
CANADA / JUDGMENT

Druchet v. Druchet

2017 BCSC 836

COURT

Supreme Court of British Columbia

DECIDED

19 May 2017

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2017 BCSC 836 Druchet v. Druchet

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Druchet v. Druchet,

2017 BCSC 836

Date: 20170519

Docket: E106807

Registry: Kelowna

Between:

Candice Catherine Druchet

Claimant

And

Jeffrey James Druchet

Respondent

Before: Master Wilson

Reasons for Judgment

Counsel for the Claimant:

M.A. Newcombe

Counsel for the Respondent:

W.T. Clarke

Place and Date of Hearing:

Kelowna, B.C.

May 10, 2017

Place and Date of Judgment:

Kelowna, B.C.

May 19, 2017

- [1] The claimant applies for a number of items of relief in this family law proceeding; however, the submissions I heard related primarily to the question of determining the respondent's income for support purposes.
- [2] By way of background, the parties commenced cohabitation in 2001 and were married in August 2005. There is one child, a daughter who is currently 18 years of age and resides with the claimant.
- [3] The respondent is approximately 49 years of age and is qualified as an electrician. He has enjoyed some successful years financially. From 1991 to 2001, the respondent was steadily employed as an electrician making in the range of \$60,000 per year. In 2001, he commenced working out of town and went to the Northwest Territories where he made in excess of \$100,000 per year. In 2002 until approximately 2014, he worked for Kiewit Construction ("Kiewit") as an electrical superintendent, often working 14 to 16 hours per day on a schedule of three weeks in and one week out. In 2012, the schedule changed to two weeks in and one week out, with his travel day subtracting from the week out. Following a promotion with Kiewit, his income increased to approximately \$200,000 per year.
- [4] The respondent stopped working for Kiewit in October 2014. He had been considering alternative employment which then fell through. He then says that he suffered significant anxiety, stress and depression and underwent a breakdown. He determined he needed time away; he had depressed thoughts, anxiety and a general lack of motivation. He was absent for a period of several months, travelling through the United States and maintaining only sporadic contact with his family. In the summer of 2015, he underwent some counselling sessions with a psychologist in Abbotsford.
- [5] These proceedings were commenced while the respondent was away. The claimant obtained an order on May 4, 2015, from Master Young, as she then was, that provided as follows:
 - 1. Upon the court having found that the respondent, Jeffrey Druchet, has an income of \$200,000 per annum, shall pay to the claimant, Candice Druchet for the support of the child, the sum of \$1,693.00 per month commencing the 1st day of April, 2015 and continuing on the 1st day of each month thereafter.

2. The respondent shall pay spousal support to the claimant in the amount of \$5,387.00 per month, commencing the 1st day of April, 2015 and continuing on the 1st day of each month thereafter.
3. The claimant's claim for retroactive child and spousal support is adjourned generally.
4. The respondent has liberty to apply to set aside this order.
5. Counsel for the claimant shall serve a copy of this order upon the respondent by email.
6. The claimant shall have her costs of this application in the amount of \$500.00.

(the "Young Order").

- [6] In June 2016, the respondent made an application to vary the Young Order, seeking cancellation of any and all arrears of spousal support and an order that no spousal support be required prospectively. In support of his application he outlined the background of his circumstances, including his time away, and indicated that following his return to B.C. he worked for an electrical company in Abbotsford making \$34.00 per hour plus occasional overtime.
- [7] The respondent started his own business, OPT Installation Inc. ("OPT"), in approximately September 2015. In his first affidavit in support of the application to vary the Young Order, sworn April 13, 2016, the respondent deposed that he was not able to return to Kiewit and set out a number of jobs for which he had applied. At paragraph 32 of that affidavit, he confirms that he incorporated OPT and indicates that an income of \$80,000 per year would be appropriate.
- [8] In his second affidavit sworn the day before the Consent Order, he confirms that he is not working for Kiewit as an employee but works with them as a subcontractor through his company. Again he asserts an income of \$80,000 per year.
- [9] The parties entered into a Consent Order before me on June 29, 2016, which provided as follows:
1. On a without prejudice basis to either party as to quantum or retroactivity of child support and spousal support:
 - (a) The Respondent shall pay to the Claimant the sum of \$30,000.00 for arrears of child support and spousal support, to be paid from the net proceeds from the sale of the family home located at 1314 Ponderosa Court, West Kelowna, B.C. and legally described as PID 004-842-316, Lot 13, District Lot 506, ODYD, Plan KAP27320, except Plan H14787 (hereinafter the "Family Home");

