

CANADA / JUDGMENT

D.M.B. v. D.W.A.L.

2019 BCSC 4

COURT

Supreme Court of British Columbia

DECIDED

3 January 2019

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2019 BCSC 4 D.M.B. v. D.W.A.L. IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: D.M.B. v. D.W.A.L., 2019 BCSC 4 Date: 20190103 Docket: 16-4729 Registry: Victoria Between: D. M. B. Claimant And: D. W. A. L. Respondent Before: The Honourable Mr. Justice Punnett Supplementary Reasons for Judgment Counsel for the Claimant: G.E. Coad Respondent on his own behalf: D.W.A.L. Place and Date of Submissions: Written Submissions of Claimant: Written Submissions of Respondent: Reply of Claimant: Written Submissions of Claimant on costs: Written Submissions of Respondent on costs:: Victoria, B.C. August 17, 2018; August 20, 2018; August 20, 2018 October 30, 2018 November 23, 2018 Place and Date of Judgment: Victoria, B.C. January 3, 2019

Introduction

- [1] In reasons for judgment in this family matter, indexed as D.M.B. v. D.W.A.L., 2018 BCSC 1254, the parties' respective incomes required determination at trial. As a result, the issues of quantum of child and spousal support and quantum of retroactive child and spousal support were adjourned for further submissions.
- [2] The parties' written submissions on the outstanding issues have now been received along with the claimant's DivorceMate calculations and further submissions from both parties on apportionment of costs. Findings at Trial
- [3] Regarding child support, I found as follows:
- [178] It is not in issue that Guidelines child support is payable in accordance with the parties' incomes and the parenting regime on a set-off basis. What is in contention is the matter of s. 7 expenses. In particular the issues of school fees for W. and tutoring for C.
- [179] The school fees for W. arise from his attendance at the Montessori school. The parties had agreed to their children attending that school and it was not until 2016 that the respondent objected based on alleged insufficient discipline. In my view the fact the parties had, except for one-year, enrolled W. in the Montessori school and given W. is happier there the s. 7 expenses are legitimate s. 7 expenses.

- [180] Regarding C.'s tutoring, the respondent objects because she is taking certain courses by distance learning, and requires tutoring in those subjects and apparently he is of the view that if she requires assistance she should return to regular high school. The evidence is that C. is comfortable with the schooling arrangement having left conventional schooling because of stress and depression. She requires assistance. The tutoring costs are also legitimate s. 7 expenses.
- [181] The parties shall share s. 7 expenses in accordance with their incomes. However, any bursary or fee reductions the claimant obtains from the Montessori school because of her financial circumstances shall be applied to her proportionate share of such expenses.
- [182] Given the history of the parties' interactions respecting s. 7 expenses and the behavior of the respondent the claimant shall have the power to incur as s. 7 expenses all costs of tutoring and counselling relating to the children. If the respondent disagrees he can apply to the Court.
- [4] At trial I declined to impute income to the claimant and determined her income as follows:
- [177] I impute no income to the claimant. In addition, I reject the respondent's submission that the claimant's vacation time, sick benefits and employer pension contributions are to be added to her income. There is no legal basis for that. Her income then is that shown on line 150 of her tax return for each year. Those tax returns show line 150 income of \$70,153.95 for 2014, \$72,461.85 for 2015 and \$70,957.25 for 2016. While her tax return was not filed by the time of trial her T-4 for 2017 shows gross income of \$69,734.80.
- [5] Regarding the respondent's income, I concluded:
- [167] The exercise of imputing income in this case then is a matter of taking into account Mr. L.'s gross income, his claimed business expenses to be added back, his claimed personal expenses, his failure to disclose and his inconsistent explanations along with his lifestyle in order to arrive at an income figure. In my view 70 percent of his claimed business and household expenses should be added back into his line 150 income. This results in an income of \$156,789.17 for 2014, \$151,977.28 for 2015 and \$140,149.11 for 2016 or an average of \$149,638.48 per year.
- [168] Because of the non-disclosure, resolution of the imputation of income is necessarily an estimate. A three-year average should be used as that is the approach provided for in section 17 of the Guidelines and doing so is not unfair. I therefore impute income to the respondent and fix his Guidelines income at \$150,000 per annum for the years 2014, 2015, 2016 and 2017.
- [6] Respecting retroactive child and spousal support, I found:

- [207] As a result, I find that retroactive child and spousal support is payable from June 1, 2014. The calculation of such shall account for the payments made by the respondent. In addition, the child support shall be calculated based on a shared parenting regime from June 1, 2014 to present date except from February to June 2016 and September 1, 2017 onward when C. resided with and continues to reside with the claimant. Position of the Claimant
- [7] The claimant submits the calculation of retroactive and future child support is a relatively straightforward exercise requiring only that the amount ordered be increased for the time periods when their daughter resided with the claimant only. The claimant also seeks an order fixing outstanding special and extraordinary expenses.
- [8] Respecting spousal support the claimant acknowledges that the Spousal Support Advisory Guidelines ("SSAG") only provide guidance and it is up to the Court to determine the appropriate amount and duration of spousal support in the circumstances of the case. She submits that the strength of her compensatory claim and degree of need favour spousal support at the higher end of the SSAG range.
- [9] Pursuant to s. 170 of the Family Law Act ("FLA"), she also seeks security for the support ordered.
- [10] Special costs were awarded against the respondent. The claimant is concerned the respondent may declare bankruptcy (as he submits may occur). As s. 178(1)(c) of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, does not allow cost awards associated with child and spousal support to be discharged in bankruptcy, she seeks an order apportioning the special costs so that those associated with child and spousal support will survive if the respondent declares bankruptcy. Position of the Respondent
- [11] The respondent has made no submissions on child support other than to note that in August 2018 his Family Maintenance Enforcement Program ("FMEP") payments showed an overpayment of \$2,260.89 respecting the existing interim order of \$520 per month for child support. Regarding special and extraordinary expenses, he submits they should be capped at \$6,000 per year assuming \$500 per month in tutoring costs for their daughter and continued free tuition for their son in his last year at Montessori. He further submits any additional sums should be subject to the parties agreeing on them.
- [12] Regarding spousal support he states support at the low end of the SSAG range should be awarded and that it should have a limited duration of six years from separation.
- [13] He also raises two points seeking clarification of the judgment. The first relates to mortgage and property tax payments he made after separation, which amount to \$19,795.56 over his agreed occupational rent in favour of the claimant. The second relates to a bill for the house roof that was incurred and paid before separation. Discussion Retroactive Child Support
- [14] The parties separated on May 5, 2014.

- [15] Retroactive child support has been ordered. The DivorceMate calculations are not in dispute nor are the periods between separation and trial when the custody was split and shared:
- | Year | Parties' Incomes | Months | Monthly Amount | Total |
|-------------------------------------|--|---------------------------------------|----------------|--------------|
| 2014 | Claimant \$70,154 Respondent \$150,000 | July to December: Shared parenting | \$1,071 x 7 | \$ 7,497.00 |
| 2015 | Claimant \$72,462 Respondent \$150,000 | January to December: Shared parenting | \$1,035 x 12 | \$12,420.00 |
| 2016 | Claimant \$70,957 Respondent \$150,000 | February to June: Split parenting | \$1,484 x 5 | \$ 7,420.00 |
| 2016 | January and July to December: Shared parenting | \$1,058 x 7 | \$ 7,406.00 | |
| 2017 | Claimant \$69,735 Respondent \$150,000 | January to August: Shared parenting | \$1,077 x 8 | \$ 8,616.00 |
| 2017 | September to December: Split parenting | \$1,496 x 4 | \$ 5,984.00 | |
| 2018 | Claimant \$69,735 Respondent \$150,000 | January to July: Split Parenting | \$1,496 x 7 | \$ 10,472.00 |
| June 1, 2014 to July 31, 2018 Total | | | | \$59,815.00 |
- Future Child Support
- [16] The parties' daughter remains with the claimant. Per the Federal Child Support Guidelines, S.O.R./97-175, the amount for child support based on the respondent's imputed income of \$150,000 and the claimant's average income of \$71,957 is \$1,484.00 per month from trial, commencing August 1, 2018.
- [17] On November 23, 2018 the respondent filed additional Submissions on Costs that included a request for adjusted child support based on alleged changes to parenting arrangements in October 2018. As no application was made and no affidavit evidence filed, I decline to address that request in these reasons. Past and Future Special and Extraordinary Expenses
- [18] The respondent essentially seeks to vary the order made at trial. As the order has been entered, it is not open to the respondent to make further submissions. Spousal Support
- [19] As noted earlier, the claimant's entitlement to indefinite spousal support has been determined. At issue is quantum.
- [20] The law on determining the quantum of spousal support was recently summarized by Justice Fitzpatrick in *Natanj v. Nasiri*, 2018 BCSC 1122 at paras. 314 and 315:
- [314] In determining the appropriate level of spousal support, this Court has said that the SSAG should be used as a guide in determining both the quantum and duration of support, assuming that entitlement has first been established: *Yemchuk v. Yemchuk*, 2005 BCCA 406 at para. 64; *Redpath v. Redpath*, 2006 BCCA 338 at para. 37; *Tedham v. Tedham*, 2005 BCCA 502 at para. 75; and *McEachern v. McEachern*, 2006 BCCA 508 at para. 48. However, the SSAG are guidelines and not law: *Yemchuk* at para. 62; *McEachern* at para. 64. The Court of Appeal in *Redpath*, however, has stated that an award which substantially differs from the range set by the SSAG might constitute an error of law in the absence of a reasonable explanation for the difference: para. 42.
- [315] The SSAG are intended to guide the Court in the determination of the appropriate award. However, it is ultimately for the court to determine, based on all the circumstances of the particular case, the appropriate amount and duration of spousal support.

- [21] At trial I addressed the claimant's entitlement to compensatory and needs-based support:
- [186] I am satisfied that Mr. L.s' success can in part be traced to the role and efforts of the claimant during the marriage. She shouldered the greater responsibility for the household and the children along with being employed.
- [194] I am satisfied the claimant is entitled to spousal support on both a compensatory and non-compensatory basis. On a compensatory basis because of her role in the marriage which included assumption of responsibility for the household and child care and on non-compensatory basis because of their disparate incomes and lifestyles post-separation.
- [22] I note as well that while the claimant had a positive effect on the respondent's career he had a negative effect on hers. As Dr. Pullyblank stated in his expert report: However, in reflecting on [Ms. B.'s] potential for advancement it is again important to remember that we are effectively seeing her at her worst. It is also important to recognize that Ms. B. has had the bulk of her career to date affected by Mr. L. She describes him as directing their trajectory, and we know that for a number of years he has had a toxic effect on Ms. B. Therefore, while I am inclined not to see Ms. B. as a natural leader, it is particularly difficult to be confident about what her potential might have been without at least 17 years of influence by Mr. L.
- [23] The SSAG results produced by DivorceMate provide a range for "an indefinite (unspecified) duration, subject to variation and possibly review, with a minimum duration of 8.25 years and a maximum duration of 16.5 years from the date of separation."
- [24] Based on the incomes noted in the child support calculations above, the ranges for monthly spousal support for the years from separation to present are: Year Low Mid-range High 2014 \$521 \$1,020 \$1,530 2015 \$430 \$936 \$1,450 2016 \$490 (Shared parenting) \$991 \$1,502 2016 \$357 (Split parenting) \$861 \$1,377 2017 \$538 (Shared parenting) \$1,035 \$1,544 2017 \$404 (Split parenting) \$905 \$1,418 2018 \$404 (Split parenting) \$905 \$1,418
- [25] When assessing compensatory spousal support, relevant factors include the history of the parties' marriage, its length, the limitations on the claimant's career advancement because of her role in the marriage and her relationship with the respondent, their marital standard of living, the claimant's continuing counselling expenses resulting from the relationship and her general need for support to provide a reasonable post-separation lifestyle.
- [26] Given the compensatory claim of the claimant, her secure employment and her needs, spousal support at the mid-range is appropriate. To save the expense of recalculating the claimant's taxes, counsel reasonably suggests that the 28% to 32% tax rate calculated in preparation for trial be set at 30% for 2014 and 2015, with the net amount under the Federal Child Support Guidelines payable to her.

- [27] Based on the mid-range and the parties' respective incomes as imputed and determined, retroactive spousal support is due as follows: Year Monthly Amount Number of Months Amount Total Total 2014 \$1,020.00 7 \$7,140 less 30% tax \$4,998.00 2015 \$ 936.00 12 \$11,232 less 30% tax \$7,862.40 2016 \$ 861.00 \$ 991.00 5 7 \$4,305.00 \$6,937.00 \$11,242.00 2017 \$1,035.00 \$ 905.00 8 4 \$8,280.00 \$3,620.00 \$11,900.00 2018 \$ 905.00 7 \$6,335.00 \$6,335.00 Total Mid-range spousal support arrears \$42,337.40
- [28] In summary the respondent's obligation for retroactive child support is \$59,815.00 and his obligation for retroactive mid-range spousal support is \$42,337.40. This amounts to \$102,152.40. As he has already paid \$29,124.00 support, his outstanding obligation for retroactive child and spousal support is \$73,028.40. Ongoing Spousal Support
- [29] Based on the respondent's imputed income of \$150,000 and the claimant's income of \$70,957 the mid-range support amount is \$905 per month commencing August 1, 2018. The support shall be indefinite due to future concerns respecting the respondent's employment. I decline to fix a date for termination of spousal support.
- [30] As determined at para. 238 of my reasons for judgment, the respondent's share of the family property division is: Debt repayment: \$30,064.21 Housing costs reimbursed: 22,376.50 Half of remaining sale proceeds: 21,951.21 Value of jeep: 3,997.50 TOTAL: \$78,389.42
- [31] The claimant shall receive from that total the net child and spousal support arrears noted above.
- [32] Regarding the balance of \$5,361.02 to the credit of the respondent, the claimant seeks an order that those funds be held in trust as security for special and extraordinary expenses and future support. She does so because of the respondent's history of not meeting his support obligations to the children and the claimant. That the situation has not changed is evidenced by the claimant's July 2018 affidavit filed with her counsel's submissions, stating the July 1, 2018 payment due under the existing order of Justice Dorgan had not been paid.
- [33] The respondent has disobeyed court orders for support. In such circumstances, requiring him to post security is appropriate (*Greenwood v. Greenwood*, [1998] B.C.J. No. 729).
- [34] The remaining funds shall be held in trust and applied to special and extraordinary expenses incurred by the claimant for the children. Special and Extraordinary Expenses
- [35] The claimant has provided affidavit evidence respecting arrears of special expenses since 2014 totalling \$6,380. The respondent has taken no objection to the filing of such information. The respondent is responsible for 60.5% being the sum of \$3,859.90. The funds held in trust shall be applied to those arrears of special and extraordinary expenses with the balance of \$1,501.12 to remain in trust to be applied to future special and extraordinary expenses. Such expenses shall in the future be capped at \$6,000 per annum unless otherwise agreed to. Costs Issue

- [36] The respondent in his submissions adverts to the possibility he may declare bankruptcy. This post-trial assertion results in the claimant seeking an order apportioning costs respecting child and spousal support in order to engage s. 178 of the Bankruptcy and Insolvency Act, which provides that such costs are not discharged in a bankruptcy. Counsel for the claimant suggested the parties be allowed to make submissions on reapportionment.
- [37] I have requested and now received submissions from both parties on the issue.
- [38] In *Sandhu v. Sandhu*, 2012 BCSC 1183, Justice Fisher concluded that the Court hearing the trial has jurisdiction to apportion costs even after an order has been entered if a party liable to pay costs makes an assignment into bankruptcy. See also *Dorey v. Havens*, 2017 BCSC 2206.
- [39] Rule 16(5) of the Supreme Court Family Rules also provides that this Court has jurisdiction to give directions on costs.
- [40] Although the respondent has not yet declared bankruptcy, he has threatened to do so. As a result, I conclude I should order the apportionment of costs. Position of the Claimant
- [41] The claimant submits that 80% of the costs should be apportioned to the issues of child and spousal support. Position of the Respondent
- [42] The respondent does not address apportionment other than to say that because since October 1, 2018 he has had their son with him 100% of the time and their daughter 22% of the time, costs should be minimal. Discussion
- [43] The order for special costs was made and entered, and I have already concluded that an apportionment of costs should be ordered given the threat of a bankruptcy. The sole issue to be determined is how to apportion costs.
- [44] The issues at trial were property division, child and spousal support, parenting responsibilities, and costs. The issues of property division and parenting responsibilities were straightforward and did not involve excessive preparation time or excessive time at trial. The major issues were child and spousal support and the complications arising from the respondent's lack of disclosure and writing off expenses.
- [45] The respondent also alleged the claimant was not fulfilling her income earning potential, resulting in expert evidence being called by the claimant.
- [46] I note that in approximately 20% of my reasons for judgment addressed property issues and the balance related to income issues and child and spousal maintenance matters. Approximately 80% of my trial reasons are related to those latter matters.
- [47] That is consistent with the trial time expended and the claimant's submission respecting the litigation generally. I accept that 80% of the costs relate to issues of child and spousal support and apportion the costs ordered accordingly.

- [48] In addition, the full cost of Dr. Pullyblank's report respecting the claimant relates to the same issues, as does the full cost of the medical records of Dr. Patricia Olsen produced at the request of the respondent. I also accept claimant counsel's estimate that approximately 66% of photocopying expenses relate to the issues of child and spousal support. Clarification Sought
- [49] Because the respondent is self-represented and sought clarification of two additional issues, I will provide some brief clarifying remarks on those issues.
- [50] First, the \$19,797.56 spent on mortgage and property tax payments was included in the reapportionment sought by the respondent. There was no agreement that the claimant would credit those to the respondent. Because the claimant agreed to reimburse the respondent \$22,376.50 for renovation expenses despite those not being shown to have increased the value of the home, the respondent's claim for reapportionment was dismissed and that dismissal included the mortgage payments.
- [51] Regarding the costs of the roof, the respondent paid for those on his RBC Visa. A set-off was not possible due to the respondent's failure to produce evidence of his credit card account at separation (para. 126). As a result the second issue has been addressed. "The Honourable Mr. Justice Punnett"

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