

CANADA / JUDGMENT

Chandler v. Chandler

2024 BCCA 325

COURT

British Columbia Court of Appeal

DECIDED

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2024 BCCA 325 Chandler v. Chandler

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Chandler v. Chandler,

2024 BCCA 325

Date: 20240917

Docket: CA49338

Between:

Christopher John Chandler

Appellant

(Respondent)

And

Jocelyn Mary Chandler

Respondent

(Claimant)

Before:

The Honourable Madam Justice Newbury

The Honourable Madam Justice Fenlon

The Honourable Mr. Justice Butler

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

August 17, 2023 (Chandler v. Chandler, 2023 BCSC 1429,
Vancouver Docket E182305).

Counsel for the Appellant:

M. Witzman

J. Bi, Articled Student

The Respondent, appearing in person:

J.M. Chandler

Place and Date of Hearing:

Vancouver, British Columbia

June 10, 2024

Place and Date of Judgment:

Vancouver, British Columbia

September 17, 2024

Written Reasons by:

The Honourable Mr. Justice Butler

Concurred in by:

The Honourable Madam Justice Newbury

The Honourable Madam Justice Fenlon

Summary:

This appeal is part of a highly contentious family dispute. Following a review application, the judge made orders setting the income of the respondent for support purposes, retrospectively and prospectively. On appeal, the appellant argues the judge erred in applying s. 16 instead of s. 18 of the Federal Child Support Guidelines, SOR/97-175, to establish the respondent's income as the respondent operates a business through a partnership and a personal services corporation. Held: Appeal allowed in part. The judge did not err in determining the respondent's Guidelines income for 2020, 2021, or 2022. The judge was faced with incomplete financial records regarding the respondent's new business structure. The judge's decision to apply s. 16 was reasonable in the circumstances. The judge erred in determining the respondent's Guidelines income for 2023 to be based on her 2022 tax return. This effectively predetermined the choice between ss. 16 and 18 of the Guidelines. Given the early state of the respondent's business structure, there is no certainty it would be reasonable to apply s. 16 prospectively. The determination of the respondent's 2023 income and support obligations is set aside and the respondent's income for 2023 is to be determined in accordance with the Guidelines through the annual financial disclosure required

by the Trial Order.

Reasons for Judgment of the Honourable Mr. Justice Butler:

- [1] Following a review application, Justice Baker made orders setting the incomes of the appellant, Dr. Christopher Chandler, and the respondent, Jocelyn Chandler, for support purposes, retrospectively and prospectively, from July 2020 to June 2024. Having fixed their incomes, the judge ordered amounts payable by both parties for child support and by Dr. Chandler for spousal support (the "Order"). Dr. Chandler appeals, arguing that the judge erred in applying s. 16 of the Federal Child Support Guidelines, SOR/97-175 [Guidelines], to establish Ms. Chandler's income. As Ms. Chandler operates a physiotherapy business through a partnership and a personal services corporation, Dr. Chandler argues that the judge should have determined her income by applying s. 18 of the Guidelines. He also submits that the judge erred in predetermining Ms. Chandler's income for 2023 onward, when that should be determined based on her earnings established through the annual financial disclosure required by an earlier trial order.
- [2] This appeal is part of a highly contentious family dispute driven by conflict over parenting. Both parties find themselves in precarious financial positions because of the legal expenses they have incurred litigating many issues, including those that appear to be relatively non-contentious. The question on appeal is one such issue. Unfortunately, the determination of Ms. Chandler's income was somewhat premature at the time of the application as she had recently set up a new business structure and the information available at the time of the hearing was incomplete. In the circumstances, the judge cannot be faulted for relying on the evidence before her in fixing Ms. Chandler's income for 2020, 2021, and 2022 by applying s. 16 of the Guidelines. I would not disturb those provisions of the Order. However, I agree that given the change in Ms. Chandler's business structure, the judge erred in making an order predetermining her prospective income from 2023 onward, and would allow the appeal to that limited extent.

Background

- [3] The parties were married in 2002, and separated in 2017. They have two children: one born in 2004; and a second born in 2008. The litigation that has ensued includes a six-day summary trial of parenting issues before Justice Macintosh in 2018, and a three-day application to vary that order in 2019, reasons indexed at 2018 BCSC 1359 and 2019 BCSC 1408, respectively. In September 2019, the parties conducted a ten-day trial before Justice Baker to deal with property division and support issues, reasons indexed at 2020 BCSC 500 (the "Trial Reasons"). I need not set out the family history in any detail as it is described in the Trial Reasons, and the parenting difficulties are described in the reasons of Justice Macintosh. To complete the chronology, in November 2023, Justice Iyer, as she then was, issued reasons dealing with a parenting dispute concerning the younger daughter, unpublished reasons indexed at 2023 BCSC 2035.

- [4] Following the marriage, the parties resided in Île-à-la-Crosse in Northern Saskatchewan until 2011, when they moved to Smithers, British Columbia. In 2016, they moved to Hazelton, British Columbia, after taking a year away from work for a trip with their daughters. Ms. Chandler is a physiotherapist. She worked in that profession throughout the marriage and has continued to do so after separation. In July 2018, Dr. Chandler's application to relocate with the children to Victoria, British Columbia was granted. Ms. Chandler also moved to Victoria to enable her to continue exercising parenting time.
- [5] By the time of trial in 2019, Ms. Chandler was earning income through different sources and building a business that provided physiotherapy and occupational therapy services in Northern British Columbia. Dr. Chandler argued that income should be imputed to her as if she was employed at a private clinic. The judge rejected that argument and concluded that Ms. Chandler was not under-employed. The judge explained in the Trial Reasons:
- [51] She is a partner in Northern Therapy Services ("NTS"), and she provides most of her services through NTS. NTS operates in Victoria, where Ms. Chandler is primarily located, and in Northern British Columbia. Ms. Chandler supervises workers, performs services herself, business develops, and manages NTS. Her work is performed in Victoria and the North. During the weeks Claire lives with her father, Ms. Chandler often travels to the northern communities.
- [52] Ms. Chandler also has a sole proprietorship called Jocelyn Chandler Physical Therapy through which she provides some physiotherapy, although she is in the process of moving all her contracts to NTS. In addition, Ms. Chandler is an employee of Victoria Cool Aid Society ("Cool Aid"), where she works one day per week.
- [59] I am satisfied that Ms. Chandler is engaged in a reasonable practice, given her education and training. She is developing NTS as a larger northern therapy provider, which will allow her to profit from the work of employees and subcontractors in a number of locations. She can receive income from NTS in addition to her personal physiotherapy billings. Her income in 2018 and projected income in 2019 exceeds the income she could receive as an employee or contractor at a private clinic. I am satisfied that no adjustment to Ms. Chandler's yearly income is warranted.
- [60] Ms. Chandler has worked hard to build her business and has increased her income substantially from the years the parties were together. I am satisfied that Ms. Chandler's tax returns accurately set out her income for the years 2015 to 2018.
- [6] After making deductions for dividends received from Dr. Chandler, the judge established Ms. Chandler's income for the years 2017-2019 to be:
- a) 2017: \$68,000;
 - b) 2018: \$87,000; and
 - c) 2019: \$116,000.

- [7] The order (the "Trial Order") contains the following terms that are relevant to the review application:

Review of Child Support

2. By May 30th of each year, each party shall provide the other with their tax return, notice of assessment, and any other information reasonably required to determine any required adjustments to child support.
3. If the parties cannot agree on any adjustments required, either party may seek a review of their respective child support obligations to ensure they are in accordance with the Federal Child Support Guidelines, such review to be brought by July 1st of each year.

Prospective Spousal Support

11. The Respondent shall pay to the Claimant for her support the sum of \$2,500.00 per month on the 1st of each month Commencing October 1, 2019 for a period of 15 years beginning January 2018.
12. Either party may initiate a review of the quantum and/or duration of spousal support on or after July 1, 2022.
- [8] In December 2022, Ms. Chandler brought the application that led to the Order. She applied for a review of the respective incomes of the parties and to determine the means of the parties and their eldest daughter to contribute to that daughter's university expenses. She also sought an order that there be no further review of prospective spousal support before October 2027. Dr. Chandler opposed her application and brought his own application for orders: fixing the parties' respective incomes; reducing his child and spousal support obligations retroactively and prospectively; and setting the amount of the parties' contributions for s. 7 expenses, including university expenses.

The Guidelines

- [9] Section 15(1) of the Guidelines provides that a spouse's annual income for support purposes is determined in accordance with ss. 16 to 20. Section 16 is the starting position:
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
- [10] Pursuant to s. 17, if a court is of the opinion that the application of s. 16 does not result in the fairest determination of income, the court may consider patterns of income and non-recurring capital or business investment losses in determining an annual income amount that is fair and reasonable. Pursuant to s. 19, a court may impute such amount of income to a spouse that it considers appropriate in circumstances including those set out in subsections (a) to (i).

[11] Section 18(1) provides:

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.

[12] The objectives of the Guidelines as set out in s. 1 include establishing a fair standard of support for children from the financial means of both spouses and ensuring consistent treatment of spouses and children who are in similar circumstances. The ability to impute income to spouses who earn income through corporations or unincorporated businesses through the application of ss. 17-19 allows courts to treat payors, who have the ability to reduce their income tax liability through the use of corporate structures and payment of dividends, similarly to those who earn employment income taxed at the source.

Reasons for Judgment

[13] Following a two-day hearing at which Dr. Chandler was self-represented, the judge issued reasons indexed at 2023 BCSC 1429 (the "Reasons"). She made orders fixing the parties' incomes for four years and set the amounts payable for child and spousal support based on those incomes. She ordered that the parties must contribute to the eldest daughter's university tuition costs, net of any financial awards and RESP contributions, in proportion to their incomes. The judge also ordered that Dr. Chandler was required to continue making spousal support payments to Ms. Chandler at the low end of the spousal support advisory guidelines range until June 2027, after which either party could bring an application to review the duration of support.

[14] Dr. Chandler does not appeal the terms of the Order fixing his income, setting the s. 7 expense contributions, or for continuation of spousal support. He challenges only the determination of Ms. Chandler's income and the support payments that are based on that finding. My summary of the Reasons is limited to those issues.

[15] The judge started the review of Ms. Chandler's income by noting that, at the time of trial in 2019, the business she was building was at an early stage of development. The judge noted the "considerable uncertainty" that existed regarding Ms. Chandler's ability to increase or even maintain her 2019 level of income going forward. She explained that this uncertainty formed the primary basis for her decision to permit a review of spousal support as of July 1, 2022, with respect to quantum or duration: Reasons at para. 12. The judge described the

changes in the business since her 2020 Trial Reasons:

- [13] Since the date of trial, Ms. Chandler has continued to develop her business. However, she argues that her expenses are considerable and growing as she obtains additional education and training to support her business. As a result, her actual income has decreased. Dr. Chandler disputes Ms. Chandler's attribution of personal income from her business, argues she does not need any further education or training, and seeks to impute additional income to her.
- [14] Ms. Chandler has rapidly grown her business, increasing her staff from two in 2018 to 40 in 2022. Ms. Chandler states that her expenses have increased to the point that they exceed her monthly income.
- [15] In August 2022 Ms. Chandler began a masters in business administration, which will complete in August 2025. This program has a total tuition cost of \$52,000. Ms. Chandler spends approximately 30 hours/week on her classes and course work. She says she is taking this program to allow her to effectively manage her growing business. In addition, it would allow her to obtain certified health executive training and, ultimately, become a CEO of a health region or administrator of a hospital. She states that this advanced training is crucial to her long-term success and growth of her career. Ms. Chandler submits that her additional schooling will help her increase her income and support her children as they embark on their own post-secondary education journeys, which are likely to include multiple degrees.
- [16] Dr. Chandler's arguments regarding the determination of Ms. Chandler's 2020 income were rejected by the judge:
- He argued that Ms. Chandler should maximize her income for child support by postponing her own education until the children have completed university. The judge found that Ms. Chandler's decision to pursue her degree was responsible in light of her growing business.
 - He argued that Ms. Chandler did not provide adequate details of the expenses deducted from her business income in 2020, such that the judge should infer that they were improper and should be brought into income. The judge found there was no evidence to support Dr. Chandler's bald assertion that the expenses did not relate to the business. She also found Ms. Chandler to be credible and that there was nothing in the material to suggest the expenses were not properly reflected in her tax returns.
- [17] The judge determined Ms. Chandler's Guidelines income for 2020 to be \$104,367.23: Reasons at para. 23. This was a combination of professional, business, and employment income, plus a small amount of rental income. The judge then noted the change made to Ms. Chandler's business structure:

- [24] In November 2020, Ms. Chandler and her partner incorporated holding companies to receive their income from the partnership known as Northern Therapy Services ("NTS"), which began operating in 2017. NTS pays Jocelyn Chandler Physical Therapist Corp. ("JCPT") for therapy services supplied by Ms. Chandler. For the 2021 tax year, Ms. Chandler no longer reported professional and business income from the NTS partnership. Rather, she reported employment income from JCPT.
- [18] Dr. Chandler argued that Ms. Chandler's 2021 reported income from her tax return--based on employment and rental income--was inaccurate. He argued that the assets shown in the financial statements for Jocelyn Chandler Physical Therapist Corp. ("JCPT") should be included in income. The judge rejected that argument as there was no evidence suggesting the value of the assets was income available for Ms. Chandler's personal use.
- [19] Dr. Chandler also disputed many of the business expenses reflected on the financial statements of Northern Therapy Services ("NTS") and JCPT for 2021. The judge rejected his argument noting that it was based on speculation. She observed that Ms. Chandler was not the sole partner in NTS and she was not satisfied that any of the expenses for the partnership, a business that employed about 40 therapists, could properly be characterized as Ms. Chandler's personal expenses. The judge rejected Dr. Chandler's argument that monies received by Ms. Chandler in 2021, further to the Trial Order for the division of assets, should be included in her income in that year. The judge also declined to impute income to Ms. Chandler on the basis that she was underemployed having taken too many holidays. The judge determined Ms. Chandler's Guidelines income for 2021 to be \$98,765.26: Reasons at para. 30.
- [20] Ms. Chandler gave an estimate of her 2022 income based on income information that was available up to November 2022. The judge accepted that estimate and determined Ms. Chandler's Guidelines income for 2022 to be \$95,000: Reasons at para. 31. The judge concluded:
- [32] Ms. Chandler's income is now received as employment income, and her guideline income for support purposes will be based on her prior year's income tax return, beginning with her tax return filed for 2023.

On Appeal

Position of Dr. Chandler

- [21] Dr. Chandler advances four grounds of appeal. His principle argument is that the judge erred by failing to apply s. 18 of the Guidelines to determine Ms. Chandler's income, and by failing to include the pre-tax corporate income of JCPT in Ms. Chandler's income in the years after its incorporation--2021 and 2022. Referring to *Quinton v. Kehler*, 2020 BCCA 254, he says it is well-settled that in the case of a personal services corporation, the pre-tax income of the corporation is presumed to be available for support purposes. He also submits that the judge erred by failing to include the pre-tax earnings of NTS in Ms.

Chandler's income. He argues that the standard of review applicable to this error is correctness.

- [22] Second, he submits that the judge erred in law in ordering that Ms. Chandler's income beginning in 2023 would be based on her prior year's income tax return. He argues that her income should be determined each year based on s. 18 of the Guidelines, and with reference to all sources of income, including NTS.
- [23] Dr. Chandler also argues that the judge committed a palpable and overriding error of fact in implicitly finding that Ms. Chandler had complied with statutory disclosure requirements set out in the Guidelines, despite the lack of evidence of income received from NTS for the first eight months of 2021.
- [24] Finally, he contends that the judge erred in law in failing to use the most recent income information available to determine Ms. Chandler's Guidelines income. He submits that the effect of this error is that the 2022 income attributed to Ms. Chandler is too low.

Position of Ms. Chandler

- [25] Ms. Chandler notes that appeal courts apply a highly deferential standard of review to all family matters. She argues that the deferential standard is applicable to all four grounds of appeal, including the judge's decision to use s. 16 of the Guidelines, rather than s. 18. The evidence before the judge was limited because JCPT had been in existence for a short period of time and the accounting information was incomplete. Based on these evidentiary limitations, Ms. Chandler submits that the judge did not err in determining her income in accordance with s. 16, or by accepting Ms. Chandler's evidence regarding her income available for support purposes in 2021 and 2022.
- [26] Ms. Chandler also submits that the judge did not have the opportunity to consider the argument now made on appeal because Dr. Chandler made only a passing reference to s. 18 of the Guidelines and did not refer to Quinton at all. In any event, she submits that his argument is misconceived because he ignores the first step that must be considered in determining income: whether the use of s. 16 of the Guidelines, rather than imputation of income using ss. 17-19 of the Guidelines, is the fairest reflection of all the money available to the spouse for the payment of support. In addition, she says that although the Guidelines allow a court to include all of the pre-tax income of a corporation in determining a spouse's annual income, they do not require it.
- [27] Ms. Chandler also opposes Dr. Chandler's contention that the judge erred in failing to consider s. 18 when examining the revenue generated by NTS.

- [28] In response to Dr. Chandler's submission that the judge failed to use the most current income information available, Ms. Chandler submits that the judge appropriately made the best determination of income based on the evidence available. She explains that while she was not in a position to provide up to date financial information for JCPT, she provided an adequate explanation for the status of her financial disclosure such that there was no basis on which income should have been imputed.

Standard of Review

- [29] The standard of review in family law matters generally, and with regard to support orders specifically, is highly deferential. An appellate court should not intervene unless it finds a material error, a serious misapprehension of the evidence, or an error of law: *Hickey v. Hickey*, [1999] 2 S.C.R. 518, 1999 CanLII 691 (SCC) at paras. 10-12; *Jean Louis v. Jean Louis*, 2020 BCCA 220 at para. 24.
- [30] As explained by Justice Griffin in *Zilic v. Zilic*, 2021 BCCA 107, at paras. 29-36, there are many reasons for the deferential standard of review in family law. Not only does a trial judge have the benefit of hearing the parties directly, family proceedings engage multiple issues that require the application of legal principles to the particular facts of the case. A judge "ought not to compartmentalize each issue or the evidence in a mechanical fashion" and must recognize that the conclusions reached on the various issues are intertwined: *Zilic* at para. 34. As noted in *Jean Louis*, although with respect to property division, at para. 25, the deferential standard applies because discretionary decisions are central to the task a judge has to perform in resolving family disputes.
- [31] I would reject Dr. Chandler's submission that the judge's decision to use s. 16 of the Guidelines to establish Ms. Chandler's income for support purposes is reviewable on a standard of correctness, unlike other child and spousal support issues. The question involves the application of principles of law to findings of fact and is discretionary at its core. This is evident from the statutory language. The starting point for determining income is "the sources of income set out under the heading 'Total income' in the T1 General form issued by the Canada Revenue Agency" as set out in s. 16 of the Guidelines. Sections 17 and 18 of the Guidelines ask "if the court is of the opinion" that determining income pursuant to s. 16 "would not be the fairest determination" or "does not fairly reflect" all the money available to a spouse for payment of support. And, s. 19 provides that a court "may impute such amount of income to a spouse as it considers appropriate". The application of the Guidelines to determine a spouse's income requires the court to exercise its discretion after finding the relevant facts. In short, a judge's conclusion that the application of s. 16 (or of ss. 17-19) results in a fair reflection of all of the money available for the payment of support is to be reviewed deferentially.
- [32] Accordingly, all four grounds of appeal involve the judge's exercise of discretion in making support orders, and are subject to the deferential standard of review.

Analysis

Alleged failure to use s. 18 of the Guidelines

- [33] As I have indicated, Dr. Chandler submits, as a matter of law, that where a spouse receives income through a professional services corporation, their income should be determined by reference to s. 18(1)(a) of the Guidelines. He argues that this principle was established in Quinton. I have already indicated that the standard of review for the judge's decision to apply s. 16 is deferential, but a closer analysis of Quinton and Kowalewich v. Kowalewich, 2001 BCCA 450, demonstrates that the question of whether to utilize ss. 16, 18(1)(a), or 18(1)(b) is more nuanced than his argument would suggest.
- [34] Kowalewich was one of the first decisions of this Court to consider ss. 16-20 of the Guidelines. The appellant operated a small retail business as one unit through two companies. While the appellant was paid employment income through the companies, he did not argue that his income for support purposes should be determined by applying s. 16 of the Guidelines. The issue before the Court was which of the two subsections of s. 18 should be used to fairly reflect the amount of money available to him for support purposes:
- [46] It is common ground that Total income on Mr. Kowalewich's 1997 T1 General form did not fairly reflect the amount of money available to him for the payment of child support in 1998. So the first issue for this Court is whether the trial judge erred in selecting s. 18(1)(a) rather than s. 18(1)(b) after forming that opinion.
- [35] The Court found that s. 18(1)(a)--the corporate income method--was the fairest way of determining the money available for support purposes in light of the corporate structure of Mr. Kowalewich's business. The Court also considered whether the trial judge erred in her determination of the pre-tax income of the two companies, and whether the "trial judge's decision to include 6/7 of the pre-tax corporate income in Mr. Kowalewich's annual income was an error in principle": Kowalewich at para. 53. Justice Huddart then noted:
- [54] The Guidelines allow a court to include all of the pre-tax income of a corporation for the most recent taxation year in a spouse's annual income for Guideline purposes. They do not require it. I am not persuaded they make the inclusion of all pre-tax income the default position.
- [36] The Court allowed the appeal because the amount of the pre-tax corporate income that the judge included in Mr. Kowalewich's income was "significantly too large". The conclusion was reached by using the figures accepted by the trial judge and by performing the analysis mandated by s. 18: Kowalewich at para. 62.
- [37] In Quinton, the appellant argued that the chambers judge erred in using a s. 16 analysis (based on "total income" at line 150 of the respondent's T1 General form) in determining the income of the respondent, a lawyer who was the sole shareholder and director of his professional law corporation through which he received income and dividends. The Court

allowed the appeal, finding that a s. 18 analysis was more appropriate in the circumstances. Justice Willcock described the sole question before the Court as one of principle: "whether corporate income tax and actual cash flows are to be considered in determining whether a s. 18 analysis is more appropriate than a s. 16 analysis": Quinton at para. 74.

- [38] The parties in Quinton had earlier appeared before Justice Pearlman who had applied s. 16 to determine the respondent's Guidelines income (unreported). In chambers, the judge preferred the opinion of the respondent's expert who had calculated his income on "the same basis" as in the decision of Justice Pearlman--"by simply adjusting the dividend income to reflect the actual cash dividends received, rather than the taxable amount that is included in line 150 income": Quinton at para. 19. The expert had opined that the s. 16 analysis fairly reflected all money available for support because the corporation did not have excess money at the end of any year, and the money required to pay income tax was not available for support purposes.
- [39] In Quinton, the Court reviewed the development of the law concerning s. 18, beginning with *Baum v. Baum* (1999), 182 D.L.R. (4th) 715, 1999 CanLII 5387 (B.C.S.C.), where Justice Martinson observed that s. 18 allows a court to lift the corporate veil and impute income where it is earned through a corporation.
- [40] The Court next quoted extensively from Kowalewich:
- [81] After approving the passage I have cited from the judgment in *Baum v. Baum*, Huddart J.A. addressed the choice of method for assessing Guidelines income--the choice between s. 16 and s. 18 assessments--as follows:
- [47] The Guidelines give no explicit guidance as to how a parent or a court might go about choosing whether to use the corporate income method or the personal services method in determining annual income. However, s. 18 suggests two considerations in the preconditions for its application: (1) which method produces an annual income that more fairly reflects "all the money available to the spouse for the payment of child support;" and (2) which method does the nature of the spouse's relationship with the corporation support. Section 18 also permits reference to the "situations described in s. 17," and thus to the spouse's income pattern over the previous three years.
- [Emphasis added.]
- [41] I note that this Court's suggestion in para. 81 that the passages at paras. 47-49 of Kowalewich address "the choice between s. 16 and 18 assessments" appears to be a misstatement. It is evident from those paragraphs that Justice Huddart was addressing, as stated in para. 47, the choice between s. 18(1)(a) of the Guidelines, the corporate income method ("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"), and s. 18(1)(b) of the Guidelines, the personal services method ("an amount commensurate with the services that the spouse provides to the corporation"), not the choice between s. 16 and s. 18. As I have indicated

above, there was no issue as to whether s. 16 should be applied because it was "common ground" that Mr. Kowalewich's total income, as reported on his T1 General form, did not fairly reflect the money available to him for the payment of support.

- [42] That misstatement does not, in my view, have any impact on the conclusions drawn in Quinton. The Court repeated the passage at para. 54 in Kowalewich, set out above, concluding that the Guidelines allow a court to include in a payor's Guidelines income all of the pre-tax income of a corporation, but they do not require it or make it the default position. The Court also repeated the passage at para. 59 in Kowalewich, reminding that an appeal court should not tinker with a trial judge's exercise of discretion or second guess a corporation's business decisions.
- [43] The Court in Quinton also quoted at length from Hausmann v. Klukas, 2009 BCCA 32, where Justice Kirkpatrick for the Court, noted the "emerging presumption" that pre-tax corporate income will be assumed to be available to a payor, subject to the payor providing clear evidence to the contrary: at para. 51. The Court concluded:
- [85] From these cases, I extract the following principles applicable to this case. First, the Guidelines should be interpreted in light of their stated objectives, including the ability to calculate child support in an objective manner that ensures consistent treatment of spouses and children who are in similar circumstances. Second, under a s. 18 approach, the corporate income method is likely to be the fairer method of determining income of an individual who wholly controls a corporation. This method allows a court to include all income available for child support an intact family would utilize. Third, where that approach is appropriate, pre-tax corporate earnings, not retained earnings or earnings after payment of taxes, are the starting point for an assessment of Guidelines income. Fourth, where a company is wholly owned by the payor, the onus is on the payor to provide evidence that his pre-tax corporate earnings are not available to him.
- [44] The Court applied those principles and concluded that the chambers judge had erred in importing a cash flow analysis into the calculations described by the Guidelines and by accepting that tax payable by the payor's personal law corporation was not money available for support purposes. In arriving at that conclusion, the Court stated:
- [88] It is fair to say that the growing discrepancy between the pre-tax corporate income of the personal law corporation and the taxpayer's line 150 income called for careful consideration by the chambers judge of the use of the former as a measure of Guidelines income.
- [90] It is clear that the drafters of the Guidelines considered all of the payor's line 150 income, used as a reference in most cases for the setting of Guidelines income, to be money available to the spouse for the payment of child support. To use the phrase employed by Huddart J.A. in Kowalewich, it is "a measuring rod for the purpose of fixing annual income and thus the amount of child support" (at para. 41, emphasis added). The choice between s. 16 and s. 18 analyses is a choice of measuring rods where the objective is to select the most accurate measure of the payor's pre-tax income. It is not a search for available cash. To again

use the words of Huddart J.A., the result of the exercise is not to "strip a spouse of their available money" (at para. 41).

[Emphasis added.]

- [45] In view of the issues that arise in the present appeal, and considering the decisions in Kowalewich, Hausmann, and Quinton, I would add the following--the nuance--to the principles set out in Quinton. The fact that a payor receives income through a corporation that they control does not, by itself, mean that the payor's Guidelines income is to be determined through the application of s. 18(1)(a), let alone that all of the pre-tax income of the corporation should be considered income available for support purposes. A court must first decide whether application of s. 16 (the use of line 150 of the T1 General form) "would not be the fairest determination" of their income and whether it "fairly reflects all the money available" for the payment of support. As I have indicated, choosing the "measuring rod" which gives the most accurate measure of a payor's income is an exercise of discretion.
- [46] In this case, when I examine the judge's reasons in context, it is evident she decided that the application of s. 16 produced the fairest determination of Ms. Chandler's professional and business income, and that it fairly reflected all the money available to her for support.
- [47] Dr. Chandler argues that the judge's reasons do not discuss the possible application of s. 18, let alone the reason for using s. 16 to determine Ms. Chandler's income. Accordingly, he submits that it is not possible to know the basis upon which the judge exercised her discretion, or whether she did so based on the application of relevant factors.
- [48] I would not accept this argument. Reasons must be read as a whole and considered in context having regard to the evidence presented and the arguments made in the lower court. Dr. Chandler's argument in the court below had a different focus from his argument on appeal. His notice of application referred to s. 18 of the Guidelines, and he made a single reference to it in his oral submissions, suggesting that the draws received by Ms. Chandler from JCPT in 2021 should be the "bare minimum" for Guidelines purposes. However, Dr. Chandler's argument focused on a s. 19 issue: whether expenses noted on the JCPT revenue statement and in the NTS financial statements should be added back into Ms. Chandler's income. He referred to a number of authorities supporting that position. He also made misguided arguments suggesting that assets listed in JCPT's financial statement should be added to her income, and that the funds she received from him for her interest in his professional corporation should be considered income. The judge's reasons at paras. 25-28 respond to his focused arguments.
- [49] Moreover, the evidentiary record made a s. 18 analysis difficult, if not impossible. The change made by Ms. Chandler to her business structure meant that starting in 2021, she no longer received draws--partnership distributions--personally from NTS. Ms. Chandler (and her partner in NTS) received partnership distributions to their personal corporations. At the time of the hearing in early February 2023, the financial records of JCPT for 2021 covered only nine months (as the corporation's financial year end was September) and had yet to be

completed for 2022. In response to requests by Dr. Chandler for additional disclosure when he was having difficulty assessing how the change in business structure impacted Ms. Chandler's income, her counsel forwarded an explanatory email from Ms. Chandler's accountant regarding information for the NTS partnership:

There seems to be confusion around how this partnership works and how the income flows. There are not three years worth of past financial statements to provide anyone with. The income from the partnership flowed to the scheduled 2125 of the personal tax returns of both partners over the past couple years. In 2021 this changed since the partners are now incorporated businesses, and the income for the partnership now flows into [JCPT] starting in 2021. The partnership has a year end of December, and the Corporation has a year end of September, therefore the only income from the partnership that was reported in 2021, is the actual draws that [Ms. Chandler] took from the partnership. In 2022 the 2021 income from the partnership will be reported, and the partnership year end will be changed to match the corporate year ends of the partners. Therefore if you have the personal tax returns for the past 3 years along with the financial statements, then you have the information as requested.

[50] Ms. Chandler produced extensive financial documentation including all of her tax returns and the corporate tax return for JCPT for its year ended, August 31, 2021. The financial statements and tax returns for JCPT's year ended August 31, 2022 were not produced, presumably because they were not due to be filed until the end of February 2023 (six months after the year end). However, Ms. Chandler did provide payroll records for JCPT for June to October 2022, prepared by her bookkeeper. The information for NTS was also incomplete. In response to Dr. Chandler's continuing requests for disclosure, an income statement for NTS for the year ending August 31, 2022 (its new year end), was produced shortly before the hearing. It indicated gross profit for the partnership as \$1,190,841.54, total expenses as \$1,111,797.05, and "change to retained earnings" as \$79,044.49. This statement did not serve to clarify matters as it does not indicate what the distributions were to the two partners and provides no explanation for the term "retained earnings".

[51] A s. 18 analysis was impractical at the time of the hearing as JCPT had been in existence less than two years and the financial statements were as yet incomplete for 2021 and 2022. Dr. Chandler's arguments in the court below suggested that some portion of NTS's revenue or "retained earnings" should be included in Ms. Chandler's Guidelines income. However, as I discuss below, that submission is without legal merit. He also argues that the judge should impute additional income to Ms. Chandler based on JCPT's incomplete records. In order to do so, the judge would have had to conclude that the total income reported in Ms. Chandler's T1 General form did not fairly represent her income available for support purposes. In light of the evidence before the court, the judge's decision not to give effect to that argument was both reasonable and understandable.

[52] First, the judge was entitled to accept Ms. Chandler's evidence, as explained by her accountant, that all of the distributions from the NTS partnership from 2021 onwards were received by JCPT as corporate income. Indeed, there was no contrary evidence and no

reason to reject that straightforward proposition. Dr. Chandler's arguments were based on his belief that Ms. Chandler still had additional sources of income available to her because she had previously received business and professional income through NTS, and employment income from other sources. Having accepted that all distributions from NTS went to JCPT, there was no need for the judge to analyze NTS's earnings or revenue except to consider whether Ms. Chandler had claimed personal expenses through the partnership which could be added back into her income. The judge considered and rejected that argument: Reasons at para. 27.

- [53] Dr. Chandler's argument that the judge should or could have applied s. 18 of the Guidelines to NTS's revenue or retained earnings is without merit. Unlike corporations, partnerships in Canada do not generally file tax returns or pay income tax because income is distributed to the partners who are obliged to pay income tax. In addition, and for the same reason, s. 18 of the Guidelines does not apply where spouses have an interest in a partnership, but only "where a spouse is a shareholder, director or officer of a corporation".
- [54] The judge was also entitled to accept Ms. Chandler's evidence that the income available to her from JCPT had not increased. Ms. Chandler provided explanations for the status of her business indicating that her income had decreased in part because she was pursuing additional education and training, and the expenses were considerable and growing.
- [55] The circumstances in this case are in sharp contrast with those in Quinton. Ms. Chandler did not, unlike the respondent payor in Quinton, receive income from her corporation by way of dividends. She received only employment income, and produced her T4s. Further, there was no history, let alone an established history, of a discrepancy between pre-tax corporate income and Ms. Chandler's line 150 income. It was not possible to determine any such discrepancy given the early stage of the new business structure. In this case, the judge was faced with draft and incomplete financial records regarding Ms. Chandler's new business structure, found her evidence to be credible, and accepted it. The judge's decision to apply s. 16 was reasonable in the circumstances.
- [56] In summary, I would not accede to Dr. Chandler's argument that the judge erred in failing to apply s. 18 to determine Ms. Chandler's Guidelines income. He has not identified an error in principle or any palpable and overriding error in fact. The judge's discretionary decision to apply s. 16 of the Guidelines is entitled to deference.

Ordering Ms. Chandler's 2023 income to be based on her 2022 tax return

- [57] The application was heard in February 2023, and Ms. Chandler did not have information available regarding her income for that year. Moreover, the judge established Ms. Chandler's 2022 Guidelines income based on unfinished information from JCPT. In spite of that, the judge ordered that Ms. Chandler's Guidelines income for 2023 would be based on the income shown in her prior year's tax return. The judge also stated that her income in subsequent years "will be based on her prior year's income tax return, beginning with her tax return

filed for 2023": Reasons at para. 32. I note that the statement that Ms. Chandler's income in subsequent years would also be determined based on the prior year's tax return is not contained in the Order. The effect of the Order is that Ms. Chandler's income in 2023 was determined through application of s. 16 of the Guidelines. If the statement at para. 32 were to be applied for subsequent years, it would have the same effect. Dr. Chandler argues that the judge erred in law in predetermining Ms. Chandler's prospective income in this way. I agree, although I regard the error as one of principle.

- [58] Pursuant to the Trial Order, the parties were required to produce all relevant financial information from the prior year by May 30 each year for the purpose of determining their Guidelines income to be used as the basis for establishing support payments. Such a term is included in court orders and separation agreements as it facilitates the exchange of financial information and enables parties to readily establish the amount of support payments. In most situations, an order that the income of a payor spouse be set based on the prior year's tax return will be appropriate. This is because most payor spouse's income is to be determined from line 150 of their T1 General form, and in most cases, the fluctuation in income from year to year is not substantial.
- [59] However, the situation here was much different. Ms. Chandler's new business structure meant that a s. 18 approach to determining her Guidelines income would need to be considered in subsequent years. The parties or, if they could not agree, the court, would have to determine which "measuring rod"--s. 16 or s. 18--should be applied to give the most accurate measure of Ms. Chandler's income for support purposes. In providing that her future Guidelines income would be fixed based on her income as established in her prior year's tax return (her line 150 income), the Order effectively predetermined the choice between ss. 16 and 18.
- [60] The term of the Order, and the statement at para. 32 of the Reasons, assume that the determination of income by application of s. 16 would continue to fairly reflect all of the money available to Ms. Chandler for support in the future. That assumption ignores the rationale behind the application of s. 18. As noted in *Baum*, the "corporate veil" is lifted because a controlling shareholder has the ability to control the income of the corporation and its distribution in a tax effective manner. It is entirely possible that the circumstances found to exist in *Quinton*--a discrepancy between JCPT's pre-tax corporate income and Ms. Chandler's line 150 income--may be evident once the JCPT financial statements and tax returns for subsequent years become available. Recognizing that situation, the judge should not have arrived at a conclusion that fixed how Ms. Chandler's prospective income would be determined. While it was reasonable for the judge to exercise her discretion to apply s. 16 to determine Ms. Chandler's income based on the information before her for 2021 and 2022, there is no certainty it would be reasonable to do so for 2023 onwards.

[61] Accordingly, I would set aside the term of the Order providing that Ms. Chandler's 2023 Guidelines income will be based on her prior year's tax return. Her income for 2023 is to be determined in accordance with the Guidelines, based on the financial information produced pursuant to the terms of the Trial Order.

Alleged failure to use the most current information and to find that Ms. Chandler breached her disclosure obligations

[62] Dr. Chandler's third and fourth grounds of appeal are related. He contends that the judge:

- erred in law in failing to use the most recent income information available when determining the respondent's Guidelines income; and
- committed a palpable and overriding error of fact in implicitly finding the respondent had complied with statutory disclosure requirements in the absence of evidence of income received from NTS for the first eight months of 2021.

[63] The standard of review applicable to both alleged errors is highly deferential. Both challenge the basis on which the judge determined Ms. Chandler's income for support purposes. As stated above, support orders specifically attract greater deference on review: *Hinz v. Davey*, 2022 BCCA 232 at para. 33. The choice of evidence on which to rely is a key step in a judge's fact-finding exercise. To intervene, the appellant has to demonstrate palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33 at para. 10. Similarly, a trial judge's acceptance that a party's document disclosure was adequate to satisfy the requirements of the Supreme Court Family Rules, B.C. Reg. 169/2009 is entitled to considerable deference: *Motyka v. Motyka*, 2001 BCCA 18 at para. 11.

[64] Relying on *Bell v. Bell*, 2009 BCCA 280, at para. 7, Dr. Chandler submits that the court is required, as a matter of law, to determine Guidelines income of a payor spouse at the time of the application based on the most current information available. Referring to the payroll records from JCPT that were attached to Ms. Chandler's November 10, 2022 Form F8, he contends the judge should have concluded that her pre-tax monthly income, at least for the period from June to October 2022, was \$11,300. Extrapolating that over the full year would produce an annual income of \$135,600, in addition to the rental income. He argues that the documentation he refers to is the most current information available.

[65] In response, Ms. Chandler says there is no legal principle requiring a judge to rely on the "most current information" available. In any event, she says the judge did rely on current information: Ms. Chandler's sworn Form F8 (which attached the documents referred to by Dr. Chandler) in which she indicated that her income for the year would be \$92,562.47. Further, she argues the judge was entitled to accept and rely on her sworn testimony. I agree.

- [66] Contrary to the appellant's submission, Bell is concerned with the practical realities that a judge faces at trial. It does not require a judge to use the "most current information" in fixing Guidelines income. Rather, it provides prudent, practical advice; judges must attempt to arrive at the best determination of current income based on the evidence presented:
- [7] Section 15 of the Guidelines provides a spouse's annual income is to be determined in accordance with ss. 16-20. Section 16 provides the determination is to be made using the sources of income that make up "Total income" (Line 150) in the federal tax return form, subject to adjustments. The court must attempt to make the best determination of current income that can be made on the evidence adduced (see the discussion in *Fuzi v. Fuzi*, [1999] B.C.J. No. 2263 (S.C.) at paras. 4-12). Here, the judge's task was to determine Mr. Bell's income for Guidelines purposes at the time his application was made in 2008. As will frequently be the case, the best indication of that is provided by his total income for tax purposes in the preceding year (2007).

[Emphasis added.]

- [67] Here, as I have already indicated, the judge's task was not easy. The information available for 2021 was difficult to assess as it represented only nine months of the first year of JCPT's operations. The incomplete picture of Ms. Chandler's and JCPT's income for 2022 made the assessment of her Guidelines income challenging. In her Form F8, Ms. Chandler set out the basis on which she estimated her income for 2022: \$6,508.35 per month from January to June 2022; \$8,108.35 from July to December 2022; and \$7,969.32 in rental income. The judge accepted that evidence and rounded Ms. Chandler's line 150 income to \$95,000. She was entitled to do so. The evidence was incomplete and lacking in clarity, but the judge had found Ms. Chandler to be an honest and forthright witness at trial and "saw nothing in the material before me on these applications to indicate to me that she has been anything but honest, forthright, and reasonable": Reasons para. 22. The judge's decision to accept and rely on the evidence of Ms. Chandler was certainly available to her. Dr. Chandler is asking this Court to reweigh the available evidence and come to a different decision. That is not our role: Hickey at para. 12.
- [68] Dr. Chandler's argument that the judge made a palpable and overriding error in assessing the evidence and failing to find that Ms. Chandler was in breach of her disclosure obligations also lacks merit.
- [69] The judge's decision to proceed to hear the application without ordering Ms. Chandler to make further discovery of documents is not "an implicit finding of fact" as suggested by Dr. Chandler. Rather, it is the discretionary decision of the judge to proceed with the hearing of the application on the basis of the evidence before her. The question that arises is whether the judge committed an error in principle in doing so. There are several interrelated reasons why Dr. Chandler is unable to demonstrate any such error.

- [70] First, Dr. Chandler did not ask the judge to rule on whether Ms. Chandler had met her disclosure obligations. He certainly argued that her disclosure was inadequate in relation to her business expenses and the judge responded:
- [22] Dr. Chandler argues that Ms. Chandler did not provide the details of these expenses, and I should infer that they are improper. I am not prepared to do so. There is nothing in the material before me which suggests she has not accurately and properly reflected her business costs on her tax returns. Dr. Chandler had options available to him to try to convince a court that the additional information was required. He did not avail himself of such options. In any event, it is not clear to me that he would have been successful if he had made such an application. Dr. Chandler's constant demands of Ms. Chandler appear to me more designed to make her life as difficult as possible, rather than a legitimate inquiry into questionable charges (of which I see none).
- [71] While the judge was dealing with business expenses, the comment that Dr. Chandler could have brought a formal application for additional information is applicable to the broader question of documentation from JCPT and Ms. Chandler for 2022. He did not bring such an application, but argued that the judge should impute income based on the information available. The judge declined to do so, and I see no error in principle in her decision.
- [72] As the application was heard in early 2023, and Ms. Chandler's 2022 income (and that of JCPT) was a contested issue, it should have been obvious to Dr. Chandler that he could have applied to adjourn the hearing of the applications until those documents were produced. In retrospect, given the s. 18 argument he advances on appeal, those documents may have assisted the judge in determining whether Ms. Chandler's income would more fairly be determined through a s. 16 or s. 18 analysis, at least for 2023.
- [73] However, both parties were content to proceed with the applications based on the documentation that had been produced. The judge was well aware of the parties' litigious history and it is understandable that she would not have raised the prospect of an adjournment on her own motion. In the circumstances, it was not the judge's task to ensure that the 2022 documentation was available. As set out in Bell, her task was to attempt to make the best determination of current income that could be made on the evidence adduced.
- [74] In addition, the documentation and information that had been produced by Ms. Chandler was considerable. While the 2022 information was incomplete, this was not a situation where there was any evident failure to disclose on the part of Ms. Chandler. She provided the explanation from her accountant regarding the change in business structure and their assertion that there was no additional information available. In addition, she provided available draft and unaudited financial records. While more information could have been provided regarding interpreting the NTS "Income Statement", there was sufficient information regarding Ms. Chandler's distributions from the partnership to proceed to determine her Guidelines income.

[75] In summary, I would not give effect to the final ground of appeal.

Disposition

[76] I would allow the appeal, but only to the extent of setting aside the terms of the Order fixing Ms. Chandler's Guidelines income and child support payments for the period from July 1, 2023 to June 30, 2024, at para. 4 of the "Findings" and para. 3(d) of the Order. Ms. Chandler's Guidelines income for that period and in subsequent years is to be determined in accordance with paras. 2 and 3 of the Trial Order.

"The Honourable Mr. Justice Butler"

I AGREE:

"The Honourable Madam Justice Newbury"

I AGREE:

"The Honourable Madam Justice Fenlon"

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