

CANADA / JUDGMENT

Brown v. Brown

2020 BCCA 53

COURT

British Columbia Court of Appeal

DECIDED

13 February 2020

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2020 BCCA 53 Brown v. Brown

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Brown v. Brown,

2020 BCCA 53

Date: 20200213

Docket: CA45878

Between:

Martina Marie Brown

Respondent

(Claimant)

And

David Sean Brown

Appellant

(Respondent)

Before:

The Honourable Madam Justice Newbury

The Honourable Mr. Justice Groberman

The Honourable Mr. Justice Abrioux

On appeal from: An order of the Supreme Court of British Columbia, dated

January 8, 2019 (Brown v. Brown, Courtenay Docket E2970).

Counsel for the Appellant:

G.W. Currie

Counsel for the Respondent:

T.J.S. Bant

C.W. Ehman

Place and Date of Hearing:

Vancouver, British Columbia

January 17, 2020

Place and Date of Judgment:

Vancouver, British Columbia

February 13, 2020

Written Reasons by:

The Honourable Mr. Justice Groberman

Concurred in by:

The Honourable Madam Justice Newbury

The Honourable Mr. Justice Abrioux

Summary:

A Supreme Court judge varied a child support order to take into account changes in the parties' incomes. The husband appealed, arguing that the judge improperly admitted evidence, made errors in assessing the parties' guideline incomes, made an improper retroactive order, unreasonably refused to vary the mechanism of payment to reduce the husband's tax burden, and made an order in which arrears were double-counted. On appeal, held: Appeal allowed, only to the extent of certain technical variations. A judge may ask questions of a self-represented litigant and relax the strict rules of evidence to ensure that matters are resolved fairly. The procedure followed in this case was fair and appropriate. The judge made no reversible error in assessing guideline incomes. The order was arguably retroactive as contended by the appellant, but there was no unreasonable delay in bringing the matter to court. The arguments with respect to tax credits were speculative, and the judge provided sound reasons for rejecting the proposed change. The formal order arguably required duplicate payments of arrears, and is varied to eliminate ambiguity. Finally, the validity of the parties' marriage has been called into question, leaving it unclear whether the order should be under the Divorce Act or the Family Law Act. The substantive order would be the same under either regime. In these unique circumstances, it is

appropriate to leave the order silent as to its statutory basis. The parties must have the validity of their marriage determined in an orderly manner in the court below.

Reasons for Judgment of the Honourable Mr. Justice Groberman:

- [1] The husband appeals from an order of a Supreme Court chambers judge determining the parties' child support obligations. He says the judge erred in her assessment of guideline incomes, erred in making a retroactive order, and unreasonably refused to make an order that would have benefitted him by reducing his tax liability. Finally, he says that the order, as entered, requires him to make duplicate support payments for the last few months of 2018 and for January 2019.

Background

- [2] The parties have two children, and have established a shared parenting regime in which the children spend equal time with each parent. On July 6, 2015, in the course of a summary trial, the parties entered into a consent order settling almost all of the issues between them, including child support. Apart from certain provisions dealing with arrears, the provisions governing child support were as follows:
6. The Respondent Father shall pay the sum of \$469.00 for child support per month beginning December 1, 2014 and continuing on the 1st of each and every month thereafter.
 7. There shall be an annual review of child support in May of each year and for the purposes of the review, the parties shall exchange income tax returns for the [sic] by April 30th and a copy of their Notice of Assessment as soon as it is received by [sic] Revenue Canada.
- [3] It is not clear, on the face of the order, whether the child support provisions were made under the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) or the Family Law Act, S.B.C. 2011, c. 25. I will return to that issue later in these reasons.
- [4] While the order indicated that there was to be an annual "review", it did not set out any mechanism for changing the amount of child support in consequence of that review. Mr. Brown took it upon himself to reduce his child support payments based on his own review of the tax returns and assessments. Although Ms. Brown disagreed with some of the figures arrived at by Mr. Brown, she did not make any application to court in respect of the disagreement and objected on only a few occasions. Mr. Brown contends that she accepted his calculations.

The Applications Before the Supreme Court Judge

- [5] On September 26, 2018, Mr. Brown filed a notice of application seeking to amend the existing order by deleting paragraph 6 and replacing it with an order that:

[T]he parties shall each pay the other the amount required pursuant to Provincial Child Support Guidelines based on their respective Guideline incomes for the preceding year for the support of the children on the 1st day of each month commencing October 1, 2018 and continuing so [sic] the children are children as defined by the Family Law Act.

