

CANADA / JUDGMENT

A.R. v. M.E.R.

2022 BCSC 2417

COURT

Supreme Court of British Columbia

DECIDED

15 December 2022

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2022 BCSC 2417 A.R. v. M.E.R. IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: A.R. v. M.E.R., 2022 BCSC 2417 Date: 20221215 Docket: E54447 Registry: New Westminster Between: A.R. Claimant And M.E.R. Respondent Before: The Honourable Mr. Justice Verhoeven Oral Reasons for Judgment In Chambers Counsel for the Claimant: R. Huinink Counsel for the Respondent: A. Ngom Place and Date of Hearing: New Westminster, B.C. December 15, 2022 Place and Date of Judgment: New Westminster, B.C. December 15, 2022

- [1] THE COURT: The parties have returned to court because they have been unable to sort out the details of the order arising out of the reasons for judgment that I issued in written form on March 30, 2022.
- [2] The major issue at trial had to do with the income levels of the parties. A substantive issue had to do in particular with the question of income levels for the claimant. That has been dealt with in the reasons for judgment which speaks for itself. That issue was decided and is not a factor in today's proceedings.
- [3] The other issue decided had to do with the income for the respondent. The income levels were fairly clearly set out in the decision at paragraph 27. As that table indicates, there was some uncertainty with respect to 2021 income. It was apparent that there were various aspects or components of the respondent's income that were uncertain. His income, while generally rising over the years, was subject to variation, including uncertainties having to do with bonus payments. So I deferred determination of the 2021 income, because when I issued the reasons for judgment, it seemed like the 2021 income would come into focus in only a few months.
- [4] I then considered what the ongoing income levels ought to be, and I had in mind the principles that income for child support purposes, effectively also for spousal support purposes, depends upon income-earning capacity. I made a reference in paragraphs 79 through 84 that, in general, incomes ought to be based upon actual information and actual incomes during the year in question. However, I was also mindful of the fact that, from a practical point of view, perfection is difficult, if not impossible to attain, and that it would be best from the point of view of the parties and the children to have certainty and simplicity.

- [5] So I attempted to set a figure in paragraph 120 for future support, that is the component of support that was not retroactive. Based upon the information then available, the number I set was \$290,000.
- [6] In paragraph 122, I said that while imperfect, a practical and fair approach is for the parties to simply adjust the child support and spousal support on an annual basis effective July 1, based upon the previous year's incomes. I had in mind that the respondent's income was variable and that the prior year's income might be somewhat high or might be somewhat low, but on an ongoing basis this would provide fair and appropriate child support and spousal support.
- [7] Further information has now become available. The parties have been able to establish, as expected, the respondent's income for 2021. The payments that were uncertain, including gains, crystallized and the parties agree that the 2021 income is \$390,165. So that is the amount applicable for retroactive payments.
- [8] Where the parties differ is with respect to ongoing income. An appeal has been brought. As I mentioned during the course of submissions, I do not concern myself with the issues on the appeal, about which I am ignorant, which is entirely appropriate.
- [9] The claimant suggests that the income level for this year, 2022, ought to be \$360,000. That is based upon the current information available, which is that the base pay for 2022 is \$260,000 plus a \$50,000 retention bonus, equalling \$310,000. However, there was another \$50,000, recent information in respect of that, that indicates it was paid on August of 2022. Pardon me, not paid, there was an agreement for payment in the amount of \$38,550 U.S., which is equivalent to \$50,000 Canadian. So the current projection for the respondent's income on December 15 is an income for 2022 of \$360,000.
- [10] Surprisingly, counsel for the respondent suggests that the 2022 income should, utilizing the structure set out in the reasons for judgment, be \$390,165 because that is the 2021 income. The claimant says the amount should be \$360,000.
- [11] There is a possibility that the further \$50,000 pursuant to the August 2022 agreement will not be paid, although that issue is going to be made certain by the end of this calendar year, only a couple of weeks hence.
- [12] In my view, the 2022 income should be set at \$360,000. That is an amendment to the reasons for judgment where I said, in paragraph 120, the amount should be \$290,000, and the income amount would then, in accordance with the reasons, be adjusted or subject to adjustment, if any is required, as of July 1, 2023.