- (b) The Respondent shall pay to the Claimant support for the child, in the amount of \$748.00 per month, commencing on the 1st day of July 2016, and continuing on the 1st day of each and every month thereafter, until written agreement between the parties or further Order of this Court.
- (c) The Respondent shall pay to the Claimant spousal support in the amount of \$1,580.00 per month, commencing on the 1st day of July 2016, and continuing on the 1st day of each and every month thereafter, until written agreement between the parties or further Order of this Court.
- 2. The net proceeds from the sale of the Family Home shall be held by counsel for the Claimant, including funds attached by the Family Maintenance Enforcement Program, pending written agreement between the parties or further Order of this Court.
- 3. On or before October 15, 2016, the Respondent shall provide to the Claimant copies of his personal and corporate bank account statements, credit card statements and financial statements from September 2014 to the current date.

(the "Consent Order")

- [10] Although the Consent Order as drafted does not expressly stipulate it, I am told that the amounts ordered for support accord with an income of \$80,000 which is the amount the respondent deposed to in his affidavits.
- [11] Subsequent to the Consent Order, the claimant received further financial disclosure from the respondent. She says that a review of the subsequently disclosed financial information reveals that the claimant has resumed making an income commensurate with the Young Order and therefore seeks to set aside the Consent Order and reinstate the Young Order.
- [12] The claimant seeks to set aside the Consent Order and to reinstate the Young Order which imputed an income of \$200,000 to the respondent, which she says is consistent with the evidence found in OPT's financial statements.
- [13] The respondent says that his Form F8 Financial Statement sworn February 14, 2017 indicating income for support purposes in the amount of \$81,846, which is consistent with his T4 statement for 2016, should be the starting point for the consideration of his income. That being said, the respondent concedes that his income for support purposes should be more than \$80,000 and suggests a range of \$100,000 to \$125,000. The respondent also says that the claimant, who is now 46 years of age, should be imputed an income of \$22,500 based upon full time minimum wage employment.
- [14] I am satisfied that I can review the background of this matter and determine the support obligations on an interim basis as if the claimant's application were made at first instance. The Young Order, which was made in the absence of the respondent, expressly included a term that provided the respondent with the opportunity to apply to set it aside. The respondent did so, which led to the Consent Order. The Consent Order was made on a

without prejudice basis both as to quantum and retroactivity, which means that I am now in a position to consider the matter afresh.

- [15] For the reasons that follow, I find the claimant should be imputed an income of \$22,500 and the respondent should be imputed an income of \$200,000 for support calculation purposes.

Respondent's Income

- [16] The respondent is employed by OPT. He is the sole shareholder and the sole director of OPT. The Federal Child Support Guidelines, SOR/97-175, contemplate such a situation in s. 18, which provides as follows:

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

- o (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
- o (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.

- [17] Since the respondent is a shareholder of a corporation, I must first determine under s. 18(1) of the Guidelines as to whether his total income from his tax return fairly reflects the money available.

- [18] The respondent's tax returns for 2013 to 2015 are included in his Form F8 Financial Statement. They indicate the following:

2013: \$199,995.00

2014: \$195,861.81

2015: \$28,173.00

- [19] The income information for 2013 and 2014, which represented his earnings when he was employed by Kiewit, provided the evidentiary foundation for the Young Order. The respondent started working through OPT in approximately September 2015.

