

CANADA / JUDGMENT

A.R.J. v. Z.S.J.

2009 BCSC 1662

COURT

Supreme Court of British Columbia

DECIDED

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2009 BCSC 1662 A.R.J. v. Z.S.J.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

A.R.J. v. Z.S.J.,

2009 BCSC 1662

Date: 20090724

Docket: E080419

Registry: Vancouver

Between:

A.R.J.

also known as A.J.

Plaintiff

And:

Z.S.J.

also known as Z.A.J.

Defendant

Before: The Honourable Mr. Justice Savage

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:

L.J. Hamilton

Counsel for the Defendant:

L.N. MacLean

Place and Date of Hearing:

Vancouver, B.C.

July 10, 2009

Place and Date of Judgment:

Vancouver, B.C.

July 24, 2009

I. Introduction

- [1] This is an application for a section 67 restraining order, interim child support and spousal support, and other relief, brought by the Defendant wife, Z.S.J. ("Z.S.J."). There are applications brought by the Plaintiff A.R.J. ("A.R.J."), however, the main issues are interim child support and spousal support, which were severed by the parties and argued before me.
- [2] The applications arise in the context of a disputed divorce which is currently scheduled for trial in January 2010. A.R.J. is a sinus surgeon and sole Director of 3A Holdings Corp. Z.S.J. is a homemaker. The parties are 44 and 37 respectively. They were married on August 15, 1992 in Vancouver and, according to Z.S.J., separated in February 2008, a marriage of 16 years.
- [3] There are two children of the marriage, A.A.J., born May 16, 2002 and A.A.J., born February 23, 2000. The primary residence of the children is with Z.S.J. who, pursuant to the order of Rice, J., pronounced September 2, 2008, has the children 72% of the time, while A.R.J. has the children 28% of the time.
- [4] A.R.J. is the sole director, and an equal shareholder, in a professional services corporation, 3A Holdings Corp., whose corporate pre-tax profit for the most recent fiscal year, 2008, was \$1,072,000. Z.S.J. asks that she be awarded one-half of the corporate pre-tax profits for the corporation, or interim child support and spousal support based on the Guidelines using this amount.

II. Defendant's Position on Child and Spousal Support

- [5] Z.S.J. says she is entitled to one-half of the corporate pre-tax profit from the family owned business. She is an equal common share holder in the corporation. All of the income for the family has been generated through this corporation. Alternatively, she is entitled to be paid spousal support and child support based on the corporate pre-taxed income.

- [6] Z.S.J. also says that such an award may be conservative. The Corporate pre-tax income has been steadily increasing, from \$716,000 in 2006 to \$807,000 in 2007 to \$1,072,000 in 2008. A.R.J. currently has a waitlist of 415 people, the longest waitlist of any ear, nose and throat surgeon at his hospital.
- [7] In the alternative, she should be entitled to child and spousal support based on the corporate pre-tax income from his most recent year, which is the most reliable future indicator of his income. This amounts to \$16,214 per month child support and \$26,608 per month spousal support based on an application of the guidelines.

III. Plaintiff's Position on Child Support and Spousal Support

- [8] A.R.J. takes issue with Z.S.J. regarding the date of separation. He says the parties separated in 2004. A.R.J. commenced this proceeding in January 2008. It is acknowledged that the parties lived in the same residence until at least March 2008. The Plaintiff in argument conceded that nothing turned on the question of when the parties separated for the purposes of this application.
- [9] A.R.J. takes issue with the parenting regime. He says "Dr. Elterman was mistaken" regarding his access desires and that he wanted 50/50 access (paragraph 21, submissions).
- [10] A.R.J. claims he spent more time with the children than Z.S.J., and although he consented to an order granting the existing parenting regime he says the Justice before whom the order was agreed "...was forceful with respect to the parties consenting to the terms of an interim order" (paragraph 22, submissions).
- [11] In my view the court's task on this application is to determine child support and spousal support based on the existence of the current regime, not to anticipate changes to that regime that might come about at some indeterminate time in the future.

