CANADA / JUDGMENT

A.S. v. G.J.S.

2003 BCSC 834

COURT
Supreme Court of British Columbia

DECIDED
28 May 2003

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2003BCSC0834

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

A.S. v. G.J.S.,

2003 BCSC 834

Date: 20030528

Docket: E010050

Registry: Vancouver

Between:

A.S.

Plaintiff

And:

G.J.S.

Defendant

Before: The Honourable Madam Justice Boyd

Reasons for Judgment

(In Chambers)

Counsel for the Plaintiff:

N.J.W. Reid

Counsel for the Defendant:

G.E. Edwards

Date and Place of Hearing:

May 26, 2003

Vancouver, B.C.

Introduction:

[1] There are two matters before the Court:

(1) the wife's appeal from the decision of Master Donaldson made March 26, 2002; and

(2) the wife's application for a variation of the Order made by Master Donaldson, so as to attribute a higher income to the husband, increase child support, require the husband to pay his proportionate share of extraordinary expenses and a variety of other forms of relief.

Background facts:

[2] The wife is 50 years of age. The husband is 60 years of age. They began to cohabit in 1975 and then married in December 1980. There are three children of the marriage: S. (age 17), C.1 (age 15), and C.2 (age 14). The parties separated in January 2001. At that time they lived in their home in P.[ ], to the south of the Resort Municipality of Whistler. The husband remained in the home until April 2001 and then relocated to Richmond, BC. The wife remained on with the children until the home was eventually sold at the husband's insistence in August 2001. Following this the wife moved with the children to S.[ ], B.C. where she has since purchased a home.

[3] Throughout most of the marriage, the wife was a homemaker and the primary caretaker of the children. The husband owns and operates a software business through his company C.[ ] Ltd.. ("C.[ ] Ltd.") and a second company, M.[ ] Ltd.., which holds C.[ ] Ltd.'s land and assets.

[4] As I understand it, over the majority of the years while C.[ ] Ltd. has been in business, the parties have effected an income-splitting scheme for tax purposes, whereby the wife has been paid an annual salary. As at the date of the hearing before the Master, that salary stood at $40,800 per annum, yielding a net monthly income of $2,610.

[5] In addition to this corporate salary, the wife earned some additional income through a series of different jobs. While still living in Whistler, the wife sold ski tickets on a part-time basis for Whistler-Blackcomb Mountain earning $8.50 per hour. Later she obtained additional employment with the Whistler Eye Clinic earning approximately $14 per hour.

[6] Following her relocation to S.[ ], the wife sought employment but was unsuccessful finding any until February 2002, when she began to work part-time as a retail clerk.

Appeal from the Order of Master Donaldson:

[7] At the time of the hearing before Master Donaldson, the wife sought both interim spousal support and child support from the husband. She also sought an order that she should be entitled to one-half of the net proceeds of sale of the matrimonial home.

[8] The wife's position before the master was that for the purposes of calculating the husband's Guideline income, the Court ought to look beyond his T4 income of $54,000 per annum, and consider the income available in the company for the purposes of supporting the family. The wife submitted that even assuming his salary remained the same, the husband had funds in the order of $141,270 to $199,309 available to pay his own salary, his wife's salary and child support for the children. She says that a total income in the order of $168,000 ought to have been attributed to the husband.

[9] She submits the Master erred by imputing an income of only $85,000 to the husband, made up of his T4 income of $54,000 per annum, plus the further sum of approximately $30,000 in benefits and expenses. Relying on the decision in Kowalewich v. Kowalewich, 2001 BCCA 450, she says that by considering only personal benefits in the hands of the husband as potential sources of additional income and by ignoring any portion of the company's retained earnings as a broader source of potential income to the husband, the Master erred in law.

[10] Following the hearing before Master Donaldson, the wife' counsel says that the husband finally disclosed a number of financial statements which had not been previously disclosed. She says that on a review of that documentation, it is clear that there have been far more funds available to the husband than he earlier disclosed and that indeed, he has withdrawn a number of large sums from the company's cash reserves, both for his own benefit and for that of various employees, including his new partner, Ms. H.B..

[11] It is very difficult at this juncture, with no independent analysis nor any form of forensic analysis of the financial statements of the company, to begin to draw the conclusions suggested by the plaintiff's counsel. Both at the time this matter was before Master Donaldson and now, there has still never been any kind of forensic accounting analysis of the company's financial statements. Nor has either party conducted examinations for discovery to obtain further information regarding the various items which are the subject of some question. It is impossible for me as the Chambers Judge, just as it was impossible for Master Donaldson, to conclude that a certain portion of the retained earnings ought to be considered as an amount available as income to the husband.

