

CANADA / JUDGMENT

Alexander v. Alexander

2010 BCSC 1674

COURT

Supreme Court of British Columbia

DECIDED

26 November 2010

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2010 BCSC 1674 Alexander v. Alexander

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Alexander v. Alexander,

2010 BCSC 1674

Date: 20101126

Docket: 43202

Registry: Kamloops

Between:

Rhyannon Alena Alexander

Plaintiff

And

David Floyd Alexander

Defendant

Before: The Honourable Mr. Justice Meiklem

in Chambers

Reasons for Judgment

Counsel for the Plaintiff:

E.A. Harris

David Floyd Alexander appeared on his own behalf:

Place and Date of Trial:

Kamloops, B.C.

November 15, 2010

Place and Date of Judgment:

Kamloops, B.C.

November 26, 2010

- [1] I pronounced a divorce order on the date of this summary trial hearing. These reasons contain my decisions on the corollary relief sought in respect of custody and guardianship, child support and spousal support.
- [2] The parties commenced cohabitation in October 2002 and were married in July 2004. They separated on or about March 1, 2009.
- [3] For the reasons articulated in discussions with the parties at the hearing of this matter, I order that the parties shall be joint guardians of Arielle Marie Alexander, born October 15, 2003. The plaintiff shall have sole custody of Arielle Marie Alexander and the defendant shall have reasonable and generous access. Neither party shall remove the child from the Province of British Columbia without written consent of the other or by order of the Court.
- [4] The parties have sold their former matrimonial home, and from the proceeds of that sale have paid certain family debts and each has received \$20,000.00 from the proceeds. There remains \$56,835.54 in trust with the plaintiff's solicitors. From the defendant's notional one-half share of these proceeds, the plaintiff seeks payment of arrears of previously ordered child support, an order that some funds are held as security for ongoing child support, and either a lump sum spousal support award or a reapportionment of proceeds to address the imbalance of the earning capacities of the parties. In the alternative, she seeks a monetary penalty for the defendant's non-disclosure.
- [5] There was an interim order made by consent at a judicial case conference held February 25, 2010 that dealt with several property matters and specific document disclosure. This consent order set interim child support at \$1,100.00 per month for two children; namely, the aforementioned Arielle, and another daughter, Aurora Jean Terry, the latter being Mr. Alexander's step-daughter. There was no specific order determining Mr. Alexander's Federal Child Support Guidelines ("Guidelines") income at the time of the interim order.
- [6] Determining Mr. Alexander's income for Guideline purposes is quite problematic for several reasons, including inadequate disclosure. The defendant is a carpenter who, during the marriage, operated a construction business building houses on Reserve lands. Mr. Alexander is a status Indian and for many years his income has been tax exempt. Mrs. Alexander is Metis, and her income is not tax exempt.

- [7] At some point following the separation, his business suffered a downturn and Mr. Alexander has liquidated his major equipment. He worked on an hourly basis for a short period of time in early 2010, but he quit work, telling Mrs. Alexander that he could not afford to work, and he resorted to social assistance from May to the end of July, not being entitled to employment insurance benefits. He has moved away from Kamloops to reside in the Quilchena area, near Merritt, and he recently completed a housing project in Keremeous area.
- [8] Mr. Alexander has consulted the KPMG financial advisory service and is contemplating making an assignment in bankruptcy in the ensuing weeks to free himself of debts accumulated in his construction business.
- [9] Mr. Alexander's December 15, 2009 Form 89 financial statement estimates his Guideline income at \$51,679.00. This figure appears to have been taken from his construction business' 2008 financial statement which records income in that sum. The financial statements for Mr. Alexander's construction business indicate gross revenues in 2006, 2007 and 2008 as \$485,437.92, \$415,400.00 and \$603,204.00 respectively. In those same years, the net income of the business was \$90,057.87, \$51,251.29 and \$51,679.00 respectively. After all expenses, including wages, salaries, and capital cost allowances, his business' balance sheet as at December 31, 2009 lists retained earnings in the previous year; that is 2008, at \$176,283.41.
- [10] There is no evidence that Mr. Alexander employed anyone other than himself, so it may be that it would be proper in imputing income to add in to the net income figures the wages and salaries shown as expenses. In that event, his tax exempt income, even after deduction for the book entries for amortization, would be approximately \$120,000.00, \$73,000.00 and \$75,000.00 in the years 2006, 2007 and 2008.
- [11] Mr. Alexander has sold rather than replaced his business equipment, so the book entries for capital cost allowance were not actually incurred, and would have the effect of increasing his disposable cash.
- [12] Mrs. Alexander relies on s. 19(1) of the Guidelines and the decision of Blair J. in *Le Bourdais v. Le Bourdais*, [1998] B.C.J. No. 217, [1998] 8 W.W.R. 563, 49 B.C.L.R. (3d) 373 in seeking an imputed Guideline income which grosses up Mr. Alexander's income earned on-reserve to such amount as would produce the aforementioned net income amounts after payment of federal and provincial income taxes. I agree that such a gross up is necessary to comply with the Guidelines and to properly utilize the table amounts of child support.
- [13] I did not have the benefit of expert evidence on the gross up necessary at various levels of income, but information as to the applicable federal and provincial income tax rates is readily and publically available on the Canada Revenue Agency website. In 2007, the federal tax rate was 15% on the first \$37,178.00 of income, 22% on the income between \$37,178.00 and \$74,357.00 and 26% on the amount between \$74,357.00 and \$120,887.00. In 2008, the 15% rate applied up to \$37,885.00, the 22% rate applied on the income between \$37,885.00 and \$75,769.00 and the 26% rate applied on the income between \$75,769.00 and \$123,184.00.

