
CANADA / JUDGMENT

G.K. v. C.K.

2021 BCSC 96

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Supreme Court of British Columbia

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2021 BCSC 96 G.K. v. C.K.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

G.K. v. C.K.,

2021 BCSC 96

Date: 20210122

Docket: E53230

Registry: New Westminster

Between:

G.K.

Claimant

And

C.K.

Respondent

Before: The Honourable Madam Justice MacNaughton

Reasons for Judgment

Counsel for the Claimant:

P. Sahota

The Respondent, appearing in person:

C.K.

Place and Date of Trial:

New Westminster, B.C.

November 4-6, 2019

December 12, 2019

March 13, July 28 and

December 7, 2020

Place and Date of Judgment:

New Westminster, B.C.

January 22, 2021

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Introduction

- [1] G.K. and C.K. were married in India in a religious ceremony on November 30, 2005. Their marriage was registered on February 25, 2007, following C.K.'s divorce from her previous husband. G.K. is currently 44 years of age and C.K. is 50.
- [2] C.K. sponsored G.K. to immigrate to Canada, and he landed here on April 15, 2008.
- [3] The parties are the parents of a son, T.K., who was born on June 17, 2010. T.K. lives with his mother, and G.K. has parenting time with him on a schedule arranged in consultation with T.K.

The Family Law Proceedings

- [4] The parties first separated on July 27, 2012, and G.K. commenced family proceedings. They reconciled in February 2015, and G.K.'s family proceeding was withdrawn.
- [5] The parties finally separated on either December 27 or 28, 2015 (the difference in the date is of no consequence), and they have lived apart since then.
- [6] These proceedings were commenced on May 30, 2017. C.K. defended the proceedings, disagreeing with the claim for divorce and agreeing with the proposed parenting arrangements.
- [7] On June 28, 2017, C.K. filed a counterclaim seeking child and spousal support. In June 2018, she amended her counterclaim. G.K. responded to both pleadings.

C.K.'s Property Claims

- [8] In her opening statement, C.K. said that she wished to address, and intended to call evidence about, property in India that she alleged was family property. G.K. objected on the basis that C.K.'s pleadings did not claim an interest in property in India and it had not been the subject of disclosure or discovery, all of which occurred while C.K. was represented by counsel. It was also not outlined specifically as an issue in C.K.'s trial brief.
- [9] While an interest in Indian property was not specifically pleaded, C.K. did seek a general order for property and debt division in her amended counterclaim and in her trial brief.
- [10] As I explained to C.K., with respect to the jurisdiction to deal with real property in India, it is settled law that this Court has no jurisdiction pursuant to the Family Law Act, S.B.C. 2011, c. 25 [FLA], or otherwise, to make an order in respect of property held in another country. In *Tezcan v. Tezcan* (1987), 20 B.C.L.R. (2d) 253 (C.A.) at 256, McLachlin J.A., as she then was, held:

The general rule is that the courts of a country have no jurisdiction to adjudicate on the right and title to lands not situate within its borders. Only the courts of the jurisdiction in which lands are situate may adjudicate on the rights and title to such lands: *Duke et al. v. Andler*, [1932] S.C.R. 734.

The rule is not confined to the formalities of transfer of title, but extends to all disputes touching the land, including debt, trust, or tort: see *Deschamps v. Miller*, [1908] 1 Ch. 856; *Purdom etc. v. A.E. Pavey & Co.* (1896), 26 S.C.R. 412; *The British South Africa Company v. The Companhia de Mocambique*, [1893] A.C. 602 (H.L.).

[11] It is possible for this Court to consider the issue of ownership of foreign property with respect to an unequal division of property in Canada and to make appropriate compensation orders. In *Tezcan v. Tezcan* (1992), 62 B.C.L.R. (2d) 344 (C.A.), Justice Cumming, for the Court, wrote:

[85] In *Laurence v. Laurence* (1991), 56 B.C.L.R. (2d) 254 (B.C.C.A.), Hutcheon J.A. considered whether a British Columbia court has the jurisdiction to order that a sum of money be made payable under the Family Relations Act in respect of a half interest in property situated in New Zealand. Speaking for the court, Hutcheon J.A. stated, at 257-258:

[The judgment in the court below] is an effective judgment so that the principle impeding an exercise of jurisdiction is not involved. Unlike the circumstances in *Duke v. Andler*, [supra], no steps are required to be taken in the foreign jurisdiction to carry out the orders of the court. The court is exercising its personal jurisdiction over Mr. Laurence ...