[6] The request for payments to be required of each spouse was a product of Mr. Brown's belief that such an arrangement would result in him being eligible to claim an "equivalent-to-spouse" tax credit in respect of one of the children. Ms. Brown filed a response opposing the application on October 16, 2018, saying:

The [respondent] does not wish to have the order changed, the [respondent] has and [sic] problems receiving the full child support for the last 3 years and can't afford to be paying large payments to the [appellant] in case it's not reciprocated.

[7] On December 6, 2018, Ms. Brown filed an application seeking re-calculation of the 2015, 2016 and 2017 child support obligations. In the application, she raised two specific issues on recalculation: she asked that an RRSP withdrawal she made in 2016 be excluded from her income, and also asked that the court refuse to accept Mr. Brown's alleged losses from a rental property in assessing his income. As things developed, it appears that the re-calculation being sought was actually in respect of the support for the years 2016 to 2018, as well as future support payments.

[8] The evidence with respect to the parties' employment income was straightforward. The judge found Mr. Brown's employment income to have been \$69,971.18 in 2015; \$69,525.25 in 2016; and \$68,935.02 in 2017. She found that Ms. Brown's employment income was \$42,176.89 in 2015; \$48,303.16 in 2016; and \$52,281.89 in 2017.

[9] The two controversial issues with respect to income were Mr. Brown's investment in a rental property, and Ms. Brown's withdrawal of funds from an RRSP.

[10] In respect of the rental property, Mr. Brown reported a net loss of \$5,636.12 in 2015; a net pre-tax profit of \$4,912.16 in 2016; and a net loss of \$18,162.92 in 2017. The judge was left with the impression that Mr. Brown occupied the property partway through 2017 and sold it in 2018. We are advised that, in fact, he continues to occupy the property as his primary residence, and that he has not sold it.

[11] The judge chose to ignore the profits and losses from the rental property for the purposes of assessing Mr. Brown's Guideline income for support in the years 2016 through 2018. She considered that the property was an investment property, and that any losses in respect of it (and particularly the losses in 2017) were, in essence, part of that investment. As she had been left with the impression that the property had been sold in 2018, she assumed that the losses had been recouped.

- [12] In those circumstances, it may well have been the trial judge's view that a full accounting of the amounts invested in the property could most conveniently be done (if such an accounting were necessary at all) in the context of determining the effect of the sale of the property on Mr. Brown's income. That issue could properly be deferred until it became necessary to determine his 2018 income, which would affect his guideline support obligations beginning in 2019.
- [13] Turning to Ms. Brown's withdrawal of \$12,504.50 from her RRSP in 2016, the judge noted that the withdrawal was allegedly for the purpose of paying off legal expenses. After quoting paras. 82 and 83 of *McKenzie v. Perestrelo*, 2014 BCCA 161, the judge said: "This was a one-time withdrawal to pay a debt, as such it is my view that it should not be included in income for child support purposes".
- [14] The judge, then, used the parties' employment incomes to calculate the amounts each was liable for under the Child Support Guidelines for the years 2016-2018, and did not include either the rental property profits and losses or the RRSP withdrawal in her calculations.
- [15] On that basis, the judge concluded that Mr. Brown had paid Ms. Brown \$4,851.00 less than he should have for the years 2016 to 2018, given their Guideline incomes. She ordered him to pay child support arrears in that amount.
- [16] Based on the parties' 2017 Guideline incomes and setting off amounts payable by Ms. Brown against amounts payable by Mr. Brown, the judge ordered that Mr. Brown pay \$261.00 per month to Ms. Brown going forward, beginning October 1, 2018.
- [17] The judge declined to make the order requested by Mr. Brown that the parties exchange cheques every month, reasoning that the absence of any ability on the part of the parties to act cooperatively militated against such an arrangement.

Issues on Appeal

[18] Mr. Brown appeals, arguing that:

- a) the judge erred by accepting unsworn evidence from Ms. Brown;
- b) the judge should have reduced Mr. Brown's Guideline income for 2015 and 2017 to take into account his losses on the rental property;
- c) the judge should have increased Ms. Brown's Guideline income for 2016 to take into account her RRSP withdrawal;
- d) the judge should not have made an award for child support arrears, as such an award was an improper retroactive award;
- e) the judge exercised her discretion improperly in failing to make an order that the parties exchange payments each month rather than setting off Ms. Brown's obligations against those of Mr. Brown;

- f) the judge erred in awarding ongoing support from October 1, 2018, as the arrears award took into account arrears up to and including January 1, 2019.

