
CANADA / JUDGMENT

B. D. D. v. G. T. S.

2021 BCSC 1010

COURT

Supreme Court of British Columbia

DECIDED

27 May 2021

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2021 BCSC 1010 B. D. D. v. G. T. S.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

B. D. D. v. G. T. S.,

2021 BCSC 1010

Date: 20210527

Docket: PRR-S-E-10591

Registry: Prince Rupert

Between:

B. D. D.

Claimant

And

G. T. S.

Respondent

Corrected Judgment: The text of the judgment was corrected at paragraphs 10, 28, and 30-33 on September 2, 2021

Before: The Honourable Mr. Justice Punnnett

Reasons for Judgment

Counsel for the Claimant:

W. C. MacGregor

Counsel for the Respondent/Applicant:

A. Huang

Place and Date of Hearing:

Prince Rupert, B.C.

November 16 and 20, 2020

April 9, 2021

Place and Date of Judgment:

Prince Rupert, B.C.

May 27, 2021

Introduction

- [1] The respondent applies to vary an existing interim spousal and child support order made on May 8, 2019. Although the respondent also seeks an order permitting him to purchase the claimant's interest in the former matrimonial home and an order relating to the RESPs of the children, those matters will be addressed in the application of the claimant for summary trial of the property issues.

Background

- [2] The parties began co-habiting in 1993 and were married on December 12, 1998. There are two children of the marriage, Z.D.S. born February 20, 2009, now 12 and T.D.S. born February 16, 2001, now 10. According to the claimant, they separated in August 2017 but remained in the same residence until December 1, 2017.
- [3] The May 2019 order was based on the respondent's 2018 income of \$84,940 and the claimant's imputed income of \$28,449.95. As the parenting was split on a week on/week off basis, the claimant's child support of \$456.00 per month and the respondent's child support of \$1,313.00 were set off, resulting in child support of \$857.00 payable by the respondent to the claimant commencing May 1, 2019.
- [4] An order for spousal support of \$850 per month commencing May 1, 2019 was also made.
- [5] The parties' 2018 incomes were used to determine the issues of interim child and spousal support. The respondent was and is employed as a locomotive engineer at the P.R.G.E. where he has worked for 14 years. The claimant operates her own business doing massage and electrolysis. Her 2018 Personal Tax Return line 150 income is \$20,130.04, however only \$10,118.15 of that is from her business. The remainder is \$1156.47 in interest and investment income and \$8,855.42 net rental income.

- [6] The claimant's 2019 Personal Tax Return shows income of \$46,225.96 which includes \$11,653.15 in net rental income from an inherited property and \$6,800 in spousal support. Her business income was \$26,515.
- [7] Given the claimant's business was disrupted by COVID and failed to recover, she commenced working as a longshore worker in August of 2020.
- [8] As she had not filed her 2020 Personal Tax Return at the time of hearing, she anticipated business income for 2020 of \$27,026 plus rental income. She also expected earnings as a longshore worker of \$12,928.79 for the last four months of 2020, \$2,000 of which was training pay.
- [9] The respondent's 2019 Personal Tax Return showed income of \$87,311.18. He anticipated an income of \$103,376 in 2020.
- [10] The parties have now filed and produced their 2020 Personal Tax Returns. The claimant's 2020 return shows line 150 income of \$58,442.42 (including \$6,000 in CERB payments) and the respondent's \$101,166.92 after deduction of RRSP withdrawals and union dues.

Position of the Respondent

- [11] The respondent challenges certain of the claimant's business deductions, saying they should be added back to her actual income and that the claimant's business only required limited working hours from her. In addition, he submits she has not been working as much as a longshore worker as she could. He seeks an order imputing income of \$80,000 per annum to the claimant starting in August 2020.
- [12] As a result, the respondent argues there has been a material change in the claimant's income sufficient to justify variation of the interim order.

Position of the Claimant

- [13] The claimant disputes the challenge to the legitimacy of her claimed business deductions and disputes that the income sought to be imputed is correct. She further submits the parties' 2019 incomes should be relied upon with annual reviews commencing June 30, 2021 based on their 2020 incomes. If not, she submits her income should be based on her actual 2020 income, not an imputed income based on the speculative submissions of the respondent unsupported by admissible evidence.

Law and Analysis

Variation of Interim Order

- [14] The Notice of Family Claim seeks child and spousal support under both the Divorce Act, R.S.C. 1985, c. 3 (2nd sup.) and the Family Law Act, S.B.C. 2011, c. 25. The existing interim order did not specify under which act the order was made, however, the Court may vary such an order under its inherent jurisdiction (*Janmohamed v. Janmohamed*, 2014 BCSC 107 at paras. 39-43) and under the Family Law Act, ss. 152 & 157.
- [15] In *Janmohamed*, Donegan J. stated:
- [44] Finally, I am mindful of *Huculak*, where Hall J.A. wrote at para. 3:
- [3] It is fair to say that previous cases, both in this court and in the Supreme Court, have made it clear that variations to interim maintenance orders are not granted lightly. There are sound policy reasons for that because if that were not the case, there would be a considerable expenditure of judicial and legal time and resources on matters that are in their nature of an interim or temporary nature and subject always to revision at the trial of the matter.
- [45] The law seems very clear here. There is no statutory provision in the Divorce Act to vary an interim order for support. Such an order can only be varied pursuant to the court's inherent jurisdiction. This jurisdiction should only be exercised in compelling circumstances that are urgent and cannot wait for trial. The onus upon the applicant is a heavy one.