- [20] Having reviewed OPT's tax return and other financial documentation I conclude that the funds available to the respondent for the purposes of support are much greater than the \$81,846 he has deposed to.
- [21] As the sole shareholder of OPT, the respondent is able to pay himself such portions of OPT's net income as he considers appropriate. I pause to mention that the respondent's T1 tax form for 2016 was not in evidence, which is not surprising given that it is not yet due. However, I am prepared to infer from the materials before me, which include the corporation's tax return and the T4 statement, that his T1 tax return will be ostensibly the same as his T4 statement.
- [22] The Schedule 125 General Index of Financial Information that comprises a portion of OPT's tax return for its financial year ending August 31, 2016, reveals the following information:

Total sales of goods and services: \$275,000

Total operating expenses: (110,695)

Net income: \$164,305

Less current income taxes: (22,405)

Net income after taxes: \$141,900

- [23] Of the operating expenses of \$110,695, the largest single expense is the respondent's wages of slightly over \$80,000, which is conceded by the respondent. As such, the best that can be said for the respondent in terms of the OPT's expenses is that approximately \$30,000 of those operating expenses might be third party business expenses. I say "might be" because there are various expenses that may be deductible for tax purposes but can properly be added back in, in whole or in part, for the purposes of determining support obligations - vehicle payments, cell phone bills, home office expenses are some of the more common examples. I have no information with regard to any of OPT's operating expenses.
- [24] OPT's bank statement was also in evidence. The bank statement indicates that OPT received \$310,750 from Kiewit between October 16, 2015 and September 7, 2016, inclusive. I note that as of the date of the respondent's second affidavit sworn the day before the Consent Order, OPT had received from Kiewit \$233,910 in the proceeding eight to nine months; however, in support of the application to vary the Young Order, the respondent deposed the following:
15. Now shown to me and attached as Exhibit "B" to this my affidavit are the 2015 personal income taxes [\$28,173.88]. My business taxes come due as of September 2016. My line 150 for 2015 was \$28,183.88, but again, I am willing to be attributed to current income of \$80,000 per annum on a going forward basis as of 1 January 2016, as the company was then starting to make money. The arrears can then be based upon that amount at that time.

- [25] I am satisfied that the respondent's second affidavit does not paint an accurate picture of the available income at that time. I am also satisfied that the respondent's line 150 income does not fairly reflect the income available for support purposes and as such an analysis under s. 18(1) of the Guidelines is appropriate.
- [26] The respondent submits that the court ought not to engage in a forensic accounting exercise in determining the respondent's income for support purposes. In this case, there is nothing complicated about the financial information or the company's structure: the respondent is the sole shareholder and sole director of the company; its revenue and net income are known; the only employee is the respondent; the statements from the company's bank account are in evidence. I do not consider that a review of the respondent's income and the affairs of the company in this case to be a forensic accounting exercise but rather an arithmetic one. To the extent that there are other factors, explanations or considerations that may be relevant, those would be uniquely within the knowledge of the respondent.
- [27] Based upon the information above, I find that a reasonable starting point for the determination of the respondent's income with reference to the principles in s. 18 of the Guidelines is as follows:

OPT's income: \$275,000

Third party expenses (best case): (30,000)

Income taxes: (22,500)

TOTAL: \$222,500

- [28] An alternative approach to determining the money available for support purposes results in the same conclusion. OPT had a balance of \$169,022.64 in its bank account as of September 9, 2016. Even if the tax obligation of \$22,405 had to be paid from the balance in the account, OPT was still able to increase its bank balance by over \$145,000 during the year even after deducting what was paid to the respondent for wages. On very rough numbers, \$145,000 over the course of a year, plus \$80,000 in the respondent's salary would also result in money available for support of around \$225,000.
- [29] The respondent deposes that it is necessary to leave some funds in the company's account to finance his ongoing operations and therefore he submits that a lower income would be appropriate for support purposes.
- [30] The respondent's position on this issue is set out in paragraph 4 of his third affidavit which states the following:
4. In response to paragraph 3, OPT Installations Inc. has a Professional Service Agreement (with NPC) on 1 project which Kiewit, who is the lead contractor on a joint venture. The PSA agreement will be completed in the month of February or March of 2017. OPT is currently looking for other contracts, but has none signed to date, or in the near future. Thus, I do not

work for Kiewit. When they claim that OPT made about \$275,000, this is incorrect, as there was income tax payable on the funds. Currently, there is about \$125,000.00 on the company bank account. From my previous business experience, I need to have a "float" for the purposes of:

- a. Taxes to be paid, as I make a reserve for the payments of taxes;
- b. Bidding on work in Ontario, Labrador, Manitoba and Northern B.C. This requires proposals to be drafted, site visits (including travel and accommodation). When I go to [bid] on a contract, depending on the size it often varies between \$5,000.00 to \$10,000.00+ in site visits and proposal costs;
- c. Payment of fixed expenses such as legal and accounting;
- d. When a contract is obtained, I only get approximately 15% of the contract paid as commencement. I am then responsible for procuring equipment and hiring employees to help with the work, and often this is in the range of \$30,000.00, which again is not paid but for my reserves. Thereafter, often contracts have remaining payments either quarterly (25%), or milestone payments such as 75% completion until further payment;
- e. Finally, I need an adequate reserve in the event that there are no contracts. Again, do note that the company only had 1 contract over the past year, with NPC. So, from those funds I will then have to pay my ongoing support obligations, necessities for myself, and then have funds left over to address (a) through (d) above.

- [31] The respondent concedes that the amount of \$81,846 deposed to in his Financial Statement is too low but argues that based on the factors as set out in paragraph 4 of his third affidavit a more reasonable income is \$120,000 to \$125,000. I do not agree.
- [32] As to the adjustments claimed in the respondent's third affidavit, there can be no question that taxes payable are a legitimate third party expense (para 4(a) of the affidavit).
- [33] Although OPT's current contract was expected to end in February or March 2017, according to the respondent's affidavit sworn in January 2017, I have been advised that it has been extended to May 2017. While there was no information as to whether the contract could be further extended, I accept that it is reasonable to assume that it is reasonable and necessary for OPT to incur expenses associated with pursuing other work as claimed in (b).
- [34] I would expect that expenses referred to in (c) such as legal expenses and accounting expenses would be modest for a company such as OPT, and there is no evidence as to what expenses have actually been incurred.

- [35] The concerns expressed by the respondent in his subparagraphs (d) and (e) pertain primarily to cash flow. As for subparagraph (d) specifically, I do not fully understand the basis for the generalized statement regarding contracts as a whole when the evidence would seem to suggest that all of OPT's work has been with Kiewit. There is no evidence that OPT has ever had employees other than the respondent.
- [36] No matter, orders for support are generally made with reference to an annual level of income and it is the responsibility of the payor to ensure that he or she budgets appropriately to deal with the peaks and valleys of income that may be inevitable in certain lines of work.
- [37] Based upon what I found to be the starting point in the analysis of the respondent's income, namely \$222,500 as set out above, the only factor that I consider to be a legitimate adjustment is the ongoing expenses associated with the pursuit of other contracts in the event the contract with Kiewit is not renewed. While the claimant correctly points out that there is no evidence to support the amounts that are indicated, an adjustment of \$20,000 to \$25,000 for expenses incurred to pursue new work would not seem to be unreasonable.
- [38] The respondent's position as to his income amounts to a downward adjustment of \$100,000 from what I have found to be the appropriate starting point. There is no justification on the evidence before me for such an adjustment, keeping in mind OPT's income tax obligations have already been taken into account.
- [39] There is no evidence before me that would suggest that OPT's income is any different now than it was during its financial year ending August 31, 2016. I recognize that it is possible that income could drop should the current contract end with no replacement work, but this is not something I need to countenance on this application given that this is merely a possibility at this point.
- [40] In the circumstances, and allowing for some increased expenses associated with trying to find replacement work, I accept the claimant's submission that the respondent's income should be imputed at \$200,000.