Analysis

Reception of Unsworn Evidence

- [19] Mr. Brown complains that the judge posed questions to Ms. Brown during her submissions, and accepted unsworn evidence from her, both in answers to questions and in the course of her submissions. He says that the evidence was inadmissible, and that its reception constitutes an error.
- [20] I do not intend to comprehensively analyse each statement that Mr. Brown says should not have been elicited or considered by the judge. I would observe that the fact that a litigant has made allegations in argument cannot, by itself, be taken as showing that the judge has accepted the allegations as evidence.
- [21] It is noteworthy that, in the case before us, the judge specifically canvassed with Mr. Brown's counsel the issue of what allegations were not covered by the affidavits. He raised only a couple of issues. The judge then adjourned overnight, specifically indicating that she wished to review the materials.
- [22] The judge's reasons made very few references to the unsworn statements, and do not appear to have relied on them except in instances that I will deal with in discussing the substantive grounds of appeal. With those few exceptions, it is not at all clear that the judge treated any of the statements as evidence. Even if she had done so, it would not necessarily give rise to a meritorious ground of appeal for two reasons. First, as I will indicate, there is some scope for admitting unsworn statements into evidence. Second, while the acceptance of inadmissible statements into evidence constitutes an error of law, it will not found a meritorious ground of appeal unless it is shown that the inadmissible evidence may have affected the judgment, or that if rendered the proceedings unfair.
- [23] Apart from the specific unsworn statements that I will mention in my discussion of the substantive grounds of appeal, I intend to discuss the matter of unsworn statements only in general terms, as I do not see that it forms a standalone ground of appeal.
- [24] Ms. Brown represented herself in the court below. It is evident that she had some difficulty distinguishing between evidence and argument. Her affidavit material, while largely conforming to the rules of evidence, was not entirely appropriate and was, in some respects, incomplete. She did not, in making submissions, take care to ensure that she confined herself to facts set out in her affidavits.

- [25] A judge dealing with a self-represented party can be in an awkward position. She must strive to ensure that the hearing is fair to both parties. Particularly in a family law proceeding with a self-represented party, the judge may properly ask questions to ensure that the self-represented party is afforded an opportunity to present their case.
- [26] This does not mean, of course, that the judge may make determinations in the absence of evidence, or act on allegations that have no evidentiary value. What is important, then, is not whether Ms. Brown said things that went beyond admissible evidence, but rather whether the judge made improper use of those statements.
- [27] Rule 10-3(4) of the Supreme Court Family Rules provides that "[o]n a chambers proceeding, evidence must be given by affidavit". The rule then sets out specific exceptions to the requirement that evidence be by way of affidavit (none of which are directly applicable here) and then provides (in Rule 10-3(4)(e)) a general discretion to "receive other forms of evidence". In *Nichols v. Gray* (1978), 9 B.C.L.R. 5, this Court interpreted a similar provision of the Rules of Court, and accepted that it permits a court (where appropriate) to treat unsworn statements by counsel as evidence (see also *Fomo Products Inc. v. Solkan Enterprises Ltd.* (1986), 4 B.C.L.R. (2d) 264 (C.A.)).
- [28] In principle, there is no reason that an unsworn statement by a self-represented litigant could not also be admitted into evidence on the basis of Rule 10-3(4)(e). In *Harbin Ding Culture v. Newman*, 2004 BCSC 107 at paras. 11-13, E.R.A. Edwards J. suggested that a court would be entitled to place greater reliance on a statement by counsel than on a statement by an interested party, in light of the professional obligations imposed on counsel as an officer of the court. There is merit to that observation.
- [29] The acceptance of unsworn statements made in the course of submissions as evidence is not routine. Courts will not accept such statements where they are controverted, or where they are of "singular importance" to matters at issue (*Boyal v. Boyal*, 2014 BCSC 2261). As a practical matter, however, courts often rely on unsworn statements of fact made by counsel or by litigants to fill in gaps in the evidence in respect of matters that are not genuinely in issue. This is particularly so when unanticipated matters arise in the course of argument.
- [30] Self-represented litigants with limited familiarity with court procedures and with the rules of evidence are particularly likely to arrive in court without having a complete evidentiary foundation for their arguments in their affidavit material. Judges should proceed cautiously in such situations, attempting to ensure that the litigant has a full opportunity to present their case, but also taking care to ensure that indulgences offered to a self-represented party do not make the proceedings unfair to others. Commendably, most chambers judges do their best to ensure that the rules of procedure and evidence do not serve as traps for self-represented litigants, while at the same time taking steps to ensure that any relaxations of the strict rules do not operate unfairly to the other parties.

