CANADA / JUDGMENT

C.A.W. v. K.C.S.

2018 BCSC 551

COURT
Supreme Court of British Columbia

DECIDED
6 April 2018

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2018 BCSC 551 C.A.W. v. K.C.S. IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: C.A.W. v. K.C.S., 2018 BCSC 551 Date: 20180406 Docket: E117321 Registry: Kelowna Between: C.A.W. Claimant And K.C.S. Respondent Before: The Honourable Madam Justice Murray Reasons for Judgment Counsel for the Claimant: B.J. Hardwick Counsel for the Respondent : J.C. Fiddes Written Submissions of the Claimant: March 5 and15, 2018 Written Submissions of the Respondent: March 13, 2018 Place and Date of Judgment: Kelowna, B.C. April 6, 2018

Introduction

[1] In February 2018 I heard a summary trial between the parties dealing with a number of issues including s. 7 expenses for the parties' children. In my ruling dated February 28, 2018 and indexed at 2018 BCSC 298, I imputed to the respondent a Guideline income of $144,000 for the purpose of calculating child support and s. 7 expenses.

[2] I realised as I was writing the judgment that no submissions had been made regarding the claimant's Guideline income for setting the parties' pro rata share of s. 7 expenses and invited written submissions on the issue.

[3] Having now received written submissions from the parties, this is my ruling regarding the claimant's Guideline income. The Claimant's Income

[4] The claimant, like the respondent, is self-employed. Her income fluctuates according to the contracts her company has. Financial records provided show that the claimant's company had a significant increase in revenue in the year ending July 31, 2016. The claimant explains that that increase was due to a contract that has ended. The claimant submits that her company currently has no contracts and she is suffering financially.

[5] At trial the respondent took no issue with the claimant's evidence, including her tax returns and financial statements. In his written submissions however he now challenges the income reported by the claimant and the expenses claimed by the company.

[6] I agree with the claimant that if the respondent took issue with the reasonableness of the expenses claimed by the claimant he should have raised them long before now. Raising issues for the first time in supplemental submissions precludes the claimant from responding fully with further evidence. I note that the respondent has never claimed an issue with disclosure. The respondent never asserted at trial that the claimant was receiving unrecorded income or was living a lavish life inconsistent with her reported income. For all of the above reasons I am satisfied that the issues raised by the respondent are without merit.

[7] In reaching this decision I take note that the respondent is fully aware of the nature of the claimant's business.

Analysis

[8] The calculation of income is dealt with in the Federal Child Support Guidelines, SOR/97-175, at sections 16 through 20. The relevant sections read as follows: Calculation of annual income 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. Pattern of income 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. Non-recurring losses

(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. SOR/2000-337, s. 4. Shareholder, director or officer 18 (1) Where a spouse is a shareholder, director or officer of a corporation and the court is of the opinion that the amount of the spouse's annual income as determined under section 16 does not fairly reflect all the money available to the spouse for the payment of child support, the court may consider the situations described in section 17 and determine the spouse's annual income to include

(a) all or part of the pre-tax income of the corporation, and of any corporation that is related to that corporation, for the most recent taxation year; or

(b) an amount commensurate with the services that the spouse provides to the corporation, provided that the amount does not exceed the corporation's pre-tax income. Adjustment to corporation's pre-tax income

(2) In determining the pre-tax income of a corporation for the purposes of subsection (1), all amounts paid by the corporation as salaries, wages or management fees, or other payments or benefits, to or on behalf of persons with whom the corporation does not deal at arm's length must be added to the pre-tax income, unless the spouse establishes that the payments were reasonable in the circumstances.

[9] The claimant's income has varied quite substantially since 2014 as can be seen from her line 150 income as reported in her personal tax returns:

a) 2014: $15,340;

b) 2015: $80,240; and

c) 2016: $146,250.

[10] The claimant estimates her 2017 income will be $95,012.

[11] As stated earlier, the higher 2016 income was due to a contract that has ended. The claimant's company has no contracts at present. Taking all of the evidence into consideration I am of the opinion that a three-year average using 2015 through 2017 would result in an attribution to the claimant of an unrealistically high income and using 2014 through 2016, an unrealistically low income. I have concluded that the fairest determination of her income is her estimated income for 2017: $95,000.

[12] Applying that figure for the coming year, the respondent will pay 60% of s. 7 expenses, and the claimant 40%.

[13] That percentage shall be adjusted yearly according to the claimant's income. Life Insurance Policies

[14] I failed to address the issue of life insurance policies in my original ruling.

[15] Under para. 55 of the parties' Separation Agreement, both parties are obliged to maintain their life insurance policies and designate their children as beneficiaries.

[16] The respondent testified on examination for discovery that he has changed the beneficiaries to add his girlfriend.

[17] This is in contravention of the separation agreement. I therefore order that by April 20, 2018, the respondent must remove J.H. as a beneficiary to his life insurance policy and reinstate his four children as the only beneficiaries. If the respondent wishes to provide for J.H., he must purchase a separate life insurance policy.

Conclusion

[18] I make the following orders:

(1) The claimant's income for the purpose of calculating the pro-rata share of s. 7 expenses is $95,000;

(2) The parties shall share s. 7 expenses with the respondent being responsible for 60% and the claimant 40%;

(3) This shall be reviewed annually according to the claimant's income; and

(4) The respondent must remove J.H. as a beneficiary on his life insurance policy and reinstate his children as the sole beneficiaries. This is to be completed by April 20, 2018. Proof of the change is to be provided to the claimant through counsel within three days of the change being made. "The Honourable Madam Justice Murray"

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