The corresponding and applicable provincial rates in those years are also set out on the Canada Revenue Agency website.

- [14] Mrs. Alexander suggests imputing a Guideline income of \$120,000.00 to Mr. Alexander. I note that his 2006 income would have been in that range, even without a grossing up for taxes, but I find that it would be excessive to impute such a high income based on averaging his 2007 to 2009 income, and also taking into consideration the reversals of fortune of his construction business following separation. For illustrated purposes, I have calculated that in 2007 a tax exempt equivalent of taxable income of \$120,000.00 would be approximately \$82,500.00.
- [15] It is apparent that Mr. Alexander is well-qualified and employable and has in the past exhibited a good work ethic, notwithstanding his sudden cessation of work and recourse to social assistance this past summer. It is most regrettable and reprehensible that he has not complied in any way with Master Shaw's order of February 25, 2010 (which was made with his consent), that within 21 days of that order he provide the plaintiff with personal and business banking records, general ledgers and balance sheets for his unincorporated business for the period commencing three years pre-separation up to the present date. However, even if he did achieve an income equivalent to a taxable gross of \$120,000.00 in 2006, 2007 and 2008, I do not think it would be realistic to expect him to rehabilitate his income to that level in the immediate future. I find it more appropriate to impute a realistic Guideline income that reflects the present realities and require Mr. Alexander to report frequently as to his employment or business circumstances.
- [16] Mr. Alexander stated in his submissions that he hopes to continue to do the same type of work, but expects that his lack of creditworthiness will necessitate that he contract for labour only on an hourly basis. I understand that he is likely to continue to earn his income on a tax exempt basis, and once his present business insolvency is resolved, whether by bankruptcy or otherwise, there is certainly a real possibility that he will once again attain his former level of earnings.
- [17] In all the circumstances, I impute a Guideline income of \$80,000.00 to Mr. Alexander at the present time. I will order that he provide the plaintiff on a monthly basis with information as to his place of employment. The Court will review the matter of child support on application of the plaintiff after six months from the date of these reasons. If Mr. Alexander fails to report as ordered, he will be vulnerable to contempt proceedings.
- [18] The child Aurora's biological father (a Mr. Terry) is obligated to pay \$250.00 per month child support, although his payments have been sporadic. Mr. Alexander is also obligated to pay child support for a third child, who is in the custody of a former spouse, and he advises that he has negotiated child support for that child in the amount of \$350.00 per month. It is not appropriate in this case to require Mr. Alexander to effectively pay the child support obligations of Mr. Terry, who is not beyond the reach of enforcement. Therefore, the table amount of child support for two children at \$80,000.00 income will be set at \$936.00,

effective December 1, 2010 (the table amount of \$1,186.00 less \$250.00, which is recoverable from Mr. Terry).

- [19] I am satisfied that this is a proper case to order that a sum be withheld from the defendant's share of the funds in trust to secure the payment of ongoing child support. It is to be understood that this in no way suspends Mr. Alexander's obligation to continue to remit child support on a monthly basis; however, should any shortfall occur, the deficiency can be made up from the security fund. I will return to the quantification of that fund.
- [20] Turning to the matter of spousal support, Mr. Alexander does not oppose either entitlement or an award of a lump sum for spousal support.
- [21] I have caused Divorcemate calculations under the Spousal Support Advisory Guidelines to be performed using the imputed income of \$80,000.00 for Mr. Alexander and \$42,900.00 for Mrs. Alexander, and using the child support determined above. The resulting calculation suggests a range of spousal support with a low of \$0 and a high of \$418.00 per month for an indefinite duration, with a minimum of two and a half years and a maximum of twelve years. Because I have taken a conservative approach to imputing present Guideline income to Mr. Alexander, and I expect that he will over the ensuing months and years actually increase his income above the imputed amount, and taking into account his non-disclosure from which I can infer a minimization of his income, I would, if I was making a periodic spousal support order, order spousal support in the amount of \$400.00 per month for an indefinite term, but with a review after 3.5 years. In the place of a periodic award, I award a lump sum to Mrs. Alexander for spousal support in the amount of \$16,000.00, which shall be remitted to her from Mr. Alexander's notional half of the home sale proceeds in trust and form a charge thereon.
- [22] Mr. Alexander is in arrears in payment of child support ordered in February 2010 to the extent of \$5,800.00. I order that those arrears also be paid from his share of the house sale proceeds in trust.
- [23] The payment of child support arrears and the lump sum spousal support award will leave approximately \$6,600.00 of Mr. Alexander's share of the house sale proceeds in trust. Mr. Alexander suggested that any balance of his share of the funds should go to an educational fund for his children, including the third child that is in the custody of a non-party; however, I order that the balance of Mr. Alexander's share of these funds shall stand as security for the payment of the next six months of child support and any funds remaining that are not required for that purpose will also be charged with payment of the costs of these proceedings, following assessment. The plaintiff is awarded costs.

"I.C. Meiklem J."

MEIKLEM J.

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