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CANADA / JUDGMENT

## C.A.N. v. J.P.C.

2003 BCSC 1285

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COURT

Supreme Court of British Columbia

DECIDED

19 August 2003

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2003BCSC1285

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

C.A.N. v. J.P.C.,

2003 BCSC 1285

Date: 20030819

Docket: E001808

Registry: Vancouver

Between:

C.A.N.

Plaintiff

And

J.P.C.

Defendant

Before: The Honourable Mr. Justice Preston

Reasons for Judgment

Counsel for the plaintiff:

G. Gordon

Counsel for the defendant:

G. Lang

**Date and Place of Hearing:**

May 6, 2003

Vancouver, B.C.

- [1] This is an application by a payor spouse to vary an existing child support order to reduce the amount of child support payable.

**Background Facts**

- [2] The parties married on August 28, 1987 and were divorced by the order of Mr. Justice Cullen, pronounced May 28, 2001. The parties have one child, J., born [ ], 1996. The primary residence of the child is with Ms. C.A.N.. The parties consented to the custodial and support provisions of Cullen J.'s order.
- [3] The relevant provisions for the purpose of this application are these:
- Ms. C.A.N.'s guideline income is \$39,000 per year;
  - Mr. J.P.C.'s guideline income is \$160,000 per year;
  - Mr. J.P.C. is to pay \$1,175 per month in child support;
  - Mr. J.P.C. is to pay all of J.'s daycare costs until September 1, 2001 after which time those costs and any other expenses under section 7 of the Child Support Guidelines (the "Guidelines") are to be borne by the parties on a prorated basis, according to their respective incomes, and;
  - Mr. J.P.C. is to pay Ms. C.A.N. the sum of \$1,000 per month as spousal support.
- [4] The order provides for a review of spousal support after August 1, 2002.
- [5] At the time of Cullen J.'s order, Mr. J.P.C. was employed as a lawyer by a large Toronto law firm on a one-year contract. On November 28, 2001 he was notified that his contract would not be renewed when it expired at the end of January 2002. After his employment with the law firm came to an end, Mr. J.P.C. collected employment insurance benefits for a period of 35 weeks. Those benefits ran out on November 16, 2002.
- [6] In the calendar year 2002, Mr. J.P.C.'s income, inclusive of his January salary and the employment insurance benefits, was approximately \$40,000.
- [7] Mr. J.P.C. continued his spousal and child support payments, including the daycare costs, until September 2002. He then ceased paying spousal support, but continued the other payments required by Cullen J.'s order.
- [8] In October 2002, the review of spousal support contemplated by Cullen J.'s order took place before Madam Justice Morrison. She found a continuing need for spousal support in the amount of the original order but concluded that Mr. J.P.C. had no ability to make the spousal support payments. She suspended payments of spousal support. Her order requires Mr. J.P.C. to advise Ms. C.A.N. of any change in his employment status and also requires that the

parties exchange copies of their income tax returns, T4 and T5 slips and notices of assessment.

- [9] Despite extensive efforts, Mr. J.P.C. has not obtained employment. He presently lives in Toronto, with a new partner, Ms. N., an executive producer with CBC who earns approximately \$104,000 per year.
- [10] After separation, Ms. C.A.N. moved from Toronto to Vancouver, where her extended family resides and where the parties had lived from 1979 to 1984 while Mr. J.P.C. was an assistant professor at the University of British Columbia Law School.
- [11] Mr. J.P.C. has exceptional job qualifications. He obtained a bachelor's degree in law from the University of [ ] and a master's degree in law from the L[ ]. He was called to the bar in Ontario in 1978. He articulated at a prestigious Toronto law firm and was a law clerk for the Ontario Court of Appeal. He describes his employment history as follows:

My employment history, to date has chiefly being comprised of in-house practice, consulting and teaching, rather than private practice in a law firm. My work experience has concentrated on government and regulatory affairs, public policy, financial services law, corporate/commercial and business law, with some technology, e-commerce and intellectual law. I have almost exclusively carried out advice-based and strategic work, rather than transaction-based work for clients.

- [12] Mr. J.P.C. 's position on this application is that the existing level of child support based on his income at the time of Cullen J.'s order is no longer appropriate. His counsel, Ms. Lang, does not contend that he should have no child support obligation. She asks that it be reduced from its current level. Implicitly, Ms. Lang seeks to have income imputed to Mr. J.P.C. in an amount less than the amount of \$160,000 that forms the basis of the existing order.
- [13] Ms. C.A.N.'s counsel, Mr. Gordon, submits that Ms. C.A.N. has become dependent upon child support continuing at the level set out in the order. He argues that any substantial reduction would force Ms. C.A.N. to relocate and would detrimentally disrupt J.'s established school and social relationships. Mr. Gordon contends that income of \$160,000 per year should be imputed to Mr. J.P.C..

## The Law

- [14] Both parents have a joint and ongoing legal obligation to support the children of the marriage. Child support is regulated by the provisions of the Guidelines. The Guidelines provide that the amount of child support to be paid by a spouse who is required to pay child support is governed by the tables included in the statute. The table amounts are based upon the payor spouse's income. The Guidelines provide that in certain circumstances income may be imputed to a spouse. The relevant portion of s. 19 of the Guidelines provides 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:

- (a) the spouse is intentionally under-employed or unemployed, other than when the under-employment or unemployment is required by the needs of a child of the marriage or any child under the age of majority or by the reasonable education or health needs of the spouse;

[emphasis added]

[15] The underlined portions of s. 19 are permissive. The section does not require a Court to impute income; it confers a discretion on the Court to do so in appropriate circumstances: *Primrose v. Hanlon* (2000), 3 R.F.L. (5th) 269 (B.C.S.C.).

[16] It is obvious from the wording of s. 19(1)(a), that the spouse must be intentionally under-employed or unemployed. That is particularly significant in an economy where widespread layoffs in certain industries are common and certain institutions may be under-funded. A parent who chooses to earn less than he or she is capable of earning is intentionally under-employed. A parent who chooses not to work when capable of doing so is intentionally unemployed. In *Hanson v. Hanson*, [1999] B.C.J. No. 2532 (S.C.), Madam Justice Martinson held at ¶ 10 - 13, that the word "intentionally" does not require bad faith on the part of the spouse. That is, there need not be a specific intent to evade child support obligations. Earlier cases in several jurisdictions held that the use of the word "intentionally" implied a deliberate course of conduct pursued for the purpose of undermining or avoiding a child support obligation. *Hunt v. Smolis-Hunt* (1998), 39 R.F.L. (4th) 143 (Alta. Q.B.); *Williams v. Williams*, [1997] N.W.T.J. No. 49 (S.C.); *Risen v. Risen*, [1998] O.J. No. 3184 (Gen. Div.) *Chace v. Chace*, [1998] P.E.I.J. No. 64 (T.D.). However, as Veit J. noted in *Phipps v. Phipps*, [2001] A.J. No. 1206 (Q.B.), s. 19(1)(a) of the Guidelines, read in its entirety, negates a requirement that a parent intend to evade his or her child support obligations. If such an intention were necessary, there would be no need for a specific exemption in that section for a parent who is under-employed or unemployed because of his or her reasonable health or educational needs or the needs of the child of the marriage.

[17] In *Hanson*, supra, Mr. Hanson, the payor spouse, was a fire fighter who had also worked for 20 years in the construction industry. His latter job was terminated and he argued that the termination, the stress of his marriage breakdown and the litigation led him to take stress leave from the fire department. He had determined not to supplement his income as a fire fighter with additional employment. Martinson J. held that he had the capacity to continue to earn the income he had traditionally earned. She recognized that it would take time to rebuild his business in the construction industry and imputed income to reflect that fact.

[18] The parental obligation imposed upon separated spouses by the Guidelines and the case law has as its object the sheltering of children from adverse financial effects of separation. Parents are required to act reasonably to ensure that they meet their obligations toward their children in the same manner as reasonable parents would in an intact marriage.

Reasonableness is to be assessed in light of the joint parental obligation to support the children and a legal duty is imposed upon parents to realize their full earning capacity. There are two aspects of earning capacity. The first aspect relates to the parent's qualifications: age, education, experience, skills and health. The second aspect relates to such matters as the availability of work, freedom to relocate and other obligations: *Hanson v. Hanson*, supra. The lifestyle of the family when it lived together is a relevant consideration: *Phipps v. Phipps*, supra.

- [19] Section 19 of the Guidelines enumerates a number of circumstances other than intentional unemployment or under-employment which may lead a court to impute income. They include diverting income, unreasonably deducting expenses, failing to disclose income, and receiving income from a trust. For the purposes of these reasons for judgment, only the provision relating to intentional unemployment is relevant.
- [20] Madam Justice Prowse considered s. 19(1) of the Guidelines in *Van Gool v. Van Gool* (1999), 44 R.F.L. (4th) 314 (B.C.C.A.) at pp. 320-23. She concluded:
1. The analysis appropriate when applying s. 19(1) is similar to that used before the Guidelines pursuant to the provisions of the Divorce Act, R.S.C. 1985 and the Family Relations Act, R.S.B.C. 1996.
  2. In determining the income of a spouse the courts, both before and after the Guidelines, considered not only the actual income of the spouse but the amount of income he or she could earn if working to capacity.
  3. The intention of the legislature was that "parties liable for child maintenance were not permitted to avoid their responsibilities simply by virtue of being unemployed or underemployed".
- [21] Section 26.1(2) of the Divorce Act articulates the principle that the Guidelines "shall be based on the principle that spouses have a joint financial obligation to maintain the children of the marriage in accordance with their relative abilities to contribute to the performance of that obligation."

### **Reason for not being employed or for being under-employed**

- [22] In *Van Gool*, Mr. Van Gool sought increased maintenance from Ms. Dryden, his ex-wife, for the support of their two children who were in his custody. The chambers judge increased support but refused to impute income to her. The Court of Appeal held that income should be imputed to her. Prowse J.A. noted that Ms. Dryden offered no persuasive reason for refusing to seek additional employment. The fact that she wanted to be "available" for her 13 year old son in her custody and at home during access periods for the other two children did not justify her failure to take steps to increase her employment. She did not have reasonable educational or health needs that justified her under-employment.

What level of employment is expected of a payor parent?

- [23] At ¶ 34, Prowse J.A. noted, in *Van Gool*, that a person is expected to take reasonable steps to obtain employment "commensurate with such factors as their age, state of health, education, skills and work history." Availability of work, freedom to relocate and other obligations are additional factors for consideration. A parent cannot refuse to take reasonable steps to support his or her children simply because they are unable to find interesting or highly-paid work.
- [24] Unrealistic or unproductive career aspirations do not excuse a parent from his or her child support obligations: *Rogers v. Rogers*, [1999] B.C.J. No. 2041 (S.C.). A parent may not decline "menial" employment when no other employment opportunities are available: *Schick v. Schick* (2000), 6 R.F.L. (5th) 421 (N.W.T.S.C.). The Court may impute income based on the minimum wage rate where there is a paucity of evidence but the parent is apparently in good health and has at least limited skills for which there is a job market: *Schick*, supra.
- [25] A parent may have to consider relocating in order to find employment: *Durant v. Durant*, [2001] N.S.J. No. 10 (S.C.).
- [26] The Court may stagger amounts of support over a period of time to allow the parent to realize his or her earning potential or defer the operation of the child support order so that the parent can put his or her affairs in order before making payments: *Visnjic v. Visnjic* (2000), 7 R.F.L. (5th) 195 (Ont. Sup. Ct.).

What evidence is necessary and admissible?

- [27] In *Messier v. Delage* (1983), 35 R.F.L. (2d) 337, the Supreme Court of Canada stated that Courts were to base child support on the facts of each case, not on speculation as to future events. Chouinard J., for the majority, stated at p. 352:

The decision must therefore be made on the facts of each case. The facts may change with time; that is the way of life. This is why s. 11(2) provides that an order may be varied from time to time; but in my opinion, the judge must arrive at his decision on each occasion [TRANSLATION] "having regard to the present circumstances", as Albert Mayrand J.A. of the Quebec Court of Appeal suggests in a study titled "L'obligation alimentaire entre époux séparés ou divorcés depuis le Bill 8 et la Loi fédérale sur le divorce", *Lois nouvelles II*, P.U.M., 1970, p. 41, at p. 61. The decision therefore must not be made in accordance with events which may or may not occur.

- [28] While that case predates the Guidelines, that principle continues to guide the Courts and it is particularly applicable to the issue of when income should be imputed and in what amount. Imputation of income is a judicial exercise that requires a rational basis. Income should not be imputed on the basis of suspicion where relevant evidence is lacking or arbitrary: *Ewaniw v. Ewaniw* (1998), 41 R.F.L. (4th) 94 (Alta. Q.B.). Such evidence may be given orally or by affidavit.

- [29] In *Wong v. Wong* (1990), 27 R.F.L. (3d) 215, the Ontario Court of Appeal overturned a trial judge who had imputed an income to the appellant wife of \$30,000. The Court held that there was no evidentiary basis for such an imputation.
- [30] The burden of proof is on the party seeking to impute income to the other spouse. A court must be satisfied on a balance of probabilities that the income reduction was brought on intentionally. An imputation of income must be grounded in evidence: *Rozen v. Rozen*, [2001] B.C.J. No. 1633 (S.C.). Findings of fact that turn on the credibility of one of the parties cannot be resolved by reviewing conflicting affidavits. A viva voce trial of the underlying issue may be required to provide the necessary evidence and permit the judge to make findings of credibility.
- [31] However, the burden of adducing evidence about the reasonableness of the actions of a self-employed professional must fall at least in part on that professional who has unique knowledge of the relevant facts: *A.E.M. v. G.W.M.*, [1999] B.C.J. No. 564 (S.C.).
- [32] An inference may be drawn from the failure to produce documentation or answer relevant questions on discovery and income may be imputed accordingly: (s. 19(1)(f) and s. 23 of the Guidelines).
- [33] The Courts have considered the following evidence on the issue of whether a person is intentionally unemployed or under-employed:
- educational or vocational training and work experience;
  - previous earnings and borrowings to fund periods of unemployment;
  - history of employment;
  - patterns of expenditure and the lifestyle of the payor parent; (however, the court should decline to attribute income to a payor on the basis of his or her lifestyle to the extent that lifestyle is enhanced by the independent income of his or her spouse: *Risen v. Risen*, [1998] O.J. No. 3184 (Gen. Div.);
  - attempts to upgrade educational or vocational qualifications;
  - the nature and quality of attempts to obtain employment: applications, interviews; and
  - the history of the relationship between the spouses, which may indicate that the payor spouse is motivated to remain unemployed or underemployed by animosity towards the payee spouse.
- [34] From the evidence, the Court may draw an inference that the spouse is honestly seeking appropriate employment or is intentionally unemployed or under-employed.

- [35] It has been held that a Court should not attribute income to a parent based on former employment that is no longer available: *Phillips v. Phillips* (1995), 14 R.F.L. (4th) 113 (Alta. C.A.); *Bayliss v. Bayliss*, [2000] M.J. No. 52 (Q.B.), or reasonable: *Smith v. Smith*, [1997] A.J. No. 1265 (Q.B.), or where withdrawal from previous employment was justified: *Canuel v. Canuel* (1997), 33 R.F.L. (4th) (B.C.C.A.).
- [36] The applicant spouse may utilize the normal disclosure procedures under the Rules as well as those under the Family Relations Act and the Guidelines to obtain the necessary evidence. Both direct and circumstantial evidence may be appropriate. Statistical evidence with respect to pay rates and related factors of different occupations may be admissible. In one case, the lifestyle of a self-employed husband was inconsistent with his evidence regarding his income from driving a taxi. An independent taxi driver who knew neither party was called to give evidence of the earning potential of taxi drivers in Toronto and income was imputed to the husband on that basis: *Chen v. Chen* (2000), 5 R.F.L. (5th) 288 (Ont. Sup. Ct.).
- [37] The court may grant an order for a vocational and aptitude assessment of a spouse to determine his or her income earning potential: *Minthorn v. Minthorn*, [1992] O.J. No. 1233 (Gen. Div.).

What income should the Court impute?

- [38] If the Court concludes that the payor spouse is intentionally unemployed or under-employed, it may, on proper evidence, project an income, based on an appropriate number of hours per week and weeks per year at a certain salary, and impute that income to the spouse.

What sources of income can be imputed?

- [39] The Courts have held that the following sources of income can be imputed to a payor spouse, whether or not they meet the definition of "sources of revenue" in Revenue Canada's T-1 form or "annual income" under the Guidelines:
- student loans and grants (*Razavi v. Aavani*, [1998] B.C.J. No. 1885 (S.C.) and cases cited therein);
  - U.I.C. payments;
  - social assistance;
  - a forgivable loan from the parent's employer (*Myers v. Myers* (2000), 189 N.S.R. (2d) 214 (S.C.) (loan apportioned over two taxation years)); see also *De Zen v. De Zen*, [2001] O.J. No. 3032 (Sup. Ct.) (gift received from parents to cover shortfall in income received from family corporation) or a parent or friend;
  - the income earning potential of lottery winnings; and
  - the earning potential of substantial assets.

## Unavailability of desired employment

- [40] It is settled law that where there is no available market for a parent's specialized accreditation, he or she must look at other viable options and take reasonable steps to secure employment commensurate with his or her age, health, education, skills and work history: *Kolada v. Kolada*, [1999] A.J. No. 609 (Q.B.).

## Evidence on this Application

- [41] After his employment terminated on January 31, 2002, Mr. J.P.C. applied for employment insurance benefits. The benefits of \$354 net per week commenced in late March 2002 and continued until February 2003. Mr. J.P.C. deposed that, since the employment insurance benefits ran out, he has had no other sources of income.
- [42] Since May 2000, Mr. J.P.C. has been living with Ms. N. in her home. In the material submitted on this application, he deposed that he shares household expenses of approximately \$2,000 per month and that because he cannot pay his portion (\$1,000 per month) it accumulates as a debt to Ms. N..
- [43] Mr. J.P.C. provided an extensive list of inquiries and meetings to support his contention that he has conducted a diligent search for employment. He described his work search as follows:

I believe that I have some significant and unique transferable work skills and expertise, but it will take some time for me to find work in the current market environment. I believe that my work search will be most productive, if the focus is on an in-house position in a company, the public sector organization or a not-for-profit organization or association.

Because of my specific background and areas of expertise, I believe that it will be extremely difficult for me to secure a position in private practice in a law firm. I was recently unsuccessful in securing employment with a major national law firm, Borden Ladner Gervais, for the reasons explained above.

- [44] It was not unreasonable of Mr. J.P.C. to search for employment consistent with the employment which he had previously enjoyed. However, it should have been apparent to him after a period of a few months that he was going to have to find employment outside of his former field at a reduced level of income because of the financial pressures that the continued job search at his former level would place on his family.
- [45] Mr. J.P.C. has been personally shielded from the economic consequences of his unemployment because of the assistance of Ms. N. and his ability to resort to his savings.
- [46] Mr. J.P.C.'s CIBC Aerogold Visa card statements indicate the following monthly charges for the 12 months beginning February 28, 2002:

March 2002 \$ 1,261 September \$ 2,085

April 2,074 October 2,286

May 1,494 November 2,247

June 1,678 December 3,610

July 1,775 January 2003 1,786

**August 2,168 February 1,538**

[47] Those monthly totals include a monthly charge for furniture storage of \$252. He has a cell phone and regularly purchases liquor. His later Visa statements indicate that he made regular monthly payments to the Deslisle Club of \$117 per month beginning in July of 2002. He contributed \$1,500 to his church and charities during the 12 month period commencing February 28, 2002. In addition there are expenditures of \$450 in August of 2002 and \$350 in January of 2003 to organizations to which Mr. J.P.C. made charitable donations in the past: the Toronto International Film Festival and the Canadian Film Centre.

[48] Mr. J.P.C. pays off his Visa account in full each month.

[49] During the 12 month period he accumulated 24,000 Aeroplan airline travel points.

[50] In addition to these credit card purchases he spent an unknown amount in cash and lived rent-free except for the accumulated debt to Ms. N..

[51] Mr. J.P.C.'s income for the four years 1998 to 2001 was:

1998 \$ 118,034

1999 69,659

2000 157,423

2001 161,985

[52] His charitable donations in the years 1999-2001 were:

1999 \$ 1,125

2000 2,685

2001 2,730

[53] Between the time he lost his employment and the time of the hearing of this application on May 6, 2003, Mr. J.P.C. paid \$26,750 in child and spousal support - an average of \$1,783 per month.

## Result

- [54] The object of the Guidelines is to ensure that children of separated parents do not suffer unduly because of the break-up of their parent's marriage. Separation often entails adverse economic consequences for both parents as they make their separate ways without the economic benefits of pooled resources, shared labour and the lower economic costs of a single household. In many cases, the standard of living of both the parents and the children will be lower after separation. One of the principal objects of s. 19 of the Guidelines is to ensure that an income earning spouse conducts himself or herself in an employment and income earning manner in the same way that he or she would be expected to, had the marriage remained intact. The cases are replete with examples of courts imputing income in circumstances in which an income earning spouse has conducted his or her employment affairs in a manner that was inconsistent with what would be expected of a parent in an intact marriage. On the other hand, many cases have recognized that families in intact marriages must often share the burden of temporarily reduced income if that reduction arises as a result of a reasonable employment decision that is in the best long-run economic interests of the family unit.
- [55] In view of his parental responsibilities, Mr. J.P.C.'s actions are not reasonable. He could have and should have obtained employment at some level within eight months or so of his job termination. He has exceptional skills and training. He would obviously be able to find employment in the legal profession at some level. Had he done so, it is likely that he would be earning a substantial income now. In view of his expenditure pattern and his earnings before he obtained the two years of contract employment in 2000, I assess his capacity to earn income at the present time, had he pursued a reasonable course of action, at \$100,000.
- [56] An annual income of \$100,000 will be imputed to Mr. J.P.C. for the purposes of calculating his child support obligations. Mr. J.P.C.'s obligations are to be reduced to conform with his imputed income as of May 1, 2003 or at such earlier date as counsel may have agreed.
- [57] The parties will bear their own costs.

"B.M. Preston, J."

The Honourable Mr. Justice B.M. Preston

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