

CANADA / JUDGMENT

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

2023 BCSC 959

COURT

Supreme Court of British Columbia

DECIDED

11 May 2023

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2023 BCSC 959 A.K. v. J.R.J.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

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

2023 BCSC 959

Date: 20230511

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

Corrected Judgment: Correction is made to paragraph 41 of the judgment on June 12, 2023.

Before: Master Harper

Oral Reasons for Judgment

In Chambers

Counsel for the Claimant:

S.R. Stanislaus

Counsel for the Respondent:

L.S. Klass

Counsel for the Attendee, M.L.:

P.M. Daykin, K.C.

Place and Dates of Hearing:

Vancouver, B.C.

April 28 and May 5, 2023

Place and Date of Judgment:

Vancouver, B.C.

May 11, 2023

- [1] THE COURT: These are my oral reasons. As is the usual case, if a transcript is requested, I reserve the right to edit for clarity.
- [2] This is an application brought by the claimant father for the production of records from the respondent mother's current husband, M.L., and his companies [names redacted] (collectively, the "corporate entities").
- [3] The application is in preparation for the main application in June for a review of retroactive and ongoing basic child support and s. 7 expenses payable by the mother. The main application is a post-final-order application and is not a trial.
- [4] The child, D., is age 14 and primarily in the care of the claimant. The child has significant special needs and may well be entitled to financial support from his parents past the age of majority.
- [5] The background to this family law matter is set out in reasons for judgment issued by Justice G.C. Weatherill, 2019 BCSC 868, Justice Branch, 2022 BCSC 705, and Master Bilawich, 2022 BCSC 1685. I will not review, therefore, any of the background that is otherwise available in those reasons for judgment.
- [6] On August 18, 2022, Master Bilawich heard a similar application to the application before me and dismissed the application with liberty to reapply on the basis that the legal basis in the notice of application was not properly set out. The application before me is narrower in scope than the application before Master Bilawich and is supported by a proper legal basis. I do not interpret Master Bilawich's reasons as restricting the scope of the application before me. If Master Bilawich had intended to order that the new application be restricted in any way, he would have so ordered.

[7] The documents sought are as follows:

- M.L.'s T1 income tax returns for 2019, 2020, and 2021;
- M.L.'s notices of assessment and reassessment for 2019, 2020, and 2021;
- financial statements and T2 income tax returns for each of the corporate entities from January 1, 2015 to date; and
- the pages of the general ledgers of each of the corporate entities relating to the remuneration, whether hourly or salary, of the employees from January 1, 2015 to date.

[8] In his reasons for judgment indexed as 2019 BCSC 868, G.C. Weatherill J. said:

[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.

[9] It is because of those reasons for judgment that the investigation has been embarked upon.

[10] For the reasons that follow, I make the following orders.

[11] The orders sought in the notice of application at paragraphs 1(b), (c), and (d) are granted.

[12] The application for production of the documents in the notice of application at paragraph 1(a) is dismissed. This is the application for M.L.'s personal income tax returns. I do not think his income tax returns are relevant to the issues of available income. M.L. can pay himself whatever he wishes. It is the revenue generated by the companies that is relevant.

- [13] With respect to the order in 1(d), with respect to employees' names, the order will be that M.L. may redact employees' names for privacy reasons, but if he does so, he must describe the position the employee occupies in the business.
- [14] I now move to my reasons for making the foregoing orders for production of documents.
- [15] Child support is currently payable at \$470 per month based on an imputed income of \$50,000 per year. The respondent works in M.L.'s business, which operates early childhood education centres. The application is brought pursuant to Rule 9-1(15) of the Supreme Court Family Rules which deals with documents from a non-party. The test is the same as a demand for additional documents under Rule 9-1(8), i.e., documents that relate to any or all matters in question in the family law case.
- [16] The issue on this application is relevance to a matter in question. A matter in question here is the respondent's involvement in M.L.'s business. The claimant puts forward alternative theories that he hopes to advance at the main application: first, that the respondent holds a beneficial interest in M.L.'s businesses; second, and alternatively, that she has divested herself of a beneficial interest; third, and more generally, that the respondent is underemployed, given that she only makes \$50,000 per year, although she is a key employee, and has been historically significantly and intimately involved in M.L.'s business interests.
- [17] Whether the respondent does, or does not, have a beneficial interest or whether she has divested herself of a beneficial interest cannot be resolved on this application. Counsel for the claimant concedes that the documents sought are not likely to reveal a beneficial interest.
- [18] Counsel for M.L. submits that credibility should be assessed by the chambers judge first, before an order for production of documents be made. I disagree.
- [19] As noted, the main application in June is not a trial because it is a post-final-order application. If the June hearing were a trial instead of an application, the trial judge would not proceed by making findings of credibility first, and then have a continuation of the trial if the judge were persuaded that the documents should be ordered.
- [20] The difficulty with M.L.'s position is that it asks the Court on this documents application to prejudge the outcome of the main application on the issue of whether the respondent has a beneficial interest or has divested herself of a beneficial interest. I cannot, and should not, resolve the ultimate questions posed by the claimant's alternative theories of liability. I use the expression "theories of liability", adopting that expression from the civil litigation branch of our justice system, but I think it is applicable here.