- [13] The other issue is with respect to length of time to pay. In terms of child support, the parties agree that the amount should be paid in a lump sum. There are no tax issues in that respect. The claimant says it should be paid forthwith. The respondent agrees that it should be paid in a lump sum, but suggests February 1, 2023, for a reason having to do with an application for a stay being made in the Court of Appeal.
- [14] The difference is about six weeks. It seems to me that it is not going to matter too much to the children whether the payment is made, for example, in early January versus February 1, so I will accept the respondent's submission that the child support retroactive payment should be payable as of February 1, 2023. That will allow time for calculations as required and any funding that might be necessary.
- [15] With respect to the retroactive spousal support, the claimant suggests it should be paid over six months. There are tax reasons why it should be periodic payments. The respondent suggests that 24 months would be more reasonable and it might allow him to reduce financial consequences for him. It seems to me that 24 months is too long. These are payments that, at least in principle, ought to have been paid in the past, and the claimant is being kept out of the money for the entire period of delay. So she is prepared to agree to some delay, but not as much as the respondent seeks. I think 12 months is fair. So that will be the length of time over which the spousal support retroactive amounts would be payable.
- [16] The first month for which that should be payable then would be January 1, 2023.
- [17] CNSL R. HUININK: I take it the 12 months is intended to be equal payments?
- [18] THE COURT: Twelve equal payments is what I had in mind.
- [19] CNSL R. HUININK: And one other thing I wanted to point out, in case it would affect Your Lordship's reasoning, I don't think it will, is that pursuant to the retention bonus agreement, it was paid on August 12th --
- [20] THE COURT: Okay.
- [21] CNSL R. HUININK: -- 2022.
- [22] THE COURT: Well, thank you for --
- [23] CNSL R. HUININK: I doubt that will change --
- [24] THE COURT: -- clarifying that.
- [25] CNSL R. HUININK: Yes.
- [26] THE COURT: I was a little uncertain --
- [27] CNSL R. HUININK: Yes.
- [28] THE COURT: -- as I was speaking, so thank you for clarifying. So it was paid, but it could be subject to claw back.

- [29] CNSL R. HUININK: If the impossible happens, yes.
- [30] THE COURT: Okay. Sorry, Mr. Ngom, is there something you wanted to add? I do want to comment on that, so I would like to, just before you go on, unless it is to do with that.
- [31] CNSL A. NGOM: Just to do with the spousal, the --
- [32] THE COURT: Okay, well let us defer that for a moment. The fact that the money was paid reinforces the view that it seems likely it will be kept and that the income should be based upon actual current income. That is all.
- [33] Anyway, Mr. Ngom, yes?
- [34] CNSL A. NGOM: Sorry, the spousal support, could that be February 1st as well, given the same reasons, the stay, January 30th. Maybe -- maybe that was missed in my argument.
- [35] THE COURT: It was not entirely missed, but it might not have been thought through. What do you say about that, Mr. Huinink?
- [36] CNSL R. HUININK: Well, it's consistent in principle. I have to concede that.
- [37] THE COURT: Okay. Well, it might be less problematic. Okay, I will amend that then. The 12 months should be payable commencing February 1, 2023.
- [38] Will the parties be able to draft an order based on those reasons?
- [39] CNSL A. NGOM: Hope so. I think so.
- [40] THE COURT: Okay.
- [41] CNSL A. NGOM: I guess the last question I had, so it's 360 as of January 1, 2022?
- [42] THE COURT: That was the idea.
- [43] CNSL A. NGOM: And all the way through till July?
- [44] THE COURT: Yes.
- [45] CNSL A. NGOM: And then as of July, it will likely be the 360 again.
- [46] THE COURT: Well --
- [47] CNSL A. NGOM: Okay.
- [48] THE COURT: -- that seems to be what is expected, yes, and the principle there is again, as I have already expressed, that to the extent possible, we pay on what we actually know, and that is the best information today.

- [49] CNSL R. HUININK: I -- to answer your question, Justice, I have tried to ensure that I am equipped here to do everything I can to try and get this order entered today, but if my learned friend and I were unable to do that, I would like to, if Justice is sitting tomorrow, to pop in and get it entered. We need to get that order entered. It is holding up the entire appeal process.
- [50] THE COURT: Mm-hmm.
- [51] CNSL R. HUININK: So I will inquire whether --
- [52] THE COURT: Well, at the moment. Things change. I am scheduled to be sitting tomorrow, and if I am sitting tomorrow, I have no trouble seeing counsel for a few minutes to sign an order.
- [53] CNSL R. HUININK: Very good.
- [54] THE COURT: If that is not possible, then you can submit it to the registry on a rush basis, either through the paper process or the online process. I cannot say which is quicker, but I will certainly deal with it as soon as I see it, in any event.
- [55] CNSL R. HUININK: Can we consider this a stand down then, in case my learned friend and I can actually go out and get this order down this morning, and we'll pop back in?
- [56] THE COURT: Oh, if you can do that, sure.
- [57] CNSL R. HUININK: Very good, thank you.
- [58] CNSL A. NGOM: I don't think I have time to do that today.
- [59] CNSL R. HUININK: Okay, understood.
- [60] THE COURT: Okay. I thought that might be a little optimistic.
- [61] And in terms of costs, in my view the same costs order should apply, so the costs, the claimant will have costs of this continued proceeding which is just a further step in the proceedings, as I see it.
- [62] CNSL R. HUININK: That will just be added to the bill of costs.
- [63] THE COURT: Yes.
- [64] CNSL R. HUININK: Thank you.
- [65] THE COURT: Thank you. "Verhoeven J."

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Prepared on 29 October 2026 · Esheria