Material Change in Circumstances

- [46] Turning now to the merits of this application. In order to vary a support order, a court must be satisfied there has been a material change in circumstances since the time of the order. This means a change such that, if known at the time, would likely have resulted in different terms: *Willick v. Willick*, [1994] 3 S.C.R. 670.
- [16] In *O.L.G. v. D.C.G.*, 2015 BCSC 474, Gaul J. summarized the applicable law and stated at paragraph 14:
- ... On an application to vary an interim order, there is a need to consider the potential for serious prejudice from waiting until trial to have the issues in dispute resolved. However, in my view, this consideration does not reduce or lessen the test to be applied nor does it diminish the requirement that there be a significant change in circumstances.
- [17] Here, two trial dates have been adjourned. The most significant issue between the parties is parenting. Resolution of property issues however depends on the ability of the respondent to refinance in order to purchase the former matrimonial home. The respondent submits this, in turn, depends on his maintenance obligations, hence the interim application to vary child and spousal support given the alleged material change in circumstances.

Analysis

- [18] The respondent submits the motor vehicle expenses claimed by the claimant's business are personal expenses given it is a home-based business. He also disputes the claimed Capital Cost Allowance and the deduction for insurance.
- [19] Addressing the latter first, the insurance is a legitimate business expense as it is professional insurance not home insurance. As to the business expenses, generally she conducts such in the home in which she resides. 40% of the home is rented and the remaining 60% is used for both her business and personal use. As for the claimed motor vehicle expenses, the evidence does not address the deduction. I decline to add such expenses to the claimant's income as a result. As for the Capital Cost Allowance amount involved, it is under \$150 in 2020.
- [20] On the evidence, I am not satisfied the respondent has established any such expenses should be added back to the income of the claimant.
- [21] The significant challenge of the respondent is that the claimant is only working as a long shore worker for about 70 hours per month and is limiting her work to day shift only. He submits that is about \$3,000 a month and that she could work more hours and should work other shifts. He also submits she should structure her business work in such a way as to maximize her availability to do longshore work.
- [22] The evidence regarding the availability of work for longshore workers is based on what the respondent has been told by friends who work as longshore workers. He deposes on that basis the claimant can call in every day and if her name is not on the board she can show up to pick up a shift and that there are three to five shifts a week available and that the more she works, the more her name will be called and that the port is very busy.
- [23] The claimant explains that she is on a recruit board and she cannot call in to see if there is work but instead has to go to the union hall at 7:00 a.m. and 3:30 p.m. daily if she is available to see if she can obtain a shift for that day. Given the uncertainty of obtaining work, she gives booked clients preference as that is guaranteed income. Additionally, during the weeks she has the children she cannot work afternoon shift (4:30 p.m. to 1:00 a.m.) as they are in her care and she does not have a sitter but can conduct her business while the boys are with her.
- [24] She also deposes that recently another 60 longshore worker recruits were hired that will limit the work available to her. She notes as well the work is not based on seniority but rotates alphabetically based on workers' last names.
- [25] The evidence of the respondent is hearsay and double hearsay. That of the claimant is not. The onus to impute income is on the respondent. I cannot give any weight to the hearsay evidence of the respondent regarding the availability of longshore work. I accept as well that the claimant's business commitments and child care responsibilities also limit her flexibility to take such work. I conclude the claimant recognized she was underemployed given her

business would not provide full time employment. Although she is trying to work, she has no guaranteed work as a longshore worker.

- [26] The respondent submits that the Court in imputing income to the claimant should do so for 2021. However, in doing so he is comparing it to his 2020 income.
- [27] It is inappropriate to compare different year's incomes when addressing support and that the same years should be used. Any variation of support should as well be based on the previous year's income for both consistency and accuracy of the income figures used. This particularly where one of the incomes is sought to be determined by imputing that income.
- [28] I therefore find that the claimant's income for 2020 is \$58,442.42 and the respondent's is \$101,166.92 for support purposes.
- [29] While the respondent in his submission compares his 2020 income to the claimant's 2021 income, as noted the comparison should be to the same year for each party and, in accordance with s. 15 of the Federal Child Support Guidelines, SOR/97 - 175, should be based on the most recent tax return unless otherwise unfair. As the Court of Appeal noted in *Bell v. Bell*, 2009 BCCA 280:
- [7] Section 15 of the Guidelines provides a spouse's annual income is to be determined in accordance with ss. 16-20. Section 16 provides the determination is to be made using the sources of income that make up "Total income" (Line 150) in the federal tax return form, subject to adjustments. Where the court is of the opinion a determination on that basis would not be fair, under s. 17 regard may be had to the spouse's income over the previous three years. (It is accepted no suggestion was made to the judge that section was to be invoked here.) The court must attempt to make the best determination of current income that can be made on the evidence adduced (see the discussion in *Fuzi v. Fuzi*, [1999] B.C.J. No. 2263 (S.C.) at paras. 4-12). Here, the judge's task was to determine Mr. Bell's income for Guidelines purposes at the time his application was made in 2008. As will frequently be the case, the best indication of that is provided by his total income for tax purposes in the preceding year (2007).
- [30] Based on the parties' 2020 incomes the Guideline amounts using DivorceMate for shared parenting, the child support payable by the respondent is \$630 and the mid-range spousal support is \$235. This as compared to the current interim order from 2018 of child support of \$857 and spousal support of \$850.
- [31] Costs shall be addressed at the conclusion of the trial.

"The Honourable Mr. Justice Punnett"

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