[T]o carry out the objectives of the Family Relations Act, we should recognize the right to a compensation order in the circumstances of land located in a foreign jurisdiction.

See also: *Moradkhan v. Mofidi*, 2013 BCCA 132 at paras. 52-53.

[12] Thus, the court may consider a compensation order for property held in another jurisdiction as part of carrying out the objectives of the FLA.

[13] However, in this case, G.K. and C.K. do not own real property in BC. As a result, there is no real property here that could be unequally divided to compensate C.K. for G.K.'s alleged ownership of Indian property. Nor does it appear that there is other family property against which a compensation order could be made. Both parties have bank accounts, but there is no evidence of how or when the funds in those accounts were acquired or whether they are family property.

[14] Further, there has been no request for disclosure of documentation with respect to Indian property on which I could determine C.K.'s entitlement to a compensation order to offset the value of any Indian property. For example, I do not know whether G.K. owned the Indian property prior to the parties' marriage. I do not know whether he owned it jointly with other family members. There was no disclosure about the value the property. All of these issues should have been explored through discovery and/or disclosure. As a result, I did not hear evidence with respect to the Indian property.

Other Property Issues

- [15] Schedule 4 of C.K.'s amended counterclaim sought a number of orders with respect to other family property and debts. In her final submissions, for the first time, C.K. sought an order that a mutual fund purchased by G.K. on or about March 4, 2015, was family property. The record of the purchase of the mutual fund was listed in G.K.'s documents. He was not asked about it in either direct or in cross-examination, and C.K. did not testify about it during her evidence.
- [16] It is important to note that the mutual fund was purchased shortly after the parties reconciled in February 2015 after a more than two-and-a-half year separation, during which the parties maintained separate finances. It would have been unfair for me to make a decision about whether the mutual fund was family property without G.K. having the opportunity to address its purchase in his evidence.
- [17] I heard no evidence about other personal property, household contents, vehicles, and financial instruments belonging to G.K., or gifts that he received. I also heard no evidence about family debt. As a result, I am unable to make findings or orders with respect to these issues.

The Consent Orders

- [18] On May 10, 2018, at a judicial case conference, the parties agreed that they were T.K.'s joint guardians and that he would primarily reside with C.K. G.K. agreed that he would pay \$329 a month in child support commencing on March 1, 2018, and continuing on the first day of each month thereafter. G.K. has consistently paid child support in accordance with the consent order.
- [19] At the start of the trial, G.K.'s counsel said that G.K. consented to many of the child-related orders sought by C.K. in her amended counterclaim. As a result, I made the following consent orders:
- (a) Both parents are, and continue to be, T.K.'s guardians under the FLA and are his joint custodians under the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.).
 - (b) T.K. shall reside primarily with C.K., and parenting time is to be arranged between G.K. and C.K. with the input of T.K. Whenever G.K. exercises parenting time, he will ensure that T.K. is returned to C.K.'s residence by 7:00 p.m.; if parenting time occurs on a Sunday, he will ensure that T.K.'s homework is completed.
 - (c) C.K. will have all of the parenting responsibilities with respect to T.K., including those set out in s. 41 of the FLA.
 - (d) The parties agree that the following expenses are s. 7 expenses under the Federal Child Support Guidelines, S.O.R./97-175 [Guidelines], and will be contributed to in proportion to their incomes:

- i. tuition, uniform, transportation, and other costs associated with T.K.'s attendance at a private religious school; and
 - ii. the cost of any orthodontic treatment for T.K. incurred by C.K.
- (e) C.K. is at liberty to travel with T.K. outside of British Columbia, for up to three days, without requiring G.K.'s consent.
- (f) If C.K. wishes to travel with T.K. outside of British Columbia for more than three days, she must seek G.K.'s consent. She will provide G.K. with a month's advance notice of the proposed travel, including advising of the proposed travel itinerary and the address at which T.K. can be contacted. G.K. will not unreasonably withhold his consent to the proposed travel. If consent is withheld, C.K. may apply for court approval, and, if the court grants such approval, C.K. will be entitled to her costs of the application.
- [20] During her closing submissions, C.K. said that T.K. wished to participate in basketball and that G.K. would not contribute to the cost. In response, G.K. said that he had never been asked to contribute and would share the cost upon provision of receipts. Based on the fact that I have not imputed income to G.K., the parties should proportionately share the cost of any agreed-upon extracurricular activities for T.K. based on their respective incomes when the costs are incurred.

The Remaining Issues

- [21] The sole issues remaining for determination are G.K.'s income for child and spousal support purposes and C.K.'s entitlement to spousal support, and, if entitled, the quantum.
- [22] C.K. alleges that G.K. is underreporting his income from driving a taxi with Bonny's Taxi Ltd. ("Bonny's") in Burnaby, BC. She seeks to have a net income of between \$62,000 and \$83,000 imputed to him for the purposes of both child and spousal support. G.K. reported gross incomes of \$69,688, \$65,696, and \$67,468 in 2016, 2017, and 2018 respectively. He reported net incomes of \$31,500, \$34,503, and \$35,000 in those years respectively.

The Law with Respect to Imputing Income

Imputation of Income for Child Support Purposes

- [23] Income may be imputed under ss. 16-21 of the Guidelines. Section 19 of the Guidelines sets out a non-exhaustive list of the circumstances in which a court may exercise discretion to impute income:

Imputing income

19 (1) The court may impute such amount of income to a spouse as it considers appropriate in the circumstances, which circumstances include the following:

- (a) the spouse is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by the needs of a child of the marriage or any child under the age of majority or by the reasonable educational or health needs of the spouse;
- (b) the spouse is exempt from paying federal or provincial income tax;
- (c) the spouse lives in a country that has effective rates of income tax that are significantly lower than those in Canada;
- (d) it appears that income has been diverted which would affect the level of child support to be determined under these Guidelines;
- (e) the spouse's property is not reasonably utilized to generate income;
- (f) the spouse has failed to provide income information when under a legal obligation to do so;
- (g) the spouse unreasonably deducts expenses from income;
- (h) the spouse derives a significant portion of income from dividends, capital gains or other sources that are taxed at a lower rate than employment or business income or that are exempt from tax; and
- (i) the spouse is a beneficiary under a trust and is or will be in receipt of income or other benefits from the trust.

[24] The list in s. 19 is not exhaustive, and C.K. does not rely on any specific subsection of it. She does not suggest that G.K. is intentionally under-employed or that he has inflated his business expenses or that they are otherwise inaccurate. As I understand her argument, she alleges that G.K. has been underreporting his cash income. She relies on her own experience as a taxi driver, and her calculations of what she believes G.K.'s comparative income should be, in support of her submission that he should be imputed an annual net income of between \$62,000 and \$83,000.

[25] The burden of establishing that income should be imputed falls on the party alleging that the other party's reported income does not reflect his or her actual income: *Marquez v. Zapiola*, 2013 BCCA 433 at para. 36.

The Parties' Work Histories and Incomes

G.K.

[26] G.K. has a Bachelor's degree in Commerce from India.