IV. Corporate Pre-Tax Earnings

- [12] A.R.J. also takes issue with the pre-tax corporate earnings. He says, based on reports prepared by experts, the income available to him for 2006 should be \$615,000 to \$635,000, for 2007 \$652,000 to \$794,000 and for 2008 \$817,000 to \$896,000. However, none of those incomes or an average of the same is appropriate.
- [13] A.R.J. says the most appropriate figure on which to base income for the purposes of child and spousal support are figures available for 2009, which is \$568,200 based on \$692,175 corporate pre-tax income.

- [14] A.R.J. argues that corporate pre-tax income should be reduced because of the concept of "double dipping". He says that Z.S.J. "...will ask for her share of the family assets as valued - this will include the corporate earnings to date". However "To include them on an interim basis at this stage for income for support purposes would represent double dipping" (paragraph 46, Submission).
- [15] A.R.J. also argues that as his income is over \$150,000 for child support purposes his base for the child support calculation could be lower than the Guideline amounts, and since his income is over \$350,000 it should be lower than actual used for Guideline purposes in calculating spousal support.
- [16] Finally, A.R.J. says that based on a means and needs analysis, Guideline amounts would be excessive, based on the families' historical pattern of spending.
- [17] With respect to the parenting regime, I observe that the existing regime is in place until trial, and I must base my decision on the regime in place today.

V. Onus Re Corporate Pre-Tax Income

- [18] In determining income for the purposes of calculating child support, I am mindful of the decision of the Court of Appeal in *Hausmann v. Klukas*, 2009 BCCA 32, application for leave to reopen the appeal dismissed, 2009 BCCA 320. In that case the court referenced the discussion of Madam Justice Huddart in *Kowalewich v. Kowalewich*, 2001 BCCA 450, 92 B.C.L.R. (3d) 38, 19 R.F.L. (5th) 330:
- [31] There has been limited appellate consideration of s. 18 of the Guidelines. See, for example: *Nesbitt v. Nesbitt*, 2001 MBCA 113, [2001] 8 W.W.R. 635, 19 R.F.L. (5th) 359 ["Nesbitt" cited to W.W.R.]; *Kowalewich v. Kowalewich*, 2001 BCCA 450, 92 B.C.L.R. (3d) 38, 19 R.F.L. (5th) 330 ["Kowalewich" cited to B.C.L.R.]; *Grossi v. Grossi*, 2005 BCCA 47, 38 B.C.L.R. (4th) 247, 10 R.F.L. (6th) 28; *Wildman v. Wildman* (2006), 82 O.R. (3d) 401, 33 R.F.L. (6th) 237 (C.A.); *Miller v. Joynt*, 2007 ABCA 214, 422 A.R. 150, 48 R.F.L. (6th) 256 [cited to A.R.].
- [32] In *Kowalewich*, Madam Justice Huddart comprehensively analyzed s. 18 and the related sections of the Guidelines. In particular she commented on the purpose and application of s. 18:
- [43] In this regard, I find helpful the view Justice Martinson expressed in *Baum v. Baum* (1999), 182 D.L.R. (4th) 715 (B.C.S.C.) at para. 28:

Valid corporate objectives may differ from valid child support objectives. The purpose of s. 18 is to allow the court to "lift the corporate veil" to ensure that the money received as income by the paying parent fairly reflects all of the money available for the payment of child support. This is particularly important in the case of a sole shareholder as that shareholder has the ability to control the income of the corporation. See *Bhopal v. Bhopal*, [1997] B.C.J. No. 1746 (S.C.), *Blackburn v. Elmitt* (1997), 34 R.F.L. (4th) (B.C.S.C.) and *McCrea v. McCrea*.