- [31] The judge in this case asked questions for the purpose of satisfying herself that the picture presented by the parties in their affidavits was adequate for the purposes of the application, and was complete. In my view, there was nothing improper in her doing so. Indeed, faced with an inexperienced and unsophisticated litigant, such a procedure was practically necessary to ensure that justice was done.
- [32] The judge's questions elicited factual assertions from Ms. Brown, some of which were not included in the affidavit evidence, but were relevant to the proceedings. In such a situation, the judge had several options open to her, including:
- a) proceeding without giving any weight to the assertions, on the basis that they were not properly in evidence;
 - b) adjourning the proceeding to allow the parties to file further affidavits;
 - c) placing Ms. Brown under oath or affirmation and allowing her to give viva voce evidence and be cross-examined; or
 - d) accepting the statements as evidence, where the assertions were uncontroversial-- particularly where they did not go to critical matters.
- [33] The judge's choice of options was a matter of judgment and discretion. Unless they resulted in the hearing being unfair to a party, it seems to me that her decisions as to how to proceed should not be second-guessed on appeal.
- [34] At the close of submissions, Mr. Brown's counsel pointed out that certain allegations-- particularly allegations of abuse--were not contained in the affidavit evidence. The judge asked whether he considered that an adjournment was necessary to deal with the issue, and counsel answered "it's not what anybody wants, we want this to be done". No doubt that was an accurate statement. An adjournment would not have been in anyone's interest. The judge did not make any findings with respect to the controversial allegations, apparently on the basis that such findings were not necessary to resolve the issues.
- [35] The judge also asked counsel what other matters were not covered by Ms. Brown's affidavit materials; in some instances, she asked whether Mr. Brown disagreed with the statements that had been made.
- [36] For the most part, the judge appears to have given no weight to Ms. Brown's unsworn allegations, presumably on the basis that they were not properly in evidence. Given that most of the allegations were of marginal relevance to matters in issue, that was an entirely proper course for the judge to follow.
- [37] Where Ms. Brown's allegations were of some importance, and were uncontroversial, the judge may well have accepted them at face value. Again, I am not persuaded that the judge's approach was improper. It does not appear to me that the judge considered the unsworn statements of Ms. Brown on any issue that was in controversy between the parties.

- [38] The judge was faced with a difficult, but common situation. The litigation before her needed to be resolved expeditiously. The monetary amounts at stake were not high enough to justify the expenditure of significant funds on legal representation, even if the parties had been able to afford to do so. It was fortunate that Mr. Currie was present on behalf of Mr. Brown. Ms. Brown struggled, herself, with the issues. The judge conducted the hearing in a manner that was both fair and efficient.
- [39] In saying this, I acknowledge that a party represented by counsel may find it frustrating when the court extends indulgences to a self-represented litigant. Where such indulgences do not give an unfair advantage to the self-represented party, however, they are entirely proper, and can serve to enhance both access to justice and the efficiency of the process.
- [40] In this case, I am not persuaded that the judge granted any indulgences that made the hearing unfair to Mr. Brown, nor am I persuaded that she accepted inadmissible evidence, or improperly relied on unsworn statements.
- [41] I turn, now, to the substantive issues on the appeal.

The Rental Property

- [42] Mr. Brown contends that the judge was required to treat his rental property losses as reductions to his Guideline income, because an accountant's letter attached to Mr. Brown's affidavit states that, "[i]n all cases the receipts presented were reviewed to ensure that they were on account of income (repairs and regular maintenance) and not on account of capital (improvements or betterments to the property) in accordance with applicable laws, regulations and guidelines".
- [43] Mr. Brown held the property as rental property for a relatively short period of time. He claims that it generated a net loss of \$5,636.12 in 2015 on rental revenues of \$14,850; and a net profit of \$4,912 in 2016 on rental revenues of \$19,800. He claims significant interest expenses for the years 2015 and 2016, and significant maintenance and repair costs for 2015.
- [44] In 2017, he ceased renting out the property partway through the year. Rental revenues amounted to only \$4,950. After ceasing to rent the property, he did extensive "repairs" on it, costing just short of \$21,000. After repairs were completed, he moved into the property himself.
- [45] While the evidence with respect to the rental property is limited, it tends to indicate that the property was held primarily as a real estate investment. As a rental property, it was not profitable.
- [46] The judge, after reviewing the limited evidence, said:
- [7] I have no other detail as to how these losses were constituted. Although CRA may accept rental losses as appropriate deductions from income for tax purposes, they are not necessarily appropriate to deduct for child support purposes. As his tax return indicates,

this property was an investment. Mr. Brown incurred losses in his investment. He decided to move to the property and sell it. In my view the losses he claimed should not be deducted from his income for child support purposes. They are capital expenditures. Mr. Brown presumably recouped the expenses of the heat pump and other repairs to the property when he sold it (and again I am presuming) in 2018. In my view it is fairest, pursuant to s. 17(2) of the guidelines to use his employment income for 2015 through 2017 for child support purposes.

