

CANADA / JUDGMENT

Bradford v. Bradford

2022 BCSC 595

COURT

Supreme Court of British Columbia

DECIDED

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2022 BCSC 595 Bradford v. Bradford

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Bradford v. Bradford,

2022 BCSC 595

Date: 20220413

Docket: E20090

Registry: Terrace

Between:

Felicity Louisa Jane Bradford a.k.a. Felicity Louisa Keenleyside

Claimant

And

Benjamin Arthur Bradford

Respondent

Before: The Honourable Justice C. Ross

Reasons for Judgment

Counsel for the Claimant:

A. Lax

Counsel for the Respondent:

J. Maxwell

Place and Date of Hearing:

Terrace, B.C.

March 21, 2022

Place and Date of Judgment:

Terrace, B.C.

April 13, 2022

- [1] This is an application by the respondent, Benjamin Bradford, for a declaration that the funds he receives for the care of a developmentally disabled adult do not constitute income for the purposes of spousal and child support in this family law matter.

Background

- [2] The parties were married on October 7, 2006. There is one child of the marriage, G., who was born July 20, 2013. On October 10, 2018, Justice Grauer, as he then was, granted an order of divorce (the "Order"). Pursuant to the Order, the parties are joint guardians and share parenting time on a roughly equal basis. Mr. Bradford was to pay child support in the amount of \$556 per month, reviewable on a yearly basis, and spousal support in the amount of \$1,090 per month. A review of spousal support was to occur on or after March 9, 2022.
- [3] Mr. Bradford currently reports annual Guidelines income of \$88,727, which is made up of \$77,953 employment income from his employment as a LAN Administrator, \$10,279 rental income and \$496 capital gains.
- [4] In July 2019 Mr. Bradford entered into an Adult Home Share Contract with the Terrace and District Community Services Society ("TDCSS") Home Share Services (the "Agreement"). Pursuant to the Agreement, Mr. Bradford provides residential care and supervision to a developmentally disabled adult, known in this application as "R." and provides all the necessities of life for him, including food, lodging in Mr. Bradford's home, personal expenses, excursions and vacations.
- [5] Mr. Bradford receives for R.'s care:
- a) a monthly allowance of \$1,795 from TDCSS; and
 - b) a monthly allowance of \$716 from the British Columbia Provincial Government.
- (Collectively, the "Support Funds").
- [6] Mr. Bradford does not report either of the Support Funds as income on his income tax returns.

Legal Principles

[7] The Federal Child Support Guidelines, SOR/97-175 [Guidelines] govern the calculation of income for the purposes of determining child support. Sections 15 and 16 provide:

15 (1) Subject to subsection (2), a spouse's annual income is determined by the court in accordance with sections 16 to 20.

16 Subject to sections 17 to 20, a spouse's annual income is determined using the sources of income set out under the heading "Total income" in the T1 General form issued by the Canada Revenue Agency and is adjusted in accordance with Schedule III.

[8] Section 81(1) of the Income Tax Act, R.S.C., 1985, c. 1 (5th Supp.) lists sources of income that "shall not be included in computing the income of a taxpayer for a taxation year." Section 81 (h) and (h.1) exempt certain classes of social assistance payments made with respect to the care of another who resides in the taxpayer's principal residence:

(h) where the taxpayer is an individual (other than a trust), a social assistance payment (other than a prescribed payment) ordinarily made on the basis of a means, needs or income test under a program provided for by an Act of Parliament or a law of a province, to the extent that it is received directly or indirectly by the taxpayer for the benefit of another individual (other than the taxpayer's spouse or common-law partner or a person who is related to the taxpayer or to the taxpayer's spouse or common-law partner), if

(ii) the other individual resides in the taxpayer's principal place of residence, or the taxpayer's principal place of residence is maintained for use as the residence of that other individual, throughout the period referred to in subparagraph 81(1)(h)(i);

(h.1) if the taxpayer is an individual (other than a trust), a social assistance payment ordinarily made on the basis of a means, needs or income test provided for under a program of the Government of Canada or the government of a province, to the extent that it is received directly or indirectly by the taxpayer for the benefit of a particular individual, if

(i) payments to recipients under the program are made for the care and upbringing, on a temporary basis, of another individual in need of protection,

[9] By virtue of s. 19 of the Guidelines, sources of funds that are not included in the computation of income under the Income Tax Act may be imputed as income for the purpose of calculating Guidelines income for child support. The applicable provisions of s. 19 are as follows:

19 (1) The court may impute such amount of income to a spouse as it considers appropriate in the circumstances, which circumstances include the following:

(b) the spouse is exempt from paying federal or provincial income tax;

- (h) the spouse derives a significant portion of income from dividends, capital gains or other sources that are taxed at a lower rate than employment or business income or that are exempt from tax; and

[10] In *Cole v. Cole*, 2010 BCSC 1330 [Cole], Justice Butler addressed the treatment of payments received for the care of foster children for Guidelines purposes. He notes at para. 14:

As set out in s. 18(1) of the Guidelines, the intent of ss. 16-20 is that the amount of the Guidelines income should "fairly reflect all the money available to the spouse for the payment of child support".