- [54] The Guidelines allow a court to include all of the pre-tax income of a corporation for the most recent taxation year in a spouse's annual income for Guideline purposes. They do not require it. I am not persuaded they make the inclusion of all pre-tax income the default position.
- [58] It seems to me regard should also be had to the nature of the company's business and any evidence of legitimate calls on its corporate income for the purposes of that business. Justice Drake cautioned about not killing the goose who lays the golden eggs. Monies needed to maintain the value of the business as a viable going concern will not be available for support purposes. In my view they should not be included in determining annual income. In *Hollenbach v. Hollenbach*, 2000 BCCA 620 (B.C.C.A.), the trial judge recognized the need for a reserve for depreciation as an appropriate factor to be considered in a real estate business. Justice Dorgan recognized Mr. Kowalewich's business expansion plan as a valid business purpose in a retail business.
- [59] I do not recite these factors to suggest this Court should tinker with a trial judge's exercise of discretion, nor that a trial judge should second guess business decisions. I do say that a trial judge must have regard to the evidence of legitimate business needs in determining what portion of pre-tax corporate income to include in annual income for Guideline purposes.
- [33] In the case at bar, both parties tendered evidence as to the amount of pre-tax corporate income available for inclusion in the calculation of child support. The difficulty posed is that the opinions are completely at odds. Mr. Mynett states that essentially all of the pre-tax corporate income is available to Mr. Klukas. Mr. Rennie states that none of it is available. A further complicating factor is the inconsistency that results from the chambers judge's unreserved acceptance of Mr. Mynett's analysis "where it is different than Mr. Rennie's concerning the money available", in addition to his acceptance of Mr. Rennie's statements as to the funds required to be retained in *Pioneer*, as recited at para. 23 of his reasons.
- [19] The court went on to consider the question of onus:
- [51] While the purpose and application of s. 18 were outlined in *Kowalewich*, this Court has not heretofore established an onus test. Some post *Kowalewich* authorities from this province, however, have concluded that there is an "emerging presumption" that pre-tax corporate income will be assumed to be available to a payor unless evidence is led to the contrary. These authorities state that the onus in the circumstances is on the payor. As discussed in *Jeffery v. Motherwell*, 2006 BCSC 140, 36 R.F.L. (6th) 377, at para. 13:

Kowalewich has been applied on other occasions by judges of this court and is binding authority. One of those cases *Bartkowski v. Bartkowski* (2003), 37 R.F.L. (5th) 242 (B.C.S.C. [In Chambers]), albeit dealing with very different factual circumstances in that the payor contended that his line 150 income was inflated to take advantage of tax benefits, the court said this about the authorities post *Kowalewich*:

I am of the view that these cases reveal an emerging presumption that the corporation's pre-tax income will be assumed to be available to the shareholder payor for the payment of child support unless compelling evidence is led by the payor spouse to support the conclusion that re-investment is necessary to sustain the company as a viable enterprise. ... (para. 51)

The onus is on the payor to provide the necessary evidence that the corporation's pre-tax income is not available to the payor. The court should not have to ferret out the necessary information from inadequate or incomplete financial disclosure. While Bartkowski says the evidence of the payor must be compelling, I prefer to use the word clear when discussing the necessary evidence of business circumstances as the former word might be taken to suggest a higher standard of proof than is called for by Kowalewich.

[52] I respectfully agree with the above comments in *Jeffery v. Motherwell*.

[53] In contrast to British Columbia, courts in Manitoba have applied an onus test since 2001. In *Nesbitt*, the Manitoba Court of Appeal concluded that in circumstances where a payor spouse has retained earnings in his company, and has failed to provide any explanation for the necessity to retain corporate earnings, the onus is on that spouse to convince the court there are valid business reasons for doing so.

[54] In *Nesbitt*, the court stated it was in "entire agreement" with the following comments cited at para. 19:

Particularly helpful is Professor James McLeod's annotation to the decision in *Fost v. Hood* (2000), 2 R.F.L. (5th) 399 (N.S.C.A.), in which the author comments on the decision of *Adams v. Adams* (2000), 5 R.F.L. (5th) 9, 2000 ABQB 153 (Alta. Q.B. [In Chambers]), and opines (at 401):

One of the more common allegations made by payees to convince a court to impute income is that a payor has retained earnings in his or her business that he or she refuses to take as income in order to reduce child support. In *Adams v. Adams* . . ., Rowbotham J. noted that retained earnings represent money that the business has earned and the shareholders can take out as income. A spouse who controls the business and chooses to leave the money in the business must be prepared to explain why his or her decision is reasonable from a business point of view.