- [21] I agree with the analogy posed by counsel for the claimant. A spouse does not need to prove entitlement to spousal support before obtaining income documents from the other spouse. On a documents application, the relevant documents are producible on the assumption that the theory may be found to apply by either the trial judge or, as in this case, the chambers judge.
- [22] Counsel for M.L. describes M.L. as a stranger to the litigation. I do not agree. M.L. is a stranger to the litigation only in the most technical sense, in that he is a non-party. The track record of this lengthy litigation demonstrates that M.L. is intricately involved in defending the claimant's claim for child support. He is not an objective, disinterested bystander (see Justice Branch's reasons for judgment as to the Hells Angels story).
- [23] The credibility issues that I need to resolve on this application are only with respect to whether the documents should be ordered as being relevant to a matter in question. My assessment is a different assessment than that to be made by the chambers judge and is made for a different purpose. Nothing I say in these reasons should be interpreted as fettering the discretion of the chambers judge in any way.
- [24] I turn now to the evidence in support of the application.
- [25] There was an article in a Langley community newspaper indicating that the respondent and M.L. were involved in the business together. There was a pronouncement by the franchisor, called CEFA, that the principals were M.L. and the respondent. M.L. says the article was inaccurate. However, he and the respondent were interviewed. In my view, it is not likely that the reporter got it wrong. In any event, why would the respondent submit to an interview if her duties in the company were so minimal as she and M.L. assert?
- [26] There was a Province of British Columbia press release in October 2015. It contains a direct quote from the respondent. The respondent says the press release is incorrect.
- [27] M.L. removed the respondent as a director of one of his companies for reasons that I find unpersuasive.
- [28] There was a notice of civil claim filed which describes the respondent and M.L. as principals of the company. An affidavit sworn by the respondent in the civil proceeding, quoted in the claimant's affidavit sworn December 21, 2022 at paragraph 6, contradicts M.L.'s position. The respondent's sworn evidence positions her alongside M.L. in the business.
- [29] A further affidavit of the respondent in the civil proceeding states, "[h]ow lucky we were to have bought into the franchise" and "we had already spent a great deal of time, effort, and money developing a brand, curriculum, and website".
- [30] She refers to "M. and I" investing into CEFA. She says, "M. and I attended our first franchise on or about March 4, 2015".

[31] Further evidence of the partnership between M.L. and the respondent is replete in her affidavit of October 13, 2018. For example, the respondent swears that she signed a franchise agreement personally. Why would she do so if she were not involved with the company as an owner or senior manager? M.L. says the respondent signed the franchise agreement as a guarantor, but why would she agree to do that if she did not have a beneficial stake in the business, but was only a lowly employee? Why would the respondent agree to put her personal assets at risk, guaranteeing the financial liabilities of a company in which she has no interest?

[32] Here is a further quote from the respondent:

M. and I have invested close to \$2 million in the schools operated by White Rock and Richmond. We sold our home and moved into rental accommodation to invest everything we could. We have no other savings or investments left. Both M. and I work at the schools and they are the sole source of income for our family and the way we support our three children. We employ approximately 75 staff and have close to 350 families attending our schools. If we could not operate these schools, we would have to go bankrupt.

[33] I do not accept the respondent's argument that "we" does not mean "we".

[34] The affidavits in this proceeding attaching the notice of civil claim were delivered, I believe, in November 2018. All of a sudden, M.L. says they need to amend the notice of civil claim. I do not accept that there were any errors made here. I find that the evidence of M.L. with respect to the purported reason for amending the notice of civil claim to be unpersuasive. I very much doubt that the lawyer representing M.L. and the respondent in the civil action was not properly briefed by her clients.

[35] Next, the prenuptial agreement. This prenuptial agreement in which M.L. protects his assets was only entered into in July 2017, six years after the start of M.L.'s and the respondent's cohabitation. Counsel for the claimant suggests that the timing of the prenuptial agreement coincided with, one could say, a ramping up of the demands for child support from the respondent. My understanding is that the child started living primarily with the claimant in about June 2017, so the respondent would know that the demands that she pay child support would intensify.

[36] The timing of the employment contract in June 2020 that the respondent signed is suspicious. Justice G.C. Weatherill imputed income to her of \$50,000. Her next contract is for the exact amount of \$50,000 for a position called "creative director".