[11] On the facts before him, Butler J. concluded that Mr. Cole derived a significant portion of his income from, at least in part, funds he received for the care of foster children and that in the circumstances it was appropriate to impute some portion of these funds as income for child support purposes. He concluded at para. 23:

As I have indicated above, I am of the view that the provisions of the Income Tax Act do not apply to the Foster Allowances received by Mr. Cole. However, even if they do, the Guidelines specifically permit the imputation of income where an individual receives income from a source that is exempt from tax. The real question is whether the income figure for a payor spouse fairly reflects all the money available for the payment of child support. This is a question of fact in each case, rather than a policy issue. There is no doubt that as a matter of policy each parent has the obligation to provide support to his or her children.

[12] The case law is consistent with the approach taken in *Cole*, including a decision of the Alberta Court of Appeal in *Fraser-Tabak v. Tabak*, 2016 ABCA 79, which dealt with funds advanced by Community Living Alternative Services for the care of a dependent adult. The Court concluded at paras. 80-86 that a portion of the funds received should be imputed as income for purposes of the calculation of both child and spousal support.

[80] Assuming that the payments Ms. Fraser receives from Community Living Alternative Services do not constitute taxable income, should these amounts be treated as if they were income, by applying s. 19 of the Federal Child Support Guidelines and imputing income to Ms. Fraser?

[81] Section 19 of the Federal Child Support Guidelines stipulates that "[t]he court may impute such amount of income to a spouse as it considers appropriate in the circumstances". There are good reasons to do this.

[82] First, the sums Community Living Alternative Services has agreed to pay Ms. Fraser benefit both the dependant adult for whom she provides care and Ms. Fraser. Ms. Fraser relies on these funds to support herself. There is no evidence that the fund provider expects Ms. Fraser to work without remuneration.

- [83] Second, Ms. Fraser does not receive this payment because she displays the markers of those in need of social assistance. Payments are made to her because she has the skills and the residence the dependent adult needs to live outside an institution.
- [84] Third, s. 19(h) of the Federal Child Support Guidelines states that income attribution is appropriate if "the spouse derives a significant portion of income from ... sources that are ... exempt from tax". This provision clearly applies to Ms. Fraser's situation.
- [85] Finally, the Spousal Support Advisory Guidelines acknowledges that disability payments, workers compensation and the income aboriginals earn on a reserve, are properly classified as income even though such payments are nontaxable under the Income Tax Act. The payments Ms. Fraser receives are in a sense comparable.
- [86] It is beyond question that the sums Community Living Alternative Services paid Ms. Fraser constitute income in her hands for the purpose of calculating the quantum of spousal support due to her.
- [13] In *Gould v. Julian*, 2010 NSSC 123, the father's main source of income was the allowance he and his current wife received as foster parents from Mi'kmaw Family and Children's Services. The Court concluded at para. 38 that the "money received by the father's household as a foster parent is not an income of the father for purposes of determining his child maintenance obligation, but rather reimbursement of expenditures for caring for foster children." However, as explained in para. 17, this was based on evidence of an employee of Mi'kmaw Family and Children's Services who testified that foster allowances were not intended to provide payment beyond reimbursement to foster parents for childcare expenses. As a result, income was imputed to the father on the basis of underemployment.

Discussion

- [14] Mr. Bradford submits that the cases which have imputed income in relation to funds advanced for the care of dependents are distinguishable in that they were situations in which the payor received all of their income from such funds, was found to be underemployed because of the responsibilities for the care of the dependents or was in effect running a business, citing *Cole, Kovich v. Kreut*, [1998] B.C.J. No. 2586 (S.C.) and *C.Z. v. K.M.*, 2008 BCPC 298.
- [15] In the present case by contrast, Mr. Bradford is employed in a full-time position in addition to the income he reports from his rental property. There is no suggestion that he is underemployed or that his responsibilities in relation to the care of R. in any way interfere with his ability to earn income.