- [27] After G.K. arrived in Canada, and up until about 2014, he worked in construction. G.K. developed back pain. He was off work for a period of time and received employment insurance benefits. He started driving a taxi with Bonny's in Burnaby. G.K. produced a letter from a supervisor at Bonny's which says that G.K. has been associated with the company since May 5, 2014. G.K. said that he applied for his taxi licence in May and started driving in June 2014.
- [28] G.K. does not own his taxi licence. Instead, he leases it from the owner, Pawar Onkar, for \$1,000 a month including PST and GST.
- [29] G.K. testified that he drives a taxi five or six days a week, usually at night. The length of the shifts he drives varies, but he has access to the taxi from 4:00 p.m. to 4:00 a.m. the following morning. Another driver drives the same taxi during the daytime hours.
- [30] G.K. signed a Taxi Driver's Lease Agreement with Bonny's, pursuant to which he agreed to abide by the company's rules and pay certain expenses. Bonny's records the dates and times of G.K.'s shifts.
- [31] During G.K.'s shifts, Bonny's receives the payment of those taxi fares charged on a credit or debit card or charged to one of Bonny's corporate accounts. Bonny's deducts the fees that G.K. is obliged to pay from those fares on a monthly basis and pays the remaining balance to him by monthly cheque. These deductions include: an airport fee and applicable taxes, a credit card processing charge, a computer maintenance fee and applicable taxes, a "stand" or dispatch fee and applicable taxes, a radio fee, and certain other charges, but do not include his monthly lease payment. The airport fee allows G.K. to pick up passengers at the airport.
- [32] On occasions when G.K. is not driving the taxi, and another driver does so for him, Bonny's will deduct the amount owing to the other driver from G.K.'s cheque.
- [33] G.K. testified that tips that he receives on credit or debit cards, or on Bonny's corporate accounts, are also collected by Bonny's on his behalf and reflected in the monthly accounting statements. The only income that G.K. earns that is not reflected in Bonny's statements is cash fares and any cash tips.
- [34] From the net amount G.K. receives monthly from Bonny's and his cash fares and tips, he pays his fuel, his share of the cost of any vehicle repairs, his monthly lease payment, his cell phone, and certain other business expenses (collectively, the "Additional Expenses").
- [35] In addition to producing Bonny's records for the almost six years he has driven for them, G.K. has produced his complete income tax returns for the years 2014 to 2018. G.K.'s returns are prepared by an accountant, and detailed tax calculation schedules are attached to them.

- [36] In each of his returns, G.K. reports his gross business income from driving a taxi by adding back amounts that were deducted for GST (these are accounted for elsewhere in his return). To arrive at gross business income, his accountant includes the net income he receives from Bonny's, after the fixed expenses outlined above were deducted, and adds the amount G.K. receives in cash fares and tips. From that total, and to arrive at his net income for income tax purposes, he deducts his Additional Expenses.
- [37] In each year, G.K.'s gross self-employment income is higher than the income he receives from Bonny's. The difference is his income from cash fares and tips. All in all, G.K.'s records are clear, detailed, and reasonable.

C.K.

- [38] C.K. has a Bachelor's degree in Education. There was no clear evidence about whether she obtained her degree in India, but I presume so as when she came to Canada, she did so as a married woman, and there was no evidence that she then attended school.
- [39] On dates that were not clear in the evidence, but appear to have been just after her marriage to G.K., C.K. worked as a security guard. From about 2012, she did seasonal work driving a van or a bus. She picked up and dropped off labourers who worked at a berry farm during the picking season.
- [40] C.K. began driving a taxi on April 14, 2015. Initially, G.K. trained her, and they shared the cab leased by him. She stopped driving on June 9, 2015, because she returned to work at the berry farm. A sprained ankle delayed her start at the berry farm. The berry season ended in about October, and she collected employment insurance until a date in early 2016.
- [41] In about February 2016, after her employment insurance ran out, C.K. began driving a taxi for Delta Sunshine Taxi (1972) Ltd., which operates taxis, including Green Cab, for whom C.K. drives. She then went back to work at the berry farm and stayed there until the season was over sometime in October 2016. She testified that she wanted to drive full time but was unable to do so. She drove when she was able to get shifts. She recalled working for Green Cab for a few days in November and December 2016 but, otherwise, collected employment insurance until she went to India in early 2017. On her return, she made up her mind to focus on taxi driving. She has worked for Green Cab ever since.
- [42] C.K. drives a taxi during the day shift. She does not lease one taxi but pays a daily rate to various licence owners to lease taxis from them.
- [43] C.K. did not disclose her income tax returns for 2017 or 2016, although she produced the tax return summaries and her notices of assessment. In 2017, C.K. declared a gross income of \$30,584.08 and net income of \$18,563.08.