Sometimes a company's creditors insist that the business retain a minimum amount of money as security for financing, or a company may carry on substantial cash operations and require a business "float" to maintain access to liquid funds. Whatever the reason alleged for retaining earnings in a business, most courts assume that a spouse should take as much money as is available as income from his or her business and a spouse who does not do so is trying to avoid his or her family obligations. The onus is on a payor who has retained earnings in his or her company to convince the court that there are valid business reasons for leaving the money in the company. In *Adams*, Rowbotham J. was satisfied that the husband could justify leaving part but not all of the retained earnings in the company for business reasons and imputed income pursuant to the Guidelines.

- [55] Nesbitt, the payor's complete control of the entire income of the corporation was not in dispute. The cash reserves of the corporation had more than doubled in a three-year period, however, the payor failed to provide any explanation as to why all of the corporate income should not be attributed to him (para. 22).
- [56] Relying on s. 17 of the Guidelines and the need to determine an amount that was "fair and reasonable" in the circumstances, the court found it was appropriate to consider the last three years in order to average the amounts to determine the imputation of income under s. 18 (para. 25).
- [57] The onus test set out in Nesbitt was recently applied by the Manitoba Court of Appeal in *Verwey v. Verwey*, 2007 MBCA 102, 220 Man. R. (2d) 52, 41 R.F.L. (6th) 29, and more recently in *Dyck v. Dyck*, 2008 MBCA 135. In *Verwey*, decided under the Manitoba Guidelines, the payor's appeal was dismissed on the basis that the father's inadequate financial disclosure was an appropriate basis for the trial judge to impute additional income, since he did not discharge the onus of explaining why it was necessary to leave his money in the corporations in which he held shares. In *Dyck*, the Court of Appeal did not interfere with the trial judge's holding with respect to pre-tax corporate income, since the payor spouse tendered some evidence in regard to the need to retain earnings, and the wife was not able to show that the trial judge erred (the court noted that she herself had not tendered any evidence on the issue).
- [58] In *Miller v. Joynt*, the leading appellate case on this issue in Alberta, the Court of Appeal outlined the general legal principles applicable to the determination of the payor's income under the Guidelines (at paras. 19-26), and appears to have adopted the onus test as outlined in *Nesbitt*. However, the court in *Miller v. Joynt* specifically rejected the use of retained earnings of the corporation as the initial reference point for the imputation of corporate income under s. 18 of the Guidelines.
- [59] The court noted that it is well settled that a judge is given discretion under s. 18(1)(a) which must be exercised judicially, and can only be altered on appeal if unreasonable (paras. 31-33). In the context of s. 18(1)(a), this is taken to mean that it is not open to a judge to speculate about the needs of the corporation in absence of any supporting evidence. Further, the court rejected the submission that the onus was entirely on the mother, who had no knowledge of the corporate affairs of the organization under the father's control, to rebut possible arguments about why the corporation may need to retain some of its income for future purposes (para. 35).
- [60] In *Miller v. Joynt*, it was uncontested that the father put forward no evidence whatsoever about the corporation's needs or plans and declined opportunities to provide evidence. The trial judge rejected the expert report tendered by the mother, and the Court of Appeal held that the trial judge erred in failing to exercise his discretion judicially by speculating about the needs of the corporation without any evidence on the issue (at para. 37). The court determined that in the circumstances, the trial judge should have included all of the pre-tax

corporate income, not the two-thirds ordered.