[37] As for the respondent's previous positions in the business, M.L. said that the respondent was never a teacher, because early childhood education is heavily regulated and the respondent does not have the necessary qualifications despite the fact that the parties both signed a contract saying that the respondent was a teacher. M.L.'s explanation is that this was the only form given by the franchisor. I do not find that explanation persuasive. There is no obligation to sign a form that is inaccurate.

- [38] The June 2020 contract says that the respondent is a creative director, but the form itself says her duties are set out in Schedule A, which are "training". Schedule A seemed to be missing, at least from the application record that I had before me.
- [39] The duties of a creative director are vague. She plans team events, Christmas parties, works with the marketing team, pays the bills when she needs to, and works with the curriculum development.
- [40] In my view, the salaries of the marketing team and curriculum planners are relevant to demonstrate, at the very least, how the respondent's duties fit within the senior management team. M.L. says:

Within the companies that are controlled by me, there are approximately 11 employees who have a managerial role. Their incomes range from \$42,000 to \$74,000 per year. Three of those individuals earn more than Jackie does, but they have specific training, experience, and credentials that Jackie does not have and their responsibilities are greater than hers.

- [41] This statement belies the many, many statements in the evidentiary record that M.L. and the respondent were "principals" of the companies. The respondent has been working with M.L. for many years. At the very least, the respondent should be moving up the management ladder. Why would she not make at least \$74,000? Who is that person and what do they do?
- [42] Returning to evidence regarding the parties' joint enterprise, the parties jointly owned property in Nanaimo that they sold and put into the purchase of a school. Although the claimant, of course, is not making a claim to the respondent's property, if her property produces income, that income should be available to pay child support. Why would the respondent invest proceeds from the sale of property jointly owned with M.L. without any return on investment?
- [43] In my view, if the chambers judge determines that the respondent either holds a beneficial interest or has divested herself of a beneficial interest, the judge will need to know what income is available from the companies as income to her. If the judge finds that the respondent is underpaid for the managerial role she occupies, the judge will need to see what other upper management employees are paid.
- [44] Generally, the financial statements are relevant to the matter of the company's organizational structure, the positions that other employees occupy, the salaries they are paid, especially given what one could reasonably argue being the made-up quality of the respondent's contracts.
- [45] The financial statements are also relevant to the ultimate issue of the pre-tax corporate income available to the respondent if the chambers judge finds a beneficial interest or divestment.

- [46] Finally, as to proportionality, the documents ordered to be produced are limited in scope and are proportional to the issues to be determined on the main application. The child has special needs and, as I said, may be entitled to support well past the age of majority. The claimant is justified in spending the time, effort, and expense in making this application.
- [47] As to the claimant's argument that the respondent's means are related to s. 7 expenses, the respondent says she does not claim undue hardship. This is despite her claim that she cannot meet her annual expenses and has to borrow money from her husband, M.L. Why would she not claim undue hardship rather than go into debt to her husband, if not to avoid the household income disclosure requirements?
- [48] I will rephrase that. Instead of saying that she cannot afford a s. 7 expense because of her limited income, the respondent simply does not pay the s. 7 expense until forced to do so by court order. The parties reached a consent order on a reference to the Registrar, but the claimant had to go to extreme lengths to obtain those s. 7 expenses.
- [49] For the purposes of this application, I cannot determine whether the household income test should be applied. The respondent, through counsel, makes what I consider to be an undertaking to the court that she is not claiming undue hardship. If she changes her position on undue hardship, obviously the door will be open to seeking M.L.'s income tax returns and notices of assessment and reassessment.
- [50] In any event, the household income test is not necessary to my determination that the documents that I have ordered ought to be disclosed.
- [51] The respondent has persistently resisted voluntarily paying appropriate child support. She is only paying based on \$50,000 because the court imputed that income to her. It is time to take the guesswork out of assessing her Guideline income. The parties should not have to "pick a number", nor should the chambers judge. The documents that I have ordered to be produced will assist the court in determining a fair Guideline income.
- [52] Those are my reasons.

[SUBMISSIONS ON COSTS]

- [53] THE COURT: I do not think that costs should be in the discretion of the chambers judge. The father was substantially successful in obtaining an order for disclosure from M.L., so the order will be that M.L. and the corporate entities will pay the claimant his costs of this application, in any event of the cause, not payable forthwith.
- [54] With respect to costs against the respondent, she has sought to defend the application alongside her husband, M.L. I do not see any reason why costs should not be awarded against her. Her interests are completely aligned with those of M.L., and I do not think it is appropriate to slice up the hearing date or the hearing time. So the order will be that the respondent will pay the claimant his costs of the application in any event of the cause, not payable forthwith.

[55] I will make a further order that the claimant is to prepare one bill of costs, such that the costs payable by the respondent and M.L. will be covered in one bill of costs, which will avoid the duplication issues I think will inevitably arise.

"Master Harper"

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