[12] Clearly, certain large amounts have been paid out in November 2001, February 2002 and July 2002, but on their face, each of those withdrawals and deposits have been explained by the defendant. Whether or not those explanations will survive any close scrutiny on a forensic analysis or whether the explanations wills stand up on discovery is another matter.

[13] I am not persuaded that Master Donaldson was clearly wrong in his analysis of the company's finances and his conclusions concerning the income available to the husband for the purposes of supporting both himself and the family. I therefore dismiss the wife's appeal from the Order of the Master.

[14] There are a variety of additional issues raised in the Notice of Appeal. The wife complains the Master erred by failing to specifically order the husband pay his share of the extraordinary expenses in proportion to the parties' respective incomes; by not making an order with respect to tuition fees payable for the eldest daughter's private school fees; by adjourning the wife's claim for spousal support; and by fixing costs at a certain amount.

[15] I am unable to find that there was any clear error with regard to any of these matters. The only extraordinary expenses considered by the Master were the orthodontic expenses which were the subject of a specific order. The Master found that so long as the wife received a salary from the company and earned her extra income which he anticipated would be some $16,000 per annum, she was not entitled to support. He specifically anticipated the application for spousal support being renewed in the event the company stopped payment of her salary. He found, based on the parties' representations, that the husband was dealing directly with the daughter's private school fees and monthly expenses and that accordingly, it was not necessary to address those expenses.

[16] He fixed costs as Masters often do at the Chambers hearing. Since no effort was apparently made by counsel to indicate there were any additional disbursements to be considered because of counsel's attendance from out of town, no request was made for the issue of costs to be referred to taxation.

[17] In these circumstances, I cannot find that there has been any clear error which requires addressing here.

Wife's application for variation of Order of Master Donaldson:

[18] The wife's application to vary the Order of Master Donaldson rests on the proposition that since the hearing in March 2002, there have been several changes of circumstances:

(1) there is approximately $100,000 more in cash on hand available in the company in March-April 2003, compared to the situation as it existed in February-March 2002;

(2) effective, June 12, 2003, the husband has advised the wife that the company will no longer engage in any income splitting scheme, and that she will no longer be paid a salary of $40,800 per annum;

(3) since March 2002, the husband has disclosed a number of documents which provide some more detailed information concerning the operations of the company;

(4) since moving to S.[ ] and purchasing a home, the wife is incurring additional living expenses, in the order of $300 per month.

Change of circumstances at the company:

[19] As I noted earlier, it is impossible on the face of the additional financial statements which have been produced to draw any conclusions about whether any portion of the company's retained earnings ought to notionally be considered to be income available to the husband. While there is some increase in the amount of cash on hand within the company in the particular months which the wife has focused upon, the bulk of the evidence suggests that the company's fortunes have actually declined since the matter was last before the Court. The company has lost a large account in New Hampshire and thus far, four employees have been terminated in an effort to meet payroll expenses. As of April 2003, the interim financial statements show a decline in revenue of $270,720, with a year to date loss of $11,415. Again, whether any of these statements stand up to a proper audit remains to be seen.

[20] One of the main themes running through the wife's counsel's submission was that Ms. H.B. was not a true employee of the company and that her entire salary of $60,000 per annum ought to be attributed as income to the husband.

[21] I understand the grounds for some of the wife's skepticism. After all, Ms. H.B. earns a salary in excess of even the husband's T4 earnings. Apart from one individual who earns marginally more, Ms. H.B. earns the top salary of the company. She is described as both a sales and customer service representative yet she is also the accounting manager for the entire firm. The company loaned her $71,000 which she apparently used to purchase a home where she now lives with the husband. The husband pays her rent of $1200 per month, which amount is sufficient to cover her mortgage. Ms. H.B.'s contribution apparently consists in purchasing the groceries and other items. The husband says that the $71,000 has been repaid by Ms. H.B., although no documents have been produced to verify that repayment.

[22] At least on the face, it would appear Ms. H.B. is indeed a legitimate employee. Whether her duties have been properly described, whether she has effectively replaced all in-house and independent bookkeeping staff, whether her salary amounts to an over-payment for her services and whether she properly repaid the $71,000 loan--all remain to be properly proven at trial. However for the purposes of this application, I am unable to make any findings of fact which can found a claim for a variation of the Master's order.