- [20] Recently the BC Court of Appeal revisited the question of the proper calculation of income for a professional services corporation in *Teja v. Dhanda*, 2009 BCCA 198. The court, overturning the decision of the trial judge, said:
- [11] The nice question thrown up by this case is whether the judge acted appropriately in making the large discount she did by fixing the payor respondent's income level at \$425,000 when admittedly the earnings he had available for that year aggregated about \$630,000. In *Kowalewich*, this Court found the judge erred by fixing too high a figure "by undervaluing the business needs in favour of those of the family" and varied the award downward. I note that in *Kowalewich* the business being considered as a source of income to the payor spouse was a retail operation with a number of outlets. The corporation here is quite different since I would describe it as a professional corporation.
- [12] In my opinion, the trial judge misapprehended the court's reasons in *Kowalewich*, which, unlike the case at bar, was concerned with a corporation for which the corporate income method was the fairer method of determining income for the purposes of calculating child support under s. 18 of the Guidelines. Such corporations include certain types of manufacturing or sales concerns which may need to use corporate income to take advantage of business opportunities, for expansion, to protect against the possibility of business downturns and the like. It was in that context that the court described the factors to be considered to allow the payor to maintain value in the company and permit the company to continue as a viable enterprise and, at the same time, also permit a reasonable amount of income to be available for child support.
- [13] The *Kowalewich* factors have, in the circumstances of this case, no application by reason of the personal services nature of Dr. Dhanda's corporation and the absence of evidence regarding any legitimate calls on the corporation's pre-tax corporate income for company purposes. Dr. Dhanda has, through hard work and relative thrift, been able to accumulate significant savings represented by the retained earnings of the company. What he has not demonstrated is that there are legitimate calls on the pre-tax corporate income of his company, other than his desire to build up savings in the company. Through the Guidelines, Parliament has said that children are entitled to support based on the full income available to the payor spouse. The payor's desire to accumulate savings, to the detriment of the child, is not a legitimate factor to consider.
- [21] In my opinion those comments are particularly apposite here. The desire to accumulate savings or retain earnings in a company is not a legitimate call on the pre-tax corporate income used to calculate child support. As the court noted, there are some corporations or enterprises that by their nature require significant injections of capital from time to time to operate.

- [22] A personal services corporation, generally speaking, is not such a corporation. In the absence of legitimate calls on the pre-tax corporate income of a company, children and a spouse are entitled to support based on the full income available to the payor spouse. In my view, the same considerations apply in an application for interim orders.

VI. Double Dipping

- [23] A.R.J. argues that as Z.S.J. will be seek a division of the family assets, which includes the personal services corporation, receiving full Guideline child and spousal support constitutes "double dipping". This concept underlies part of the differences between the various experts regarding the appropriate income to use for the purposes of calculation child and spousal support.
- [24] The term "double dipping" was used by the Supreme Court of Canada in *Boston v. Boston*, 2001 SCC 43, [2001] 2 S.C.R. 413, in the context of a pension plan that had no value apart from the income that it generated.
- [25] Of course, in an interim application, there is no division of family assets, so it is difficult to ascertain how this argument gains purchase. If, after the trial judge apportions property, A.R.J.'s ability to pay is likely to be impacted, it is a matter for the trial judge to take such into consideration.
- [26] In any event, it is not the relatively modest assets of a personal services corporation that gives rise to the income earning capacity of A.R.J., it is his skills and abilities as a surgeon.
- [27] The term "double dipping" has been applied to pension plans however, as noted by Madam Justice Stromberg-Stein in *Bozak v. Bozak*, 2008 BCSC 1458:
- [52] The concept of "double dipping" or "double recovery" was addressed by the Supreme Court of Canada in *Boston v. Boston*, [2001] 2 S.C.R. 413. That case examined whether a pension plan, which was treated as property and equalized in the division of assets, could also be treated as income in assessing spousal support obligations. The majority held that a pension plan that had no value apart from the income stream it represented could not be used for determining spousal support obligations, as to permit otherwise would allow the spouse to recover twice from the pension. The majority distinguished cases involving pensions from those involving business income or income from investment. This distinction was addressed at para. 57:

When a pension produces income the asset is being liquidated. The same capital that was equalized is being converted into an income stream. By contrast, when a business or investment is producing income, that income can be spent without affecting the asset itself. In fact, the business or asset may continue to increase in value. The value of the business or investment can be equalized, but neither are depleted solely by producing income.

