aid, and eventually in rebuilding after the war. He had been given free accommodation as a foreign volunteer and only needed to draw between \$800 and \$1,000 per month of his share of the home sale proceeds to meet his other needs. He had a variable income, which at that point was the equivalent of about 76 Canadian dollars per month. His girlfriend accompanied him but was supporting herself.
- [66] He was prepared to draw on his remaining savings from the home sale proceeds to pay combined support of \$2,000 per month, but could not extend the depletion of those funds any further.
- [67] He explains that he maintained the New Westminster apartment because he intended to return to Canada more frequently than he was ultimately able to do, and to protect himself against higher rents in the Lower Mainland's housing situation. He clarifies in his subsequent financial statement that he also retained his leased vehicle in the expectation of returning. He only rented a furnished apartment in Edmonton while carrying on a job there because it ended up being cheaper than renting a hotel room.
- [68] His financial statement in September 2022 listed an income of \$11,250 for support purposes, which I infer reflected employment in Ukraine, against monthly expenses of \$2,525. None of the required tax returns, personal or corporate, were attached to the statement.
- [69] His June 2023 financial statement projects his income from then until November as \$17,176. If this extrapolated to an annual amount, it would be approximately \$51,000. His annual expenses were about \$36,000.
- [70] According to the statement, his assets in Canada, aside from relatively modest RRSP and RESPs held jointly with the claimant, consisted of about \$8,000 in bank deposits and \$64,000 in an RRSP, which was listed in his previous financial statement as containing \$91,000. His main liabilities are said to be a loan of \$35,000 to his related management company for taxes and payroll, which he described as unrecoverable due to that company's insolvency, an unsecured line of credit of \$750,000, and potential joint directors' liability to the CRA with the claimant of \$900,000.
- [71] He received a total of \$284,000 in 2022 from his share of the sale of the family home, and the sale of four Rolex watches. He says that about \$48,000 of that was paid to the claimant in the form of cash, paying off her vehicle, and paying the children's school fees. The rest was applied to such personal purposes as repaying a loan that he and the claimant had taken from his parents, legal fees for his family law and criminal defence counsel, prepaying the lease on the New Westminster apartment, paying out a balance of the company's broken lease on its warehouse, and personal items such as protective equipment for his work in Ukraine.

- [72] As I have mentioned, the respondent added some narrative paragraphs to the 2023 financial statement. After setting out his educational and employment background (omitting the post-secondary qualifications and well-paid container terminal position that the claimant had described), he explains that he and the claimant were facing bankruptcy because of a legal action by a bank over the company's line of credit, and the pending action by the CRA over the unremitted taxes and other payments.
- [73] He describes his alternatives as taking a minimum wage job in Canada or going to Ukraine "to find some commercial opportunity". He initially cofounded a charity for Ukrainian defence, and then travelled there to work as "a small arms and tactics trainer" for a territorial defence unit. The work was unpaid, but he received most of his food and accommodation, as well as minimum amounts as "tips" from a Ukrainian businessman. He continued this work until August 2022. He then worked for a logistics company until November, from which he netted about \$10,000 in U.S. funds after his expenses were covered.
- [74] The four-month position that I had previously referred to, he explains, is with the Ukraine Defence Ministry. He took it so that he could earn his travel costs back to Canada and secure a residence here on his expected return in November. He was also prepared to pay child support on the basis of that annualized income, which works to \$810 per month with no spousal support payable under the "With Child Support Formula" of the Spousal Support Advisory Guidelines.
- [75] Once again, none of the required documents were attached to this financial statement.
- [76] His ultimate intention is to apply to set aside the arrears of support, on the basis that the interim support amounts were ordered without engaging in the necessary process of imputing an income to him.

Discussion

Governing Principles

- [77] The threshold question is whether or not this matter is suitable for summary trial. Rule 11-3(15) of the Supreme Court Family Rules provides:

On the hearing of a summary trial application, the court may

- (a) grant judgment in favour of any party, either on an issue or generally, unless
- (i) the court is unable, on the whole of the evidence before the court on the application, to find the facts necessary to decide the issues of fact or law, or
- (ii) the court is of the opinion that it would be unjust to decide the issues on the application, . . .

- [78] The correct approach to fact-finding in the face of conflicts in the evidence and credibility issues was summarized in *Nagy v. BCAA Insurance Corp.*, 2019 BCSC 930, rev'd on other grounds 2020 BCCA 270:
- [20] Where there are conflicting affidavits on a summary trial application, judges may be able to make findings of fact, however this depends on the nature and quality of the material before the court: *Placer Development Ltd. v. Skyline Explorations Ltd.* (1985), 67 B.C.L.R. 366 (C.A.) at 386, cited in *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202 (C.A.) [Inspiration Management] at para. 42. If there is a conflict in the evidence on a critical issue, the court may not be able to assess credibility and determine the necessary facts under the summary trial rule: *HP and OM Enterprises Ltd. v. Badesha Enterprises Ltd.*, 2009 BCSC 1429 at paras. 37-38; see also *Urban Holdings Ltd. v. MacDuff*, 2007 BCSC 631. The inability to find the necessary facts may be most acute where credibility lies at the heart of a case, in which case proceeding by way of summary trial is not appropriate: *Mayer [v. Mayer]*, 2012 BCCA 77 at para. 93.
- [79] Nevertheless, as *Gill v. Gill*, 2022 BCCA 264, made clear:
- [54] A summary trial will almost invariably involve the resolution of some credibility issues. The existence of conflicts in the evidence that cannot easily be resolved on affidavits does not necessarily entitle a party to a full trial: *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.*, (1989), 36 B.C.L.R. (2d) 202, at 215-216; 36 C.P.C. (2d) 199 (C.A.). The crucial question is whether the court can achieve a just and fair result in the context of a summary trial: *MacMillan v. Kaiser Equipment Ltd.*, 2004 BCCA 270 at para. 22.
- [80] Relevant factors in deciding if it would be "unjust" to decide the issues summarily have been found to include "the amount involved, the complexity of the matter, its urgency, any prejudice likely to arise by reason of delay, the cost of taking the trial forward to a conventional trial in relation to the amount involved, the course of the proceedings the cost of the litigation and time of the summary trial, whether credibility is a critical factor in the determination of the dispute, and whether the summary trial may create an unnecessary complexity in the resolution of the dispute, and whether the application would result in litigating in slices": *Gichuru v. Pallai*, 2013 BCCA 60, at paragraphs 30 to 31.
- [81] When a summary trial is set down the parties are obliged "to take every reasonable step to put themselves in the best position possible and cannot, by failing to take such steps, frustrate the ends of the summary trial process". The defendant may not simply insist on a full trial in the hopes that with the benefit of viva voce evidence, "something might turn up": *Everest Canadian Properties Ltd. v. Mallmann*, 2008 BCCA 275, at paragraph 34.

- [82] The basis for imputing income on the basis that a payor parent is intentionally unemployed is found in s. 19(1)(a) of the Federal Child Support Guidelines. As explained in *Marquez v. Zapiola*, 2013 BCCA 433, at paragraphs 36 to 37, the test is one of reasonableness, "having regard to the parties' capacity to earn income in light of age, education, health, work history and work availability". There must be an evidentiary basis for the finding, and the burden is on the party asserting underemployment to prove it.
- [83] One basis on which income may be imputed is persisting in unremunerative employment: *Watts v. Willie*, 2004 BCCA 600, at paragraph 16, citing *Donovan v. Donovan*, 2000 MBCA 80, at paragraph 21.
- [84] Dealing with income that is earned through a corporation, s. 18 of the Guidelines allows a court, when it is of the opinion that a payor's statement of total income on their personal tax return "does not fairly reflect all the money available to them for the payment of child support", to include all part of the company's pre-tax profit as the payor's income.
- [85] Where the disclosure necessary to allow a court to make such a determination has not been provided, despite an order to that effect, s. 24 of the Guidelines allows the court to proceed to a hearing, in the course of which it may draw an adverse inference against the spouse and impute income to that spouse in such amount as it considers appropriate.
- [86] While the income on which the respondent should pay support was hotly disputed, and he described a much greater role for the claimant in the company than she concedes, it was not disputed that he should pay support for the two children at whatever income is ultimately arrived at. Nor was it argued that the disadvantages conferred on the claimant by the end of the marriage, in light of the household and childcare duties that she performed during it, or her current needs based on her earning ability, do not support a claim for spousal support at some level. As a result, I will dispense with a recitation of the governing principles in relation to those types of support.

Application

- [87] To the extent that the unsuitability of this matter for summary trial could be said to rest on the absence of the evidence of the income of the company during its operation, the whereabouts of assets of the company, and the income and assets of other companies under the respondent's control, that deficiency rises solely from the respondent's own wilful nondisclosure of that evidence, despite having consented to an order to provide it. That nondisclosure is not a reason to order that the matter proceed to a full trial. If anything, it could potentially be the basis of an adverse inference and the imputation of an income to him.
- [88] Turning to the merits, since the issue is the respondent's current ability to earn income, rather than his historical earnings in support of a retroactive claim, the income derived from that company or other ones under his control is relevant for present purposes only to the question of whether he should reasonably be expected to now reproduce such income

outside of that specific corporate framework. In other words, the extent of his deposits to the family accounts during the operation of the company and his lavish post-separation spending do not necessarily demonstrate the current resources he is capable of generating through the operation of a business.

- [89] In this regard, it is essential not to conflate his ability to earn income for child and spousal support from that company, and whether additional parts of its pre-tax profits were available to pay it, with the dissipation and/or concealment of its capital assets that the claimant has alleged. The latter is a property division issue that is not being raised in this application but that could potentially lead to an unequal division of that property in her favour, based on an adverse inference drawn from his nondisclosure. Those matters are not before me.
- [90] It is also important to keep in mind that the fate of the company, and the fallout from it in terms of debt and enforcement of that debt, must inevitably play a role in what type of business, if any, the respondent may now be able to operate profitably through a corporation in Canada, at least in the short term.
- [91] On either party's version of events, given the mountain of debt that unquestionably faced the company and still potentially hounds the parties personally, I do not think that the respondent is currently capable of accessing the kind of credit and assembling the necessary equipment or operational infrastructure that would be needed to earn the range of income that was being provided to the family while the former company was functioning.
- [92] In my opinion, the real issue, which presents itself on any version of the evidence and therefore is not subject to credibility conflicts, is whether it was reasonable for the respondent to flee the situation here and pursue almost completely unremunerative employment in Ukraine, thereby disregarding his support obligations in Canada. It seems self-evident that it was not reasonable.
- [93] The claimant's uncontradicted evidence is that before embarking on the corporate venture, he was well paid as a foreman at a shipping terminal, and that before that the apparent downside to his employment with CP Rail was that he had to spend long hours away from the family, not that it was unremunerative. He also omits the civil engineering technology associate credential that he has earned and the extensive work experience that he accumulated in the rail business, as he described himself in his online profile. It is appropriate to find, and I do find, that he is capable of obtaining the type of employment and the level of income demonstrated by his preceding two positions.
- [94] The difficulty is there is no current evidence in the record of the range of earnings available in such positions or the extent of their availability, so I am not in a position to impute income accurately. Despite this, I do not think this is a situation in which I am unable to find the necessary facts to grant judgment, therefore requiring the matter to be referred for a full trial.

[95] Instead, the way I would characterize the situation is that, having been able to find that income should be imputed to the respondent on the basis that he is currently intentionally underemployed, I have raised a new issue about the basis on which that imputation should be measured in light of the actual available alternative employment that the parties could not have anticipated, because they both focussed solely on whether the income from the company is what should be imputed to him.

[96] I conclude that the objectives of the Supreme Court Family Rules, of the summary trial rule in particular, and of proportionality in general, favour giving the parties the opportunity to fill in that evidentiary gap, enabling support amounts to be determined on the basis of the facts that I have been able to find. It serves no one's interest to order a full trial for that narrow purpose.

[97] Accordingly, I will order the following:

- The claimant will file and serve a further affidavit describing the nature of the respondent's previous jobs before he started his own company, including other types of jobs to which she says the skill he acquired in them would be transferable, and the current pay for and availability of such positions in the Lower Mainland area. She should also calculate the amount of child and spousal support that would be payable by the respondent for the range of incomes generated by that evidence.
- The respondent will reply with an affidavit on the same issues. If he raises any new matters in his affidavit that the claimant did not have an opportunity to address previously, she may provide a further affidavit that addresses only those new issues.
- Unless the parties agree to a different timetable between themselves, the claimant's affidavit must be provided within 21 days; the respondent's affidavit within a further 21 days; and any responsive affidavit by the claimant within seven days after that.

[98] Once I have received this material, I will reconvene to render my decision.

[99] The interim orders, including the existing order for support, will remain in force until then.

"Schultes J."

[1] I adjourned the claimant's further application for special costs to be paid personally by the respondent's counsel (arising from her alleged improper conduct in relation to that June hearing) generally, to give her the opportunity to retain her own counsel to defend her potential costs liability. She had been retained for the limited purpose of preparing the respondent's initial response and is no longer acting for him.

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