Reduction in wife's income:

[23] As I noted earlier, the husband has given the wife notice that effective June 1, 2003, he intends to stop paying her a salary of $40,800 per annum. The husband has not suggested that by virtue of the decline in the company's fortunes he will be drawing some lesser salary and that accordingly, the wife's share must similarly decline. Rather he says that the cessation of the wife's salary springs from the fact that he has only recently learned from his accountant, Mr. Leung, that the company can no longer continue with these payments of the wife's salary, by virtue of the provisions of s. 18(1)(a) of the Income Tax Act. Mr. Leung has apparently advised that "since (the wife) no longer works at the business, has not been

working at the business for some time, and is not expected to provide any services to the company in the near future", the salary can no longer be paid.

[24] During submissions, I remarked on the fact that it was curious the company's accountant should chose this point in time, some two years after the separation and some three months before trial, to impart this advice to the husband. The wife has had no connection with the company for a number of years. The parties have historically always effected an income splitting in accordance with the formula which has been in place for many years.

[25] As I noted earlier the wife is 50 years of age. She has been a homemaker throughout most of the marriage. She has earned some small amounts as a ski ticket salesperson and retail clerk since separation. In submissions, the husband's counsel said that by moving to Vancouver Island the wife had created a situation whereby she had substantially reduced her income-earning abilities and that she would have to live with the ramifications of her decision. For her part, the wife says that since the husband forced the sale of the matrimonial home, she could not afford to live and raise the daughters in the Lower Mainland, and that the Island offered the possibility of cheaper accommodation and a reduction in other costs. She says it has not been easy to find employment near S.[ ] and that a good deal of her time has been spent addressing her daughters' emotional turmoil in the post-separation period. At least at the present time, I cannot find that the wife has deliberately avoided employment.

[26] Mr. Edwards conceded that the upcoming cessation of the wife's corporate salary would indeed constitute a change of circumstances. I asked him what he suggested be done to deal with the resulting financial situation which will ensue and he volunteered the husband would pay spousal maintenance of $3000 per month. Since he was insistent that the husband did not have any net disposable income to cover such costs, I assume that the monies would be paid out by the company--totalling $36,000 per year, which I note is just slightly less than the corporate salary of $40,400.

[27] While I am unable to specifically order the husband's company to continue the payments as it has historically done over the years, there is no present rationale for awarding the wife spousal maintenance of anything less than the salary she has been paid by the company. Assuming her salary is not in fact discontinued by the company, I will make no order for a variation of Master Donaldson's order, so as to require that the husband pay spousal support. If however the company does discontinue her salary payment as of June 1, 2003, the husband will be required to pay interim spousal support in an identical amount--$40,400 per annum, to be paid out in the necessary monthly increments.

Increase in expenses:

[28] I will make no order for any greater amount of child support so as to compensate for any increase in expenses since the last order. At the present time, the information concerning the increase in expenses is not sufficiently clear to support a variation order.

Disclosure of corporate documents:

[29] For the same reasons set out earlier, I do not consider the disclosure of the corporate documents to support any variation in the earlier order.

Extraordinary Expenses:

[30] The wife's counsel submitted that the husband had failed to pay for his proportionate share of a variety of extraordinary expenses--including camps, leadership courses, lifeguard courses, rugby etc. She says her claim for extraordinary expenses totals $6,369.48 as against which the husband has contributed no more than $171.50. The husband says that with the exception of tennis lessons, the wife has never sought to consult with him about any of these alleged "extraordinary expenses", and that on their face, many of the expenses ought not to be characterized as extraordinary.

[31] In the circumstances of this case, with the exception of the Young Drivers of Canada invoice, there is simply insufficient information to make any reasoned decision about the expenses claimed. Nor is there any information about the specific expenses and what the parties historically funded in the past. I note that other expenses such as those arising from a school fire which destroyed the children's school supplies, an upcoming after-graduation party and the eldest child's upcoming attendance at the University of Alberta all remain to be quantified and have not even been incurred.

[32] All of these costs ought to be itemized and dealt with at trial under the rubric of retroactive extraordinary expenses and ongoing extraordinary expenses.

[33] For the moment, I will simply order that the parties share in the Young Drivers' cost of $842 in accordance with the ratio established earlier by Master Donaldson.

Costs:

[34] Costs will be costs in the cause.

"M.E. Boyd, J."

The Honourable Madam Justice M.E. Boyd

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Prepared on 30 October 2026 · Esheria