[47] Section 17 of the Federal Child Support Guidelines, SOR/97-175 deals with non-recurring income and losses:

17(1) If the court is of the opinion that the determination of a spouse's annual income under section 16 would not be the fairest determination of that income, the court may have regard to the spouse's income over the last three years and determine an amount that is fair and reasonable in light of any pattern of income, fluctuation in income or receipt of a non-recurring amount during those years.

(2) Where a spouse has incurred a non-recurring capital or business investment loss, the court may, if it is of the opinion that the determination of the spouse's annual income under section 16 would not provide the fairest determination of the annual income, choose not to apply sections 6 and 7 of Schedule III, and adjust the amount of the loss, including related expenses and carrying charges and interest expenses, to arrive at such amount as the court considers appropriate.

[48] The judge evidently considered the rental property to be a real estate investment by Mr. Brown, and was of the view that it was fairest to treat it entirely separately from Mr. Brown's income. I can see no error in that assessment. The property generated a small net loss totalling approximately \$700 in 2015 and 2016. The losses on the property are largely attributable to financing charges, and to the replacement of a heat pump. I can see no error in the judge's conclusion that the fairest solution in respect of those two years was to ignore the rental property entirely.

[49] With respect to 2017, the evidence was that the claimed income loss arose after the property ceased to be rented, and was for the purpose of making the property available for Mr. Brown to use as his primary residence. The judge's view that expenditures for that purpose were capital expenditures was a reasonable one. While she was led to believe that the property was sold in 2018, the fact that it was not does not make her determination unfair.

[50] There is no palpable and overriding error to be found in the judge's view that the fairest manner of dealing with the rental property incomes and losses was to treat the venture as a whole as a capital investment that had no impact on Mr. Brown's Guideline income for 2015 to 2017. I would not, therefore, interfere with her treatment of the rental property.

Ms. Brown's RRSP Withdrawal

- [51] In 2016, Ms. Brown withdrew \$12,504.50 from her RRSP. Her affidavit material indicated that it was a one-time withdrawal, and that it would not be appropriate to include it in calculating her Guideline income. She advised the trial judge, in the course of her submissions, that the money was used to pay amounts that she owed her lawyer. Mr. Brown argues that the judge ought not to have accepted that assertion, though he does not dispute that the purpose of the withdrawal was to pay off debt.
- [52] The judge, after referring to paras. 82 and 83 of this Court's judgment in *McKenzie v. Perestrelo*, 2014 BCCA 161, decided that the RRSP withdrawal was appropriately excluded from Ms. Brown's 2016 income, saying:
- [10] This was a one-time withdrawal to pay a debt, as such it is my view that it should not be included in income for child support purposes.
- [53] Mr. Brown does not suggest that the judge misinterpreted *McKenzie v. Perestrelo*, or that she applied her discretion improperly. Rather, he says that the judge improperly based her decision on the proposition that the money was used to pay off debt, a fact that was not attested to in an affidavit.
- [54] This is an example of a matter over which there is no genuine dispute. In the circumstances, it was not improper for the judge to rely on Ms. Brown's statement that the money was used to pay off a debt, and to treat that statement as evidence.

"Retroactive" Support

- [55] The chambers judge's order, pronounced January 2019, dealt with child support for the years 2016, 2017 and 2018. It fixed arrears at \$4,851.00.
- [56] The applications before the judge were filed in September 2018 and December 2018. The judge, therefore, treated the arrears question as one involving retroactive child support.
- [57] There is no doubt that the judge was being asked to make an order varying child support retroactively. The existing order was dated July 2015. It had not been varied by a court, nor had the parties entered into any formal agreement to vary the support amount. Given the informal adjustments that had been made by Mr. Brown, and a degree of acquiescence (though not full agreement) by Ms. Brown, it is clear that the court was entitled to reach back to 2016 to formally vary the 2015 order.
- [58] Mr. Brown does not, of course, object to the court reducing his obligations under the 2015 order. Rather, he claims that the adjustments that he made beginning in 2016 should be treated as the de facto support arrangement, and he says that any finding that there are arrears owing should be treated as a retroactive order.