- [53] The British Columbia Court of Appeal decisions of *Holmes v. Matkovich*, 2008 YCKA 10, [2008] Y.J. No. 51 (C.A.) and *Jens v. Jens* held that a spouse who retains marketable assets with an income yield as part of the equalization of family assets cannot eliminate such income from the determination of his or her capacity to pay spousal support by claiming it would be "double dipping". The Court commented in *Jens*:
- [49] The respondent argues that the rental helicopter income of approximately \$40,000 per year should not be included in his income for the purpose of determining spousal support. He notes that his interest in the helicopters was retained by him on the division of property, while the appellant retained other assets. As the helicopters are a depreciating, income-producing asset, the respondent says that including the rental income in calculating spousal support would be "double dipping", as discussed by the Supreme Court of Canada in *Boston v. Boston*, 2001 SCC 43, [2001] 2 S.C.R. 413, at paras. 63-5.
- [50] A similar argument was rejected by the Yukon Court of Appeal in *Holmes v. Matkovich*, 2008 YKCA 10. In that case, the appellant argued that income from a bulldozer and shares in a company should not be included in determining his spousal support obligation. He was ordered to buy out his spouse's interests in those assets, and said that it would be "double dipping" if his spouse received spousal support out of the income. Madam Justice Newbury, for the Court, rejected (at para. 26) that argument on the basis that *Boston* dealt with a pension, which "is different from other income-producing assets." She explained (at para. 27) that income-producing capital assets (like the helicopters) may be sold or transferred, or retained to earn income without liquidating them, while a pension is liquidated as income is paid out. The fact that the respondent in this case does not control the helicopters and cannot make the decision whether to sell or retain them (the business is operated by his family, without any involvement by him) does not change the essential difference in character between such income-producing assets and a pension.
- [54] Dr. Bozak's counsel recognizes his "double recovery" argument, while well established in pension cases, has not been applied in the like circumstances in this case. On the strength of the authorities, I conclude there is no double recovery by Ms. Bozak if she receives spousal support based on capitalization of the discretionary cash flow of the company.
- [25] I agree. In the circumstances I see no merit to A.R.J.'s argument regarding double dipping. In any event, as I have said, it is premature to raise this argument before the division of family assets.

VII. Appropriate Base Income for Child and Spousal Support

- [28] As I have said, the parties are far apart on what is the Base Income to use for the calculation of Child and Spousal support, absent the double-dipping argument. In a report prepared May 2009 Ms. Daum opines that A.R.J.'s pre-tax corporate income for 2009 is \$692,175.

- [29] The income for the current year, it is argued, is the best evidence because it reflects current circumstances, or the current ability to pay. See, for example, the decision of Wedge, J. in *Akkor v. Roulston*, 2009 BCSC 258, [2009] B.C.J. No. 367, where she required further submissions on child support where there was uncertainty regarding current circumstances.
- [30] The current circumstances approach, which gives less weight to historical performance, is supported by decisions such as *Fuzi v. Fuzi*, [1999] B.C.J. No. 2263 (B.C.S.C.). The current circumstances are particularly apposite where, as here, it is argued, the business has lost a key employee.
- [31] On the other hand, Z.S.J. argues that the current year performance is not known, as the financial statements have not been prepared, moreover, the past years performance is better evidence. There are cases that support this approach, such as *C.(S.E.) v. G(D.C.)*, 2003 BCSC 896.
- [32] The current year's performance, it is also suggested, may be motivated by the current proceedings.
- [33] On an interim applications generally, prior to discoveries, and without cross-examination it is difficult to resolve in a completely satisfactory way the root causes of fluctuating income, and all of the other factors that may go into making a "permanent" award.
- [34] Martinson, J., neatly summarized the differences between interim and final orders, which, in respect of interim orders, takes into account the summary nature of these proceedings, the short term nature of such orders, the bridging nature of such an order, and the different legal tests that apply: *M. (D.R.) v. M. (R.B.)*, 2006 BCSC 1921, at paragraphs 7-8.
- [35] Gray, J. in *Lewis v. Lewis*, [2008] O.J. No. 2227, 55 R.F.L. (6th) 454 and *Morey v. Morey*, [2009] O.J. No. 1160, suggests that the matter should be approached with caution by the motions judge. I agree.
- [36] In the circumstances, I find that the Base Income to be used for the calculation of child support and spousal support is \$700,000.