- [44] In C.K.'s income tax return for 2018, she records gross self-employment income of \$50,000 and net income of \$32,358.67. Her return does not itemize the deductions from her gross income to arrive at the net figure. There is no information about C.K.'s receipt of cash fares or tips.
- [45] C.K. produced some of Green Cab's records for the dates on which she drove between January and September 2019. Her records for earlier years were not produced.
- [46] The 2019 records total the fares paid by credit card or on corporate accounts. From the total received by Green Cab, it deducted the daily lease costs for the various cabs driven by C.K. The amount of the lease varied by the length of the shift. Green Cab also deducted bank charges. The balance was paid to C.K. by cheque.
- [47] In a letter she provided from Delta Sunshine Taxi, the operator of Green Cab, between January and September 2019, C.K. received cheques from Delta Sunshine Taxi totalling \$20,369.89. The attached documents do not detail the days on which she drove a taxi or for how long.

Has C.K. Established a Basis for Imputing Income to G.K.?

- [48] C.K.'s argument is based on a comparison between her income and G.K.'s. She asks me to engage in a comparative analysis. She submits that, after deducting her expenses, she earns \$200 net a day driving a taxi during the daytime, three or four days a week, for a smaller taxi company. She submits that G.K., who works nights and on the weekends, for five or six days a week, and for a larger taxi company, should be earning more than she does. She prepared a chart based on various net earnings scenarios ranging from \$1,200-\$1,600 a day. She says her figures suggest that G.K. earns a net income of \$62,400 for working five days a week for 52 weeks a year. That net income is based on the lowest earnings figure that she estimates for him.
- [49] The difficulty with C.K.'s submission is that due to her failure to provide detailed disclosure, it is not possible for me to determine the number of days and hours she worked and what her net daily earnings were. Her calculations are not authenticated by disclosure from her or from Green Cab. In fact, some of the evidence C.K. produced contradicted her evidence that she did not drive more than three or four days a week and did not drive on weekends.
- [50] For example, C.K.'s log or trip sheets for late November and early December 2016 were marked as part of Exhibit 5. C.K.'s evidence was that she did not regularly complete log sheets as Green Cab did not expect their drivers to do so. It is apparent that she was not recording her fares on her log sheets as some of them showed 11 or 12-hour shifts without fares.
- [51] Nonetheless, the log sheets provide some useful information. For example, they show that C.K. drove more than three or four days a week and drove three weekend days. The first page is for an 11-hour shift on November 20, 2016, which was a Sunday. On November 21, C.K. drove for another 11 hours. On November 22, she drove for 10 or possibly 11 hours. On

November 24, she drove for 11 hours. On November 25, she drove for 10 hours. On either November 26 or 27, the date is not recorded, but it was either a Saturday or a Sunday, she drove for 12 hours. On November 28 and 29, she drove for 12 hours. Absent detailed disclosure by C.K., I am unable to assess how many days a week and for how many hours she worked. It is not possible to impute a higher income to G.K. without more fulsome evidence from C.K. on her average daily earnings. Alternatively, she could have led evidence from others about earnings from driving a taxi in the Lower Mainland.

- [52] Further contradictions are evident in the Green Cab records included at Tab 8 of Exhibit 3, which record the net earnings C.K. received between January and September 2019. In April 2019, she paid a lease fee for various cabs over 24 days in the month, clearly more than three or four days a week, and her net earnings were \$2,663.29, just over \$110 a day. The net earnings figure does not include cash fares or cash tips, but it seems unlikely that she was earning an additional \$90 a day in cash to arrive at net earnings of \$200 a day. There is also no evidence, aside from her testimony, that she was earning \$90 a day in cash fares and tips. C.K. has not produced bank records evidencing deposits of cash to her account or trip logs to support her testimony.
- [53] Finally, Ex. 2, which was apparently prepared by Green Cab and sets out the cheques C.K. received from it for the period of January 2019 to September 2019, does not accord with Green Cab's records for the same period included at Tab 8 of Ex. 3.
- [54] Overall, there is a marked contrast between the documents disclosed by C.K. and those disclosed by G.K., which, as I have said, are clear and detailed.
- [55] During her closing submissions, and for the first time, C.K. argued that G.K.'s bank account records suggested that he was earning more income than he had reported for income tax purposes. G.K. had disclosed his bank account records and they formed part of the book of documents he filed at trial.
- [56] C.K. did not question G.K. about his bank records during her cross-examination of him and, as a result, counsel for G.K. did not address the bank records in re-examination. Counsel for G.K. objected to C.K.'s submissions on the basis that it would be unfair to allow C.K. to ask the Court to draw inferences from bank records that G.K. had not been asked about. I agreed and did not consider C.K.'s submissions. Although she was self-represented at trial, she had been represented by counsel and, from time to time, had sought advice on specific legal issues.
- [57] Because of all of these difficulties with the evidence, I cannot accept C.K.'s calculation of what she says G.K. should be earning. Her evidence would perhaps have been the most compelling but there were no tax records or other document to support it. C.K. did not provide any other evidence about what full-time taxi drivers earn in the Lower Mainland. For example, she did not call another taxi driver, or an employee of a taxi company, to give evidence about drivers' cash earnings. She made a number of conclusory statements about the taxi industry that were not supported by evidence or by the disclosure that she made.