- [59] I have considerable doubt that Mr. Brown's analysis is the correct one. However, given that the trial judge accepted it without question, and given that both parties have come to this Court acknowledging that the order setting arrears ought to be treated as a retroactive order, I am dealing with the issue on that basis.
- [60] The calculation of the amount of arrears was performed by the parties, and the details were not provided to the judge. The arrears were fixed at \$4,851.00. A handwritten sheet providing the calculation was included in the appeal book, to demonstrate that the arrears were calculated up to January 2019. The sheet is perfectly satisfactory for that purpose, but the calculations themselves are not self-explanatory, and it is not obvious where some of the numbers come from.
- [61] What is clear, however, is that the only significant factors that led to changes in the support calculations were the judge's determinations that: a) Mr. Brown's rental income and losses should be excluded from his Guideline income; and b) Ms. Brown's RRSP withdrawal should be excluded from her Guideline income.
- [62] In respect of the rental income and losses, the losses for 2015 were largely offset by profits in 2016, so the only major influence on support obligations was the loss of \$18,162.92 in 2017.
- [63] Ms. Brown's RRSP withdrawal would have been reported on her 2016 tax return, which would have been filed in 2017. Mr. Brown's 2017 rental property losses would have been reported on that year's tax return, which would have been filed in 2018. In the result, the delay in bringing these matters to court was not a particularly long one. With respect to the RRSP issue, it is just over one year. With respect to the 2017 rental losses, it is at most a few months.
- [64] Given the relatively small amounts involved and the difficulties inherent in people with limited resources accessing the courts, it would be difficult to suggest that the delay in this case was an unreasonable one.
- [65] The judge referred to *D.B.S. v. S.R.G.*, 2006 SCC 37 in making the award. I am unable to see that the judge erred in applying that decision to the facts of this case.
- [66] Mr. Brown contends that no retroactive award can be made unless there is blameworthy conduct on the part of the payor spouse. He claims, therefore, that the trial judge must, in making a retroactive award, have placed weight on Ms. Brown's unsworn allegations of abuse, which he says are unfounded.
- [67] I am unable to accept that proposition. The judge did not, in her reasons, suggest that she found that a retroactive award was justified because of abuse. Rather, she found that there had been disagreements on the correct amount of support for a considerable length of time, so that Mr. Brown was on notice that there was no agreement. There was sworn evidence supporting that proposition. The judge was entitled to view the evidence as she did.

- [68] In any event, as I have indicated, the delay in approaching the court in this case was quite limited. Given the circumstances of this case, including the relatively modest sum of the arrears, a retroactive award was justifiable.

The Taxation Issue

- [69] The 2015 order sets off the payments notionally owed by Ms. Brown against the payments that would be required of Mr. Brown. In the result, the order is that Mr. Brown make a monthly payment to Ms. Brown, representing the difference between amounts they each would be required to pay under the Federal Child Support Guidelines.
- [70] In 2018, Mr. Brown read a published discussion of family law agreements, which suggested that where parents share parenting of two children, the parents may each have a right to claim an equivalent-to-spouse tax credit in respect of one of the children, provided that they each make an actual payment of child support to the other. Mr. Brown sought to have the support order amended so that the parents would exchange payments each month.
- [71] Ms. Brown opposed any change. She was concerned that the arrangement proposed by Mr. Brown would compel her to make payments to him whether or not he was fulfilling his support obligations. Any order that made the child support obligations of each parent independent of the obligations of the other would have that effect.
- [72] The jurisprudence on the use of the equivalent-to-spouse tax credit in respect of parents sharing parenting of two children is somewhat confused. The article that Mr. Brown read is based on one interpretation of a 2007 statutory amendment, and on some jurisprudence in which parents' claims to the credit have been denied.
- [73] The provisions of the Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.) dealing with the equivalent-to-spouse tax credit are difficult to interpret. The credit itself is recognized by s. 118(1)(b). In order to claim the credit, a person must either be unmarried (and not living in a common-law partnership) or a married person (or common-law partner) who is neither supporting nor being supported by their partner. Among other requirements, the person must maintain and live in a "self-contained domestic establishment" and support a relative in that establishment who is "wholly dependent for support on the individual".
- [74] Section 118(4) of the Income Tax Act places certain limitations on claiming the equivalent-to-spouse credit. First, no individual can claim the credit in respect of more than one dependent. Second, only one individual can claim the credit in respect of a particular dependent person.
- [75] Section 118(5) prohibits a person from claiming the equivalent-to-spouse credit where the person is required to make a payment to a spouse for support of the dependent, or where the person claims a deduction for spousal support.