- [16] Counsel submits that there is a strong policy reason not to impute any of the Support Funds as income in that to do so would have a chilling effect on the willingness of members of the public to take on such responsibilities. In addition, there could be an erosion of the quality of the experience provided to the dependents. To impute income would be to divert the Support Funds away from the person for whose needs they are intended to a person or persons wholly unconnected with the dependent person.
- [17] Finally, counsel submits that in the present case because Mr. Bradford is employed full time, the Support Funds are not a significant source of income and thus do not fall within s. 19(1) (h) of the Guidelines.
- [18] Ms. Bradford submits that the Guidelines are clear that for purposes of determining Guidelines income, total income pursuant to the Income Tax Act is not determinative. Counsel submits that the case law supports the imputation of some portion of the Support Funds as income pursuant to s. 19 of the Guidelines.
- [19] Counsel submits that the governing policy is as stated in Cole that Guidelines income should "fairly reflect all the money available to the spouse for the payment of child support." In the present case, the applicant has not demonstrated that all of the Support Funds are used for the expenses of R. The balance should be imputed as income. Using the dictionary definition of the term "significant", counsel submits that the balance is significant in the present case.
- [20] I agree with Ms. Bradford that in the present case there is no evidence that all of the Support Funds are expended for the care of R. In my view, it is appropriate, consistent with the approach in Cole, that some portion of the Support Funds that exceed the amounts expended for the care of R. and amount to a "significant portion" of Mr. Bradford's income be imputed as income for Guidelines purposes.
- [21] I found helpful guidance with respect to the meaning to be given to the term "significant" in the context of the Guidelines in the Ontario case *Fielding v. Fielding*, 2018 ONSC 5659. Justice Monahan noted at paras. 121-122:
- [121] The ITA definitions of "significant" referenced by Ranot arise in rather different contexts, where the concern is to identify non-arm's length relationships or situations where one party or entity is in a position to exercise influence or control over another entity. I certainly agree that in instances where a support payor derives more than 10% of his or her total income from sources that are taxed at a lower rate, such income would necessarily constitute "significant" income for the purposes of s. 19(1)(h) of the Guidelines. But, even in instances where lower-taxed income represents less than 10% of total income, it may still be significant.
- [122] In my view, "significant" in this context should be interpreted having regard to the purposes of the Guidelines enumerated at s. 1, which include "to establish a fair standard of support for children that ensures that they continue to benefit from the financial means of both

spouses after separation". The Merriam-Webster dictionary defines "significant" as "having or likely to have influence or effect". Thus, to the extent that the lower-taxed income is such that it "would have influence or effect" on the standard of support available to the children, such income should be regarded as "significant" and subject to an income tax gross up pursuant to s. 19(1)(h).

- [22] Mr. Bradford's taxable income for 2020 is \$88,727, based on an acceptance of his deductions from gross rental property incomes, which might form the subject of a future application. The Support Funds amount to a total amount of tax-free payments of \$30,132 before any gross up to reflect the fact that the payments are tax free and without deduction.
- [23] Counsel for Ms. Bradford urged the Court to undertake a calculation of appropriate deductions for expenses to arrive at a figure to be imputed as income. Mr. Bradford provided some material in support of a submission that R.'s expenses were inextricably entwined with those of Mr. Bradford and the household such that the exercise suggested by counsel Ms. Bradford could not realistically be undertaken. In the alternative, counsel submitted that the Court should not undertake such an analysis in the absence of an application seeking such relief, arguing that additional submissions and evidence would have been provided had he been aware that such an exercise would be undertaken.
- [24] The notice of application sought a declaration that the Support Funds do not constitute income for the purposes of spousal and child support. I am satisfied that it is not appropriate to make the declaration sought. I find that it is appropriate to treat some portion of the Support Funds as income for purposes of the calculation of the Guidelines income for child and spousal support where it is significant in the sense that it would be likely to have an influence or effect on the amount of support available.
- [25] On the present state of the record, it is not appropriate to determine what portion of the Support Funds should be treated as income in Mr. Bradford's hands or to make a final determination as to whether this amount is significant within the meaning of s. 19 (1)(h) of the Guidelines.
- [26] In order to grant the declaratory relief sought I would have to conclude either:
- a) that the Support Funds could not be imputed as income pursuant to s. 19(1)(h) of the Guidelines; or
 - b) that the Support Funds in the circumstances do not form a significant portion of Mr. Bradford's income.

- [27] With respect to the first alternative, I have reached the opposite conclusion; namely, that the Support Funds do fall within the group of funds for which the Court "may impute such amount of income to a spouse as it considers appropriate in the circumstances". With respect to the second, given the amounts involved and their relation to Mr. Bradford's other sources of income, it cannot be said that the amounts at issue are not significant within the meaning of the section.
- [28] Accordingly, I dismiss the application for a declaration. There will need to be a further hearing to determine what portion of the Support Funds should be treated as income and whether this amount is significant within the meaning of s. 19 of the Guidelines in that it would have an influence or effect on the support available.

"C. Ross J."

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