VIII. Child Support

- [37] In argument before me counsel for A.R.J. did not object to child support being calculated based on corporate pre-tax income close to what I have found. In making this concession she reserved the right to take a different position at trial, depending on the parenting arrangement, and based on the discretionary aspect of child support where incomes range over \$150,000.

- [38] Under section 4 of the Child Support Guidelines if the payor makes more than \$150,000 annually, then the court has the discretion to either increase or decrease the table amount, if the table amount would be unsuitable given the conditions, needs and means of the children and the parties: see *Francis v. Baker*, [1999] 3 S.C.R. 250, 1777 D.L.R. (4th) 1.
- [39] The presumption is that the table amount is appropriate and the party seeking a different amount must rebut that presumption with clear and compelling evidence: *Hollenback v. Hollenback*, 2000 BCCA 620.
- [40] In the circumstances I find that child support is payable in the amount of \$8771 per month.

IX. Spousal Support

- [41] An interim order for spousal support is made under s. 15.2(2) of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.):

Spousal support order

15.2 (1) A court of competent jurisdiction may, on application by either or both spouses, make an order requiring a spouse to secure or pay, or to secure and pay, such lump sum or periodic sums, or such lump sum and periodic sums, as the court thinks reasonable for the support of the other spouse.

Interim order

- (2) Where an application is made under subsection (1), the court may, on application by either or both spouses, make an interim order requiring a spouse to secure or pay, or to secure and pay, such lump sum or periodic sums, or such lump sum and periodic sums, as the court thinks reasonable for the support of the other spouse, pending the determination of the application under subsection (1).

Terms and conditions

- (3) The court may make an order under subsection (1) or an interim order under subsection (2) for a definite or indefinite period or until a specified event occurs, and may impose terms, conditions or restrictions in connection with the order as it thinks fit and just.

Factors

- (4) In making an order under subsection (1) or an interim order under subsection (2), the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including
- (a) the length of time the spouses cohabited;
 - (b) the functions performed by each spouse during cohabitation; and

- (c) any order, agreement or arrangement relating to support of either spouse.

Spousal misconduct

- (5) In making an order under subsection (1) or an interim order under subsection (2), the court shall not take into consideration any misconduct of a spouse in relation to the marriage.

Objectives of spousal support order

- (6) An order made under subsection (1) or an interim order under subsection (2) that provides for the support of a spouse should
- (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
 - (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
 - (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
 - (d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.
- [42] Like a final order for spousal support, in making an interim order for spousal support, the court must consider the factors listed in s. 15.2(4) and the objectives listed in s. 15.2(6). All of the objectives under s. 15.2(6) are equally important, and no one objective is paramount over the others: *Moge v. Moge*, [1992] 3 S.C.R. 813 at 820, 99 D.L.R. (4th) 456.
- [43] The court must also consider all of the factors listed in s. 15.2(4); given the circumstances of the case, any one of the factors may be paramount over the others: *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420 at paras. 18 and 36, 169 D.L.R. (4th) 577.
- [44] In cases where the parties are wealthy, the court can consider lifestyle in determining the wife's needs for the purposes of spousal support. If means are available, the appropriate standard of living is a reasonable standard with reference to the marital standard of living: *Touwslager v. Touwslager* (1992), 63 B.C.L.R. (2d) 247, 9 B.C.A.C. 203.
- [45] Where there are the means available, the payee spouse is entitled to receive spousal support in an amount sufficient to enjoy a level of comfort beyond her basic needs: *Hodgkinson v. Hodgkinson*, 2006 BCCA 158, 53 B.C.L.R. (4th) 52 at para. 69.
- [46] Where the parties have had a long marriage, the goal of spousal support may be equality of standards of living: *Yemchuk v. Yemchuk*, 2005 BCCA 406, 44 B.C.L.R. (4th) 77 at para. 50.

- [47] Thus, in the present case, where it appears that the parties enjoyed an affluent lifestyle, the wife is entitled to receive support sufficient to maintain a high level of comfort and a lifestyle on par with her husband. See also *M. (H.R.) v. B(D.M.)*, 2004 BCSC 147, *Kopelow v. Warkentin*, 2006 BCCA 271 and *Kuznecov v. Kuznecov*, 2006 BCSC 1926.
- [48] Both parties reviewed in argument the discretionary nature of the spousal support guidelines. In the circumstances here I see no need to depart from the Guideline amount, and I find that spousal support is payable in the amount of \$17714 per month.

X. Effective Date of Child and Spousal Support

- [49] The applicant asks that the effective date of my orders regarding child support and spousal support should be the date of the Notice of Motion, May 16, 2008. A.R.J. opposes this, saying the date should be the date of the hearing of the Notice of Motion. There have been many affidavits filed and the delay in bringing the matter on for hearing is essentially unexplained.
- [50] The effect of making the child support and spousal support orders be effective as of the date of the Notice of Motion, after all this delay, would, arguably to make these orders retroactive. With respect to child support, the court exercises a discretion, but such awards should not be regarded as exceptional: see *S. (D.B.) v. G.(S.R.)*, 2006 SCC 37.
- [51] As A.R.J. has had notice, in my view the order for child support is made effect as of the date of the Notice of Motion, May 16, 2008.
- [52] Under section 15.2(2) of the Divorce Act the court may make an interim order for spousal support retroactive to the date of the application: *Halpin v. Halpin*, [1992] B.C.J. No. 609. In this case A.R.J. has paid various expenses over the period from the date of the application. Neither party was in a position to enumerate in any detail the accounting necessary.
- [53] In this matter there are some 40 affidavits filed constituting hundreds of pages of materials and exhibits. The accounting will simply provide the parties with another occasion and avenue in which to vet their differences, while there is a trial date not far away, and discoveries have not yet been held.
- [54] In the circumstances the order for spousal support is effective as of the date of hearing of the motions, July 10, 2009, but, of course, Z.S.J. is at liberty to apply for retroactive spousal support at the trial of this proceeding.

XI. Order for Sale of Expo Property

- [55] A.R.J. asks that a condominium described as the Expo be sold. Z.S.J. says it was a gift to her, and she would like to retain this as part of her share of the division of property. A.R.J. thinks the property is used by Z.S.J. for other purposes, besides those she enumerates, which involve swimming with the children. He thinks Z.S.J. has a relationship with another man there.
- [56] I decline to make such an order as (1) there is no present day requirement to sell this property, and (2) this matter is better dealt with as part of the division of family assets at trial.

XII. Order to Pay Market Rent

- [57] Z.S.J. ask that A.R.J. be required to charge market rent to a tenant for a property described as the Yew street property. Z.S.J. thinks that under market rent is charged because of a relationship between A.R.J. and the female tenant. The tenant is not before me.
- [58] I decline to make such order as (1) the tenant is not before me, and (2) in my view the issue of under market rent is better resolved at trial.

XIII. Restraining Order

- [59] There is a restraining order in place, being the order of Mr. Justice Myers dated October 8, 2008. Z.S.J. applies to the court for a more restrictive order on revised terms. I decline to make such order.
- [60] In my opinion the order of Mr. Justice Myers is adequate at the present time. There is, of course, ongoing liberty to either party to apply to the Court in the event of any dispute involving the day to day operations of 3A Holdings Corp and A.R.J.'s nominate corporation, or, for that matter, any matter arising out of the treatment of family assets.

XIV. Costs

- [61] There has been divided success and, as this is an interim application, costs shall be in the cause.

XV. Summary

- [62] I make the following orders:
1. child support is payable in the amount of \$8771 per month;
 2. spousal support is payable in the amount of \$17714 per month;
 3. the order for child support is made effective as of the date of the Notice of Motion, May 16, 2008;

4. the order for spousal support is effective as of the date of hearing of the motions, July 10, 2009, but, Z.S.J. is at liberty to apply for retroactive spousal support at the trial of this proceeding;
5. the application with respect to the Yew Street property is dismissed;
6. the application with respect to the Expo property is dismissed;
7. both parties are at liberty to apply to the trial judge to take into account the issues raised by the use of the Yew Street property and the Expo property at the trial of this action;
8. the application for a more restrictive restraining order is dismissed; and
9. costs of this application shall be costs in the cause.

"The Honourable Mr. Justice Savage"

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