- [58] I accept that C.K. firmly believes that G.K. is earning additional cash income but I could only make that finding based on a reliable evidentiary record that C.K. did not provide.
- [59] Thus, while it is possible that G.K. is earning additional cash income that he is not reporting for income tax purposes, C.K. has not demonstrated that to be the case on a balance of probabilities. She has not met the burden on her to establish that I should impute income to him.
- [60] On the evidence, I accept G.K.'s income as set out in his income tax returns as the basis for calculating his child support obligations.

Child Support

- [61] For the year 2018, the last year on which I have income tax information for G.K., his line 150 income was \$34,503.59. G.K. is content to calculate his child support payments based on income of \$35,000 a year.
- [62] Based on G.K.'s reported line 150 income for 2016 (rounded to \$31,500), and 2017 (rounded to 34,503), and based on the Guidelines for BC, he should have been paying \$294 a month in child support commencing January 1, 2016, and \$324 a month for 2017. He is currently paying \$329 per month based on his 2018 income and commenced doing so on March 1, 2018.
- [63] By my calculation, child support arrears are \$3,528 for 2016, \$3888 for 2016, and \$658 for the first two months of 2018, for a total of \$8,074.
- [64] For the year 2018, based on C.K.'s reported line 150 income of \$32,359, G.K.'s proportional share of the agreed s. 7 expenses is 52%. Based on C.K.'s income for 2016 (rounded to \$17,789) and 2017 (rounded to \$18,563), G.K.'s proportionate share of the agreed s. 7 expenses for 2016 is 64% and for 2017 is 65%. It was not clear on the evidence whether G.K. has paid anything towards these expenses. If there are any arrears, they should be paid.
- [65] I was not advised whether G.K. paid anything towards child support from the date of separation until the consent order was reached. If he did so, he should be credited with any payments he made as against the arrears set out in the previous paragraphs.

Spousal Support

- [66] Regardless of whether the start date of the marriage is the date of the religious ceremony (November 30, 2005) or the date of the marriage registration (February 25, 2007), based on a with-child-support formula, G.K. is not required to pay spousal support to C.K.

Conclusion and Orders

- [67] I have not imputed an income to G.K.

- [68] As set out above, the parties have agreed to a number of consent orders that I will not repeat here. I have also outlined G.K.'s ongoing child support obligations, the division of s. 7 expenses, and the arrears of child support from the start of January 2016.
- [69] Because of the parties' incomes, and in accordance with the Spousal Support Advisory Guidelines, G.K. does not owe any spousal support.
- [70] If they have not already done so, the parties are to exchange their 2019 income tax returns and notices of assessment as soon as they are available. They are to adjust child support and their respective proportionate shares of s. 7 expenses effective January 1, 2019. Thereafter, the parties will exchange their income tax information annually by June 1, and adjust both child support and the proportional sharing of s. 7 expenses effective January 1 of that year.
- [71] On July 28, 2020, I granted an order divorcing the parties from each other.
- [72] In light of the G.K.'s success in this trial, he is entitled to his costs.

"MacNaughton J."

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