- [76] In three cases before the Tax Court of Canada in 2005 and 2006, it was held that s. 118(5) prohibited a parent from claiming the equivalent-to-spouse credit in respect of a child who changed residences during a year, where each spouse was required to pay child support for part of that year: *Slade v. The Queen*, 2005 TCC 641; *Leclerc v. The Queen*, 2005 TCC 689; and *de Moissac v. The Queen*, [2007] 1 C.T.C. 2001.
- [77] In *Leclerc* and *de Moissac*, a change in custody arrangements resulted in a child leaving the home of one parent and going to live in the home of the other. Support obligations switched along with the child's principal residence. In *Slade*, the parents entered into an arrangement where the child switched homes every two years, and support obligations changed along with the residence of the child. In all three cases, the court denied a claim for an equivalent-to-spouse credit, on the basis that the claimant had received child support payments in respect of the dependent during the year in which the credit was claimed. The judges in each of those cases suggested that the result was unfair, and recommended that Parliament consider correcting the situation.
- [78] In 2007, Parliament acted by introducing the following provision:
- 118(5.1) Where, if this Act were read without reference to this subsection, solely because of the application of subsection (5), no individual is entitled to [an equivalent-to-spouse credit] for a taxation year in respect of a child, subsection (5) shall not apply in respect of that child for that taxation year.
- [79] The intent of the section was to deal with situations in which a child moved from one parent to the other during the year, and it was designed to ensure that one or the other could claim the credit.
- [80] There is a suggestion in some judgments and in some commentaries that if both spouses are required to pay support under the Federal Child Support Guidelines in respect of two children in a joint parenting arrangement, they can each claim an equivalent-to-spouse credit in respect of one of the children (assuming they otherwise qualify). I am not aware of any case that has definitively stated that arrangements can be made that will result in both claims to the credit being successful, and counsel was unable to assist the Court in that respect. It is difficult for me to interpret the legislation as allowing such claims, but I confess that I find the legislation inscrutable.
- [81] It appears clear that in situations of "split custody" (as described in s. 8 of the Federal Child Support Guidelines), it is possible for parents to arrange their affairs so that both qualify to claim the equivalent-to-spouse credit in respect of the child that lives with them: *Ruel v. The Queen*, 2017 TCC 93; *Judickas v. The Queen*, 2016 TCC 225. On the other hand, where there is "shared custody" (as described in s. 9 of the Federal Child Support Guidelines), attempts by both parents to claim the credit have failed where the order or agreement sets off the payments that would be required of one parent against the payments of the other: *Verones v. Canada*, 2013 FCA 69; *Belway v. The Queen*, 2015 TCC 249.

- [82] In *Lawson v. The Queen*, 2017 TCC 131, the Tax Court of Canada appears to have allowed both parties to claim the equivalent-to-spouse credit (in spite of a setoff, as I read the case), but subsequent decisions appear to confine *Lawson* to situations in which support is not based on the Federal Child Support Guidelines: *Stevenson v. The Queen*, 2018 TCC 176; *Bayrack v. The Queen*, 2019 TCC 53.
- [83] In my view, all that can be taken from these cases is a recognition that the Canada Revenue Agency is resistant to allowing both parents to claim the equivalent-to-spouse credit in a shared parenting arrangement. While there is some suggestion that the scheme proposed by Mr. Brown might succeed, it is far from certain.
- [84] Where, under the Federal Child Support Guidelines, each parent would have to pay child support to the other, it is usual for the order to set off the amount payable by one spouse against the amount payable by the other. The order only requires an actual payment of the difference. Such an order is mandated in split custody arrangements (s. 8). While it does not appear to be mandatory in shared custody arrangements (s. 9), it is certainly the norm.
- [85] I see no basis on which it can be said that the trial court is obligated to make the sort of order proposed by Mr. Brown. I am strengthened in that view by the fact that the theory on which it would be advantageous to him is speculative. I also doubt that the trial court is compelled to impose artificial arrangements in order to assist parties in their tax planning.
- [86] Finally, in this case, the judge provided a cogent reason for refusing to alter the existing payment arrangements:
- [16] With respect to Mr. Brown's request that the order be varied to specify that the parties exchange cheques so that they can deduct the spousal equivalent and save taxes rather than simply offset the amount as would normally be the case when the children are exchanged on a week-on/week-off basis, this may be appropriate where the parties can act cooperatively, however, it is apparent that there is a large degree of animosity in this case.
- [87] While Mr. Brown suggests that the finding that "there is a large degree of animosity in this case" might have been influenced by unsworn statements made by Ms. Brown in argument, there is no reason to accept that assertion. The judge, herself, included a reference to sworn evidence in her reasons. In any event, it is apparent both from the sworn evidence and from the court record that the parties find it difficult to work cooperatively.
- [88] I am not convinced that the judge made any error in refusing Mr. Brown's proposal to change the mechanism of payment of child support.

The Double Counting Issue

- [89] The formal order in this matter sets the arrears at \$4,851.00, and orders that Mr. Brown make monthly payments of \$261.00 beginning October 1, 2018. The parties are agreed that the arrears calculation included arrears for October, November, and December 2018 and for January 2019.
- [90] Mr. Brown says that the order needs to be amended, to show that the arrears were calculated to January 2019, and that the monthly payments were due beginning February 1, 2019.
- [91] While Ms. Brown agrees that the arrears included all amounts owing to January 2019, she says that the order, as entered, does not require any duplicate payments, and that she will not attempt to obtain double payments. She opposes any change to the order.
- [92] In my view, the order ought to be clarified to avoid any duplication or ambiguity. I would amend paragraph 9 to add an indication that the arrears are calculated up to and including January 1, 2019. I would amend paragraph 10 to change the date of commencement of monthly payments to February 1, 2019.

Divorce Act or Family Law Act

- [93] While it has very limited substantive impact on this appeal, the reference in Mr. Brown's notice of motion to the Provincial Child Support Guidelines (presumably meaning Part 4 of the Family Law Act Regulation, B.C. Reg. 347/2012) and to the Family Law Act merits some explanation and comment. The original notice of family claim in this proceeding was filed by Ms. Brown. It sought child support under both the Divorce Act and the Family Relations Act, R.S.B.C. 1996, c. 128. The response to family claim filed by Mr. Brown agreed that the parties were married, and accepted the details of the marriage set out in the notice of family claim.
- [94] In 2018, Mr. Brown changed his position on the marital status of the parties. While he agrees that the parties married in a church in Mexico in 2000, he says that the marriage "was never properly registered with the Mexican authority". He claims, therefore, that the parties were never legally married. While it is not entirely clear, Ms. Brown may well wish to go along with that theory.
- [95] I would caution the parties that the question of whether their marriage is recognized under the laws of Canada is not a matter of personal choice, and it would be risky for them to simply assume that their marriage is void.

- [96] The consent order in 2015 dealt with all aspects of the claim other than divorce, and adjourned the claim for divorce generally. It was silent as to whether the child support order was made under the Family Law Act (which had replaced the Family Relations Act) or under the Divorce Act. In such a circumstance, the usual presumption is that the order was made under Federal legislation: *Yu v. Jordan*, 2012 BCCA 367. If that is the case, it could not be varied under the Family Law Act.
- [97] The order under appeal is also silent as to whether it is made under the Divorce Act or the Family Law Act, though it refers to support being payable "as long as the children are eligible for support under the Family Law Act". As the judge made no reference to the Family Law Act in her judgment, it is quite possible that she did not turn her mind to the question of what statute governed her order.
- [98] In *Yu* and subsequent cases, this Court has emphasized that support orders should normally state which statute they are made under, so that courts are able to respect the differences in the two regimes when they deal with variation applications.
- [99] In the unique circumstances of this case, it is necessary to leave the order ambiguous. The Court is not in a position to determine whether or not the parties are married. That issue is best determined in the Court below, with the parties presenting arguments to the best of their abilities. It would appear to me that the easiest way for the parties to proceed would be to apply for directions in the trial court as to whether a divorce is necessary to terminate their relationship, and, if so, what documents they need to file.
- [100] Once the Supreme Court determines the parties' marital status, it can amend the current order (as well as the 2015 order, if necessary) to set out the correct statute under which the child support order is made.

Disposition

- [101] I would vary the order in the court below by replacing paragraphs 9 and 10 with the following:
9. The Respondent, David Sean Brown, will pay the Claimant, Martina Marie Brown child support arrears of \$4,851.00, which amount includes arrears up to and including January 1, 2019.
 10. The Respondent, David Sean Brown, will pay the Claimant, Martina Marie Brown the sum of \$261.00 per month for the support of the children, commencing on February 1, 2019 and continuing on the 1st day of each and every month thereafter, for as long as the children are eligible for support or until further agreement by the parties or Court Order.
- [102] Apart from those changes, I would dismiss the appeal.

"The Honourable Mr. Justice Groberman"

I AGREE:

"The Honourable Madam Justice Newbury"

I AGREE:

"The Honourable Mr. Justice Abrioux"

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