

CANADA / JUDGMENT

## A.K. v. J.R.J.

2022 BCSC 1685

### COURT

Supreme Court of British Columbia

### DECIDED

27 September 2022

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2022 BCSC 1685 A.K. v. J.R.J.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

A.K. v. J.R.J.,

2022 BCSC 1685

Date: 20220927

Docket: E112356

Registry: Vancouver

Between:

A.K. also known as T.A.K. also known as A.(T.)K.

Claimant

And

J.R.J. also known as J.J.

Respondent

Before: Master Bilawich

Reasons for Judgment

Counsel for the Claimant:

S. Stanislaus

Counsel for the Application Respondent, M.L.:

P. Daykin

No other appearances

Place and Date of Hearing:

Vancouver, B.C.

August 18, 2022

Place and Date of Judgment:

Vancouver, B.C.

September 27, 2022

## Introduction

- [1] By application filed July 18, 2022, the claimant seeks an order that a non-party, M.L., produce the following disclosure within 14 days, pursuant to rules 5-1 and 9-1(15) of the Supreme Court Family Rules ("SCFR"):
- a) documents relating to the purchase and sale of real property since M.L. commenced a marriage-like relationship with the respondent, including particulars of the source of funds required to purchase the properties;
  - b) an unredacted copy of the complete prenuptial agreement between M.L. and the respondent dated July 17, 2017;
  - c) particulars of all assets listed at schedules A1 and A2 of the prenuptial agreement;
  - d) particulars of debts attributed to the respondent at page 10 of the prenuptial agreement;
  - e) M.L.'s T1 income tax returns for 2019, 2020 and 2021;
  - f) M.L.'s notices of assessment and reassessment for 2019, 2020 and 2021;
  - g) incorporation documents for each of J.W. West Coast Properties Ltd. ("JWWC"), New Beginnings Early Learning (White Rock) Ltd. ("NB White Rock") and New Beginnings Early Learning (Richmond) Ltd. ("NB Richmond");
  - i. financial statements and T2 income tax returns for each of the foregoing companies, from January 1, 2015 to present;
  - ii. particulars of any taxable or non-taxable benefits or allowances the respondent receives from any of the foregoing companies;
  - iii. pages of the general ledgers of each of the foregoing companies relating to remuneration of employees from January 1, 2015 to present;
  - h) franchise agreement (and other subsequent agreements) that M.L. and the respondent signed with CEFA [a franchisor];

- i) particulars of any requirement by CEFA that spouses sign as guarantors on a franchise agreement; and
  - j) an order that M.L. complete and deliver a Form F8 financial statement.
- [2] M.L. opposes all of the relief sought.
- [3] This was just one of eight items of relief set out in the claimant's application. Other items of relief include attribution of additional income to the respondent, retroactive variation of child support and reapportionment of special and extraordinary expenses for their child, D. back to January 1, 2017, and variation of ongoing child support and proportionate shares of special and extraordinary expenses from August 1, 2022 onward. All of these were adjourned generally.

## Background

- [4] The claimant is 45 years old and the respondent is 42 years. The parties married on December 18, 2007 and separated in November 2010. They were divorced by order made January 13, 2014.
- [5] The parties have one child of their marriage, "D.", who is currently 13 years old. He has been diagnosed with attention deficit hyperactivity disorder ("ADHD"), autism spectrum disorder ("ASD"), a learning disorder and a phonology disorder.
- [6] In about 2011, the respondent re-partnered with M.L. They married on August 12, 2017. They have two children, ages 10 and 8 years respectively.
- [7] On July 29, 2011, the claimant started this action.
- [8] On October 14, 2011, Master Donaldson ordered that the parties have joint guardianship of D. and set an interim parenting schedule, with the claimant having D. every Thursday at noon to Sunday at 5:00 pm and the respondent having him Sunday at 5:00 pm until Thursday at noon.
- [9] On January 6, 2014, the parties agreed the claimant would have primary care of D. and the respondent would have parenting time three weekends per month.
- [10] On October 5, 2018, Master Muir made a consent order, on an interim without prejudice basis, that the respondent have parenting time with D. every Saturday from 8:30 am until 2:30 pm.
- [11] On December 10, 2018, Master Cameron made a consent order varying Master Muir's order to provide that the respondent have parenting time with D. every other weekend from Saturday at 8:30 am to 5:00 pm and Sunday from 8:30 am until 5:00 pm.
- [12] On April 26, 2019, Justice G.C. Weatherill ordered that:

- a) The parties are joint guardians of D., but if they disagree regarding the exercise of parenting responsibilities, the claimant has authority to make final decisions;
  - b) The respondent would have parenting time with D. every other weekend from Friday at 6:00 pm until Sunday at 6:00 pm;
  - c) The parties would share the summer holiday, spring break and Christmas break equally;
  - d) For the purposes of calculating interim child support and the proportionate sharing of section 7 special or extraordinary expenses, the claimant's Guideline income was \$113,000 per annum and the respondent's Guideline income was imputed as \$50,000 per annum;
  - e) Commencing May 1, 2019, the respondent would pay the claimant child support for D. of \$470 per month;
  - f) Commencing May 1, 2019, the parties would share the cost of D.'s special or extraordinary expenses in proportion to their Guideline incomes, namely 70% to the claimant and 30% to the respondent;
  - g) Each of the parties had leave to apply to vary the amount of child support or proportionate sharing of section 7 special or extraordinary expenses, both retroactively and prospectively, once counsel has had an opportunity [to] conduct further examination and analysis of the financial circumstances of the respondent and her husband;
- [13] Justice Weatherill issued reasons, indexed as see A.K. v. J.R.J., 2019 BCSC 868. At paras. 20-24, he commented on the state of the evidence before him relating to the respondent's Guideline income:
- [20] During the course of the hearing, it became clear that insufficient information was available to enable the fulsome determination of the respondent's income for Guideline purposes. She and her new husband, M.L.'s ownership of and association with various business enterprises appear to be inextricably intertwined. The respondent's involvement in those enterprises and her income earning capacity from them raises, at least in my mind, significant questions and concerns that require further investigation.
- [21] I am satisfied on the evidence that her income is likely greater than what she has claimed it is. However, in the circumstances, I do not consider it would be appropriate to make a final determination of what the respondent's income for Guideline purposes ought to be.
- [22] Rather, I find that based upon the evidence as a whole, and the submissions of counsel, an interim order should be made that commencing May 1, 2019, child support and s. 7 expenses be paid based upon D. being primarily in the care of the claimant, the claimant having Guideline income of \$113,000, and the respondent having Guideline income of \$50,000.

- [23] Each of the parties has leave to apply to vary those amounts both retroactively and prospectively once counsel has had an opportunity to conduct further examination and analysis of the financial circumstances of the respondent and M.L.
- [24] The parties' respective applications for orders regarding the quantum and payment of retroactive child support and s. 7 expenses are adjourned sine die.
- [14] The respondent says she has been employed at schools associated with JWWC, NB White Rock and NB Richmond since 2015. She has produced employment contracts indicating she has worked as teacher and later as manager or creative director, earning amounts ranging between \$25,000 and \$50,000 per annum. She says she has no ownership interest in the companies.
- [15] On March 2, 2022, the respondent was examined for discovery. Numerous document and information requests were made. Claimant's counsel sent letters following up on these requests. Respondent's counsel took the position that requests relating to the companies were not in her possession or control.
- [16] Claimant's counsel sent letters to M.L. on June 13, 2022 and July 14, 2022 requesting disclosure, purportedly to help determine the respondent's Guideline income for purposes of calculating child support and proportionate sharing of special and extraordinary expenses. Claimant's counsel notes that M.L. was not a stranger to the litigation, having sworn 5 affidavits up to that point in time.
- [17] On July 18, 2022, the claimant filed this application. Both the factual and legal basis relating to relief sought against M.L. is relatively sparse. It is also notable that the claimant did not name the three companies as application respondents. There are brief references to rules 1-3 (Object of the Rules) 5-1 (Financial Disclosure) and 9-1 (Discovery and Inspection of Documents) of the SCFR, sections 149, 152 and 22 of the FLA and the Guidelines. There is no detailed legal basis relating to the document disclosure sought from M.L. and, indirectly through him, the companies. There are excerpts from four cases which focus on imputation of income due to intentional underemployment and s. 19(1)(a) of the Guidelines.
- [18] On August 5, 2022, M.L. filed an application response. He took the position that neither his income nor the companies' incomes are relevant to determination of child support payable by the respondent for D. He says the claimant did not set out a proper factual or legal basis for requiring him to provide information or documents and characterizes the application as a fishing expedition.
- [19] On August 10, 2022, claimant's counsel wrote to M.L.'s counsel with a more detailed basis for the relief sought against M.L. This was clearly an attempt to remedy shortcomings with the application. The letter highlights, amongst other things, evidence from the claimant's affidavit #7 sworn October 4, 2018 which attaches:

- a) A page from a CEFA early learning franchise website, on which the respondent was identified as a franchisee;
  - b) A webpage showing the respondent and M.L. identified jointly in a publication advertising a CEFA Walnut Grove location, stating "they purchased Walnut Grove CEFA in 2015 and are adding two more CEFA childcare facilities in other communities to their businesses"; and
  - c) A notice of civil claim filed August 24, 2018 for an action filed by NB White Rock, NB Richmond, M.L. and the respondent against CEFA Systems Inc. which states M.L. and the respondent executed two franchise agreements as guarantors and noting both were directors and principals of NB White Rock and NB Richmond. It also refers to JWWC as owned by ML and the respondent.
- [20] The claimant goes on to argue the respondent is diverting income through the companies, noting that s. 19(1)(d) of the Guidelines allows the court to impute income to her in those circumstances. Counsel also refers to several new case authorities. Finally, counsel suggests M.L.'s financial information is relevant to a consideration of the means, needs and circumstances of the respondent as it relates to the appropriateness of special and extraordinary expenses for D.

### M.L.'s Evidence

- [21] M.L. notes he is not a party to this action, nor are the companies. He says he has always been sole shareholder of JWWC. It is his holding company. It was incorporated on March 8, 2014, before he and the respondent married. JWWC in turn owns:
- a) All issued shares of NB White Rock, which was incorporated on September 15, 2015. It operates an early learning school in South Surrey;
  - b) The majority of issued shares of NB Richmond, which was incorporated on September 15, 2015. It operates an early learning school in Richmond City Centre. The minority shareholder is a company owned by an arm's length non-party;
  - c) All of the issued shares of Rothwoode Academy Ltd., which was incorporated on September 13, 2018. It is franchisor for two other early learning schools, one in White Rock and the other in Richmond Garden City.
- [22] All four schools operate under the "Rothewood Academy" brand.
- [23] M.L. says the respondent does not have and has never had a legal or beneficial interest in the companies. There is no agreement between him and the respondent under which she will earn or become entitled to an ownership interest. He and the respondent entered into the prenuptial agreement dated July 17, 2017, which provides in part that respondent gave up any claim to an interest in the companies.

- [24] M.L. says the respondent is employed with NB Richmond as its creative director and her salary reflects the market value of the services she provides.
- [25] At the hearing, counsel for M.L. tendered an affidavit of Warren Towler sworn August 16, 2022. He is accountant for JWWC, NB White Rock and NB Richmond. He sets out the salary the companies paid to the respondent during 2018 - 2021. He says none of the companies provided any other form of direct or indirect remuneration to her, nor were there payments made to her or on her behalf that were reported as income to someone else, or characterized as some other form of expense.

### **M.L.'s Objections**

- [26] M.L. says there is no basis on the pleadings under which such an order could be sought against him. Neither his income nor the income of the companies is relevant to determination of the amount of child support payable by the respondent to the claimant.
- [27] M.L. says the claimant has not set out a legal basis upon which his personal financial information or that of the companies could be ordered produced. The claimant simply refers to rules 5-1 and 9-1(15) SCFR.
- [28] Rule 5-1 pertains to parties to a proceeding. A party is defined as a person named to a family law case who is claiming, or against whom there are claims for, orders related to support or Part 5 of the FLA. Neither he nor the companies are parties. Sub-rules (19) - (26) relate to the production of documents from a corporation where the party has disclosed an interest therein. Here, the respondent has no interest in the companies from whom information is sought.
- [29] Regarding rule 9-1(15), M.L. says the claimant has not complied with the application procedure or service requirements in rule 10-6. He did not serve the materials within the 8 business days time limit. The application was not brought on notice to the companies as parties affected by the order sought.
- [30] M.L. says the claimant failed to demonstrate the documents sought are relevant, in his possession and control and that this is merely a fishing expedition. The pleadings (the application) are deficient and the court should exercise caution before ordering production of documents by non-parties.
- [31] Lastly, if an order is made, it should be on the basis that the claimant pay either to M.L. or the companies their reasonable legal costs.

### **Applicable Law**

- [32] Rule 5-1 of the SCFR addresses parties' financial disclosure obligations.
- [33] Rule 9-1(15) of the SCFR is as follows:

## Documents not in possession of party

(15) If a document is in the possession or control of a person who is not a party, the court, on an application under Part 10 brought on notice to the person and the parties, may make an order for one or both of the following:

- (a) production, inspection and copying of the document;
- (b) preparation of a certified copy that may be used instead of the original.

[34] In *Northwest Organics, Limited Partnership v. Roest*, 2017 BCSC 673 ["Northwest Organics"] at paras. 78-81, Justice G.C. Weatherill sets out principles applicable to applications under s. 7-1(18) of SCCR, the civil rule counterpart of rule 9-1(15) SCFR:

78 Although Davies J. concluded at para. 53 that Rule 7-1(18) should be "substantively and procedurally interpreted and applied in a way that is consistent with the interpretation and application of Rules 7-1(10) to (14)", he also concluded that, with respect to Rule 7-1(18), there should be "necessary modification to ensure protection of the independent interests of third parties whose records are sought".

79 That "necessary modification" includes a requirement that the applicant provide some evidence to support an application for documents from a non-party (see *Kaladjian*, para. 62) in order to prevent against "unwarranted "fishing expeditions" based solely upon pro forma pleadings" (see *Kaladjian*, para. 64).

80 The phrase "fishing expedition" perfectly describes the plaintiffs' application in this case. Although Ms. Tegart deposed that she has spoken to various of her constituents about the project, other than the specific documents that have been identified, there is no evidence that the requested documents even exist, let alone are in the possession or control of the appellants. With respect to those unidentified documents, in my view, the application is based upon the Peruvian Guano "train of inquiry" test that is no longer applicable under Rule 7-1(1).

81 It is apparent from the wording of Rule 7-1(18) that it was not intended to provide broad discovery of documents from non-parties, but rather a mechanism by which parties can access specific documents or classes of documents when it has been demonstrated that they are in the possession or control of a non-party and are relevant to an action. With the exception of the specific documents ordered to be produced at paras. 1(b), (c) and (d) of the Order, evidence supporting the application was lacking. Master Baker did not consider the need for such evidence.

[35] In *Mann v. Jagpal*, 2020 BCSC 1919 at paras. 47-50, Justice Giaschi found this same approach applies in family proceedings.

[36] Section 18(1) of the Guidelines is as follows:

**Shareholder, director or officer**

18 (1) Where a spouse is a shareholder, director or officer of a corporation and the court is of the opinion that the amount of the spouse's annual income as determined under section 16 does not fairly reflect all the money available to the spouse for the payment of child support, the court may consider the situations described in section 17 and determine the spouse's annual income to include

- (a) all or part of the pre-tax income of the corporation, and of any corporation that is related to that corporation, for the most recent taxation year; or
- (b) an amount commensurate with the services that the spouse provides to the corporation, provided that the amount does not exceed the corporation's pre-tax income.

[37] Section 19(1) is as follows:

**Imputing income**

19 (1) The court may impute such amount of income to a spouse as it considers appropriate in the circumstances, which circumstances include the following:

- (a) the spouse is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by the needs of a child of the marriage or any child under the age of majority or by the reasonable educational or health needs of the spouse;
- (b) the spouse is exempt from paying federal or provincial income tax;
- (c) the spouse lives in a country that has effective rates of income tax that are significantly lower than those in Canada;
- (d) it appears that income has been diverted which would affect the level of child support to be determined under these Guidelines;
- (e) the spouse's property is not reasonably utilized to generate income;
- (f) the spouse has failed to provide income information when under a legal obligation to do so;
- (g) the spouse unreasonably deducts expenses from income;
- (h) the spouse derives a significant portion of income from dividends, capital gains or other sources that are taxed at a lower rate than employment or business income or that are exempt from tax; and
- (i) the spouse is a beneficiary under a trust and is or will be in receipt of income or other benefits from the trust.

## Analysis

- [38] The starting point is what the claimant has pled. In this case, the issues raised are variation of retroactive and ongoing child support. The original pleadings do not address the specific circumstances which gave rise to the present application. The "pleadings" for present purposes is the claimant's application filed July 18, 2022.
- [39] As originally framed, the application focuses on imputation of income based on intentional underemployment, which is addressed by s. 19(1)(a) of the Guidelines. Authorities noted include *Marquez v. Zapiola*, 2013 BCCA 433 at para. 37, *Yeung v. Silva*, 2016 BCSC 1682 at para. 51-52, *Barker v. Barker*, 2005 BCCA 177 at para. 18 and *Sedlmair v. Sedlmair*, [1999] B.C.J. No. 3017 at paras. 12-13.
- [40] M.L. argues that assessment of whether the respondent is underemployed can and should be carried out based on whether she is being paid appropriately for the services she provides the companies. I would state this somewhat differently. By characterizing the issue as underemployment, this could potentially involve the respondent working for a lesser salary than is warranted based on the services she provides, or it could involve her working in a position which pays her less than she could earn elsewhere if she were to work to her full potential. Either way, I do not agree that production of M.L.'s personal financial records including returns and notices of assessment are relevant to the respondent's alleged underemployment with the companies.
- [41] In my view, the claimant should have named each of the companies effected as application respondents, given the nature of the requests made. That said, arguably service on M.L. would suffice as service on them, considering he director and sole / majority shareholder of each.
- [42] Requests relating to the companies include incorporation documents, financial statements, T2 income tax returns from 2015 to present and general ledgers relating to remuneration of all employees from 2015 to present. M.L. says he has provided copies of company articles and central securities registers, that company financial statements and tax returns are not relevant to alleged underemployment and that general ledgers setting out remuneration paid to other employees is likewise irrelevant. Mr. Towler addressed remuneration and benefits issues in his affidavit. In any event, I am not persuaded the claimant has established a connection between alleged underemployment and the various classes of company documents sought on this application.
- [43] In argument, claimant's counsel also raised as an issue (1) whether the respondent had diverted income in some manner using the companies [s. 19(1)(d), Guidelines] and (2) whether income could be attributed to her based on her acting as a director or being a beneficial owner of the companies [s. 18, Guidelines].

- [44] The claimant did not allege in his application that the respondent had diverted income using the companies and he did not allege she is a beneficial owner of the companies. He did not expressly refer to s. 18 of the Guidelines in his legal basis. Not having properly raised these issues, it is not open to the claimant to pursue production of documents which address them.
- [45] To the extent claimant's counsel sought to belatedly remedy shortcomings in the application with the August 10, 2022 letter, the points made therein could and should have been included in the application. By raising them for the first time in a late reply, M.L. was deprived of the opportunity to understand the full basis for the relief that was being sought against him and muster a response to it. In *Dupre v. Patterson*, 2013 BCSC 1561 at paras. 45-56, Justice Adair emphasized the importance of providing an adequately detailed factual and legal basis in applications and application responses. I do not consider it appropriate to decide these additional points in these circumstances.
- [46] Claimant's counsel was not able to direct me to any authority for the request that a non-party be required to execute and deliver a form F-8 financial statement. Rule 5-1 SCFR deals with financial disclosure obligations of parties; it does not apply to M.L.

## Conclusion

- [47] The claimant's application is dismissed, with liberty to re-apply after filing a new (amended) notice of application which properly sets out the factual and legal basis for the relief sought against both the respondent and M.L.
- [48] M.L. is entitled to costs of this application from the claimant. Since M.L. is not a party to the action, this is assessable and payable forthwith.

"Master Bilawich"

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