

CANADA / JUDGMENT

Ishwarlall v. Ishwarlall

2022 BCSC 794

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Supreme Court of British Columbia

DECIDED

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2022 BCSC 794 Ishwarlall v. Ishwarlall

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Ishwarlall v. Ishwarlall,

2022 BCSC 794

Date: 20220513

Docket: E203780

Registry: Victoria

Between:

Sujay Ishwarlall

Claimant

And

Shresta Ishwarlall

Respondent

Before: The Honourable Justice Mayer

Reasons for Judgment

Counsel for the Claimant via videoconference:

M.C. Norton

Counsel for the Respondent via videoconference:

J. Emmond

Place and Date of Hearing:

Victoria, B.C.

April 21-22, 2022

Place and Date of Judgment:

Victoria, B.C.

May 13, 2022

Introduction

- [1] In this family case application, Shresta Ishwarlall seeks orders pursuant to ss. 149 and 165 of the Family Law Act, S.B.C. 2011, c. 25 [FLA], for payment from the respondent Sujay Ishwarlall, of interim child and spousal support commencing May 1, 2022 and pursuant to s. 170(b) of the FLA for payment of retroactive child support. In addition, Ms. Ishwarlall seeks an order pursuant to ss. 222 and 227 of the FLA that rental income earned on alleged family property in South Africa be paid into trust with her counsel or counsel for Mr. Ishwarlall, in Canada.
- [2] Mr. Ishwarlall does not dispute that an order for interim child and spousal support should be made but disputes the amount of income that should be imputed to him for the purposes of determining support payments. He disputes that retroactive child support is payable. He is prepared to agree that rental income from the property in South Africa be held in trust, but with a solicitor in South Africa - so that these funds can be used to pay expenses including mortgage, strata fees and other costs in that country.

Background

- [3] Ms. Ishwarlall is 45 years old and works as a unit clerk with a health care agency in Oak Bay, British Columbia.
- [4] Mr. Ishwarlall is 44 years old and works as an anesthesiologist in Duncan and on occasion, at other locations on Vancouver Island.
- [5] The parties were married on February 1, 2005 and separated on or about July 1, 2020. They have one male child who is currently 13 years old and lives with his mother in Victoria.
- [6] Since they separated on July 1, 2020, the parties have maintained an informal arrangement under which Ms. Ishwarlall uses two credit cards for expenses, in lieu of receiving monthly payments for spousal and child support.
- [7] Going forward, Ms. Ishwarlall seeks interim child support of \$4,476 per month and interim spousal support of \$14,323 per month. These amounts are calculated based upon a guideline income of \$550,054.81 for Mr. Ishwarlall and \$45,000 for Ms. Ishwarlall.

- [8] In her notice of application Ms. Ishwarlall seeks payment of retroactive child support for the period July 1, 2020 to May 1, 2022, in the amount of \$120,312, less the amount Mr. Ishwarlall paid towards child support during this period, to reflect what she contends has been an underpayment of support to date.
- [9] As a starting position, Mr. Ishwarlall contends that this Court should maintain the status quo with respect to payment of child and spousal support going forward, and decline to make an order for retroactive child support, as the trial of this family case is set for January 2023. He submits that it would be better if the parties' disputes with respect to income and support be resolved on a full evidentiary record. He submits that if orders increasing child and spousal support payable until trial are to be made that his guideline income for child and spousal support purposes should be set at approximately \$439,000.
- [10] Mr. Ishwarlall contends that there is no basis for awarding retroactive child support at this time. He submits that under any income scenario he has paid more than required for child support and the question of retroactive spousal support, which is not sought by Ms. Ishwarlall in this application, can be resolved at trial.

Issues

- [11] The principle issues for determination in this case include the following:
- What income should be applied to Mr. Ishwarlall for the purposes of calculating both child and spousal support going forward?
 - Has there been a shortfall in child support payments to date justifying the payment of retroactive child support?
 - Is there a basis for making a conduct order requiring income earned on rental properties in South Africa to be paid into a Canadian lawyer's trust account?

Prospective Child and Spousal Support

Position of the Parties

- [12] The income which Ms. Ishwarlall seeks to have imputed to Mr. Ishwarlall for 2021 and forward is, \$550,054.81, which is the total of the amount he earned from the Vancouver Island Health Authority ("VIHA") for fiscal year 2019/20 (\$27,518) and the amount of his MSP billings for fiscal year 2019/20 reported by the Ministry of Health in the MSP "Bluebook" (\$522,536.81). Ms. Ishwarlall contends that it is appropriate to use Mr. Ishwarlall's earnings from fiscal year 2019/20 before his income temporarily dropped in fiscal year 2020/21 because of cancellation or delays of surgery arising from the COVID-19 pandemic.

- [13] In support of her position on imputation of income Ms. Ishwarlall contends that based on the work schedule Mr. Ishwarlall has disclosed, he may only be working two to three days per week and now takes six weeks vacation, which he never did before the separation. She believes that he is not earning up to his full potential.
- [14] Ms. Ishwarlall refers to a printout obtained website obtained by a legal assistant in her lawyer's office named SALARYEXPERT, maintained by an entity called the Economic Research Institute. This website states that the average gross salary for an anesthesiologist with 8+ years of experience in Duncan, British Columbia, is \$561,484. Ms. Ishwarlall submits that this provides some indication that Mr. Ishwarlall could be earning more than he is.
- [15] In addition, Ms. Ishwarlall contends that Mr. Ishwarlall has not disclosed relevant documents which further justifies a high imputed income. These include, for example, providing an updated work schedule showing his work schedule for July 2020 to December 2021 - which would allow her to further determine whether he is working a reasonable number of days. As well she contends that Mr. Ishwarlall has not produced statements for various credit card accounts - which I presume would allow her to determine his expenditures as a way to assist in determining his income.
- [16] In determining the amount of spousal support payable using whatever income imputed to Mr. Ishwarlall, Ms. Ishwarlall submits that spousal support should be paid on the higher end of the range determined using DivorceMate software. She contends that the high end of the range should be used as a result of factors including the following: the fact that the parties had a traditional marriage before separation (that is Ms. Ishwarlall remained at home to raise the parties' son); the parties' relative incomes; that she has been the sole parent of the child since separation; and, Mr. Ishwarlall's needs and therefore monthly expenses are lower than hers.
- [17] Mr. Ishwarlall says that the MSP "Blue Book" earnings data for 2019/20 relied upon by Ms. Ishwarlall to determine Mr. Ishwarlall's gross earnings from his MSP billings is not reliable. He submits that the most reliable method of determining all of his gross income is by referring to his banking records. Based on those records, after deducting earnings from Questrade investments which he says are family property, and therefore will be subject to apportionment at trial, he says that his income should be imputed at approximately \$439,000. This amount is calculated based on his gross income earned through his medical practice (approx. \$471,000) less what he says are legitimate professional expenses (approx. \$32,000).
- [18] I note that although in her notice of application Ms. Ishwarlall did not deduct any professional expenses from her calculation of Mr. Ishwarlall's gross income, during submissions before me her counsel conceded that approximately \$12,000 should be deducted for such expenses.

- [19] Mr. Ishwarlall denies that he is not working enough. His evidence is that he works more than the average number of hours than worked by his colleagues in the same workplace. In addition, he denies that there is a basis for Ms. Ishwarlall's complaint that he is evading his document disclosure obligations.

Analysis and Conclusion

- [20] This Court is to determine, as best as it can in an interim application such as this, what Mr. Ishwarlall's income is for the purposes of determining interim child and spousal support. This Court is then to determine whether the circumstances justify imputing a greater income than the amount earned.
- [21] In this case I am not satisfied calculating Mr. Ishwarlall's income at \$550,000, based on the total of his earnings from VIHA and his MSP "Bluebook" billings for fiscal year 2019/20 is appropriate. The MSP "Bluebook" is a third-party document which includes estimates for unpaid MSP claims. It is unclear if the amount of MSP billings shown reflects Mr. Ishwarlall's actual earnings. The publishers of the MSP "Bluebook" specifically state that the billings data should not be relied upon for income tax purposes.
- [22] I do not find that a sufficient basis has been provided on which I can determine the reliability and accuracy of the salary estimate provide by the Economic Research Institute and apply the average earnings data shown on that website, for the purpose of determining Mr. Ishwarlall's earnings.
- [23] For the purposes of determining interim support, I consider it more appropriate to rely upon the earnings shown on Mr. Ishwarlall's bank statements. In addition to the reasons expressed above, these records show amounts deposited to his account over a calendar year and not, as is the case with VIHA earnings and MSP billings over a fiscal year.
- [24] The accounts summary provided by counsel for Ms. Ishwarlall shows that approximately \$491,000 was deposited into Mr. Ishwarlall's accounts from various sources in 2021. I accept that the approximate \$22,000 amount received from Questrade as investment income may be family property and therefore subject to apportionment as such at trial. This amount is therefore not income and should be deducted, resulting in earnings of \$469,000 - before deduction of professional expenses.
- [25] With respect to whether a higher income should be imputed, Section 19(1) of the Federal Child Support Guidelines, SOR/97-175 [Guidelines] sets out a non-exhaustive list of circumstances where the court has the discretion to impute income to a parent. Of relevance, those include at subsection (a) where a spouse is intentionally underemployed (that is, whether they are earning to capacity), subsection (f) where a spouse fails to provide income information, and subsection (g) the spouse unreasonably deducts expenses from income.

[26] Generally, to determine if a parent is earning to capacity, the court will consider the following principles:

1. parents who are healthy and can work have a duty to seek employment;
2. reasonable income-earning capacity is based on consideration of a parent's age, education, experience, skills, health, and on-the-job opportunities that are reasonably available;
3. limited experience and skills do not justify a failure to pursue employment;
4. persistence in un-remunerative employment or unrealistic career aspirations will not be an excuse; and
5. self-induced reduction in income will not justify the avoidance of child support obligations.

Hanson v. Hanson, [1999] B.C.J. No. 2532 (S.C.), at para. 14.

[27] Section 18(1) of the Guidelines provides that where a payor spouse is a shareholder, director or officer of a corporation the court may determine the spouse's annual income to include pre-tax income. Pre-tax corporate income will be assumed to be available to the payor spouse - unless the payor spouse can provide clear evidence that not all pre-tax income was available to them: Hausmann v. Klukas, 2009 BCCA 32, at paras. 51-52. In this case, this means that Mr. Ishwarlall has the onus to demonstrate what portions of his pre-tax income should not be considered as income for the purposes of determining support payments.

[28] As I have stated above, Ms. Ishwarlall concedes that some professional expenses should be deducted from Mr. Ishwarlall's gross income but that the amounts he seeks to deduct are either too high or are not explained. Mr. Ishwarlall concedes that not all of his professional expenses should be deducted.

[29] I am not satisfied that Mr. Ishwarlall has met his onus of proving that it is appropriate to deduct all of the amount he seeks to deduct for automobile expense (\$5,812), and home office expense (\$4,968), telephone (\$975). I find no basis on which to conclude that any amount for life and disability insurance costs, which I expect is a purely discretionary expense made for Mr. Ishwarlall's personal benefit, constitutes a business expense. Similarly, I see no basis to deduct the amount claimed for wage and employee benefit.

[30] In the interests of determining a "rough and ready" calculation of Mr. Ishwarlall's earnings for child and spousal support purposes I have assumed that 50% of the acceptable professional expenses described in the paragraph above, along with the full amounts sought to be deducted for bank charges (\$1,219), insurance (\$372), licences and dues (\$4,601) and professional fees (\$5,689), constitute "deductible" professional expenses. As a result, I calculate that it is appropriate to deduct a further \$17,758 from Mr. Ishwarlall's earnings of \$469,000, resulting in approximate gross earnings of \$451,242 for calendar year 2021.

- [31] I am not satisfied that Mr. Ishwarlall is intentionally underemployed justifying an imputation of income higher than this amount. As stated in *Barker v. Barker*, 2005 BCCA 177, it is not necessary for a person to put in long hours in order to earn a higher income - but they cannot choose to work less than a regular work week: *Barker*, at para. 18. Mr. Ishwarlall's evidence indicates that in addition to the 2-3 days per week shown on his calendar (I understand for work as an anesthetist in Duncan) that during the week he works on call and also in other hospitals including in Nanaimo. As well, Mr. Ishwarlall has sworn that he is working more than his colleagues, and other than Ms. Ishwarlall's speculation that he may be working less than he is able to, there is insufficient evidence to the contrary.
- [32] Finally, I am not satisfied that imputation of a higher income is justified on the basis of a failure on the part of Mr. Ishwarlall to produce financial documents. Although he has not produced all credit card statements I am not satisfied that these statements will show that he earned a higher income than that demonstrated by his bank account records. Although, it may be that a comprehensive review of financial records at trial, perhaps with the assistance of opinion evidence from an accounting expert, may demonstrate that Mr. Ishwarlall in fact earned more than is shown on his banking records, I am not satisfied that it is appropriate, at this time, to impute higher income based on a failure to produce some documents. Mr. Ishwarlall has substantially complied with his disclosure obligations.

Payment of Retroactive Child Support

- [33] In submissions before me Ms. Ishwarlall agreed that Mr. Ishwarlall has effectively paid \$12,788 per month, as a blended payment for spousal and child support, for the period July 1, 2020 to February 1, 2021 and has paid \$11,028 per month for the period March 1, 2021 to May 1, 2022. This is equivalent to blended payments of \$267,724 over this period.
- [34] Ms. Ishwarlall calculates that based on a guideline income for her of \$15,237 during the period July 2020 to January 2022, and \$43,111 during the period February 2022 to April 2022 and guideline income for Mr. Ishwarlall of \$550,000 during this period, and after deducting the amounts paid as blended child and spousal support payments, that arrears for spousal support and child support are approximately \$174,504. I have already found that guideline income for Mr. Ishwarlall for interim child and spousal support going forward should be set at \$451,242.
- [35] Mr. Ishwarlall correctly points out that Ms. Ishwarlall has not sought payment of retroactive spousal support in this application. The only issue therefore is whether it is appropriate to make an order for payment of retroactive child support.
- [36] Mr. Ishwarlall contends that under any scenario, that is even if his income for the period July 2020 to April 2022 was imputed to be \$550,000, that he has made blended support payments of well over the monthly amount that would be payable for child support at this level of income. I note that the Guidelines indicate that Mr. Ishwarlall would have been liable to pay \$3,705.72 in monthly child support with earnings of \$451,242, and \$4,467 with

earnings of \$550,000. Mr. Ishwarlall has paid blended monthly support payments of between \$11,028 and \$12,788 during the relevant period.

- [37] As counsel for Mr