Claimant's Income

- [41] The claimant is unemployed and discloses no income other than support payments from the respondent and the child tax benefit and British Columbia family bonus. The respondent says that the claimant should be imputed an income of \$22,500, which represents full-time employment at minimum wage.
- [42] The parties separated in October 2014 when the respondent left the home. The respondent says that during the marriage the claimant worked from time to time, including as an employee for an automobile parts delivery service and also as a traffic controller. He says that in 2011 she became certified as a traffic controller and that traffic controllers can earn between \$18 and \$22 per hour.

- [43] As for the suggestion that full-time minimum wage ought to be imputed to the claimant, the claimant submits that most minimum wage jobs tend to be part-time and therefore if any income is to be imputed, \$15,000 as opposed to \$22,500 would be more appropriate.
- [44] The claimant has an obligation to make efforts to become self-sufficient. There is no evidence before me that indicates any efforts on her part nor is there any evidence that would justify why no efforts have been made - there is no medical evidence, for example. It is unreasonable to suggest that only part-time work should be imputed when there is no evidence of the claimant having made any efforts at all.
- [45] I therefore accept the respondent's argument that income of \$22,500 ought to be imputed to the claimant.

Retroactivity

- [46] As I indicated earlier, I consider that I am at liberty to consider the issue of support as if it were an application of first instance.
- [47] I find that both child support and spousal support are payable retroactive to and including September 1, 2015, based upon an imputed income to the respondent of \$200,000 and an imputed income to the claimant of \$22,500, which date is shortly before when OPT commenced work with Kiewit, and accords with OPT's financial year-end of August 31, 2016, which forms the basis for the income determination as set out above, but is after the respondent had briefly done some lower paying work in Abbotsford.
- [48] The claimant is obviously at liberty to argue at trial for retroactive support between the date of separation and September 1, 2015, but I am unable to determine on this application whether the respondent was unable to work for medical reasons as alleged, and if he had been able to work, what an appropriate level of income would be.

Monies Held In Trust

- [49] The claimant seeks an order that the funds currently held in her solicitor's trust account in the approximate amount of \$58,000 which result from the net sale proceeds of the former matrimonial home and were subject to the lien in favour of the Family Maintenance Enforcement Program ("FMEP") be released to her. These arrears accrued pursuant to the Young Order. The former matrimonial home was sold after foreclosure proceedings were commenced.
- [50] Since separation, the respondent has sold some stock options he held in Kiewit and has also sold other family property and retained the proceeds.
- [51] Although I do not have enough information to determine whether the arrears of support owed to the claimant exceed the amount held in trust pursuant to the FMEP charge, I will order that the funds in trust may be released to the claimant to the extent of any arrears.

Orders made

- [52] The respondent is to pay child support in the amount of \$1,693 per month based upon an income of \$200,000, for the support of the child, such order retroactive to September 1, 2015.
- [53] The respondent is to pay spousal support in the mid-range support based upon an imputed income to the respondent of \$200,000 and an imputed income to the claimant of \$22,500. This order is also retroactive to September 1, 2015. I was not provided with any calculations based upon the incomes I have imputed; if the parties cannot agree, they can contact Supreme Court Scheduling to arrange another appearance before me to set the amount.
- [54] The Young Order and the Consent Order will be varied to the extent necessary to give effect to this order.
- [55] The claimant is entitled to the funds that are subject to the FMEP lien to the extent there are arrears. The claimant's notice of application filed June 10, 2016, is dismissed.
- [56] The claimant's notice of application filed December 29, 2016, is granted to the extent indicated above; as for the other items of relief that were not specifically addressed before me (items 6, 7 and 8), I can only assume those items are no longer necessary.
- [57] The claimant would ordinarily be entitled to her costs; if the parties wish to address this issue or require clarification on any matter, the parties will have leave to contact Supreme Court Scheduling within 14 days.

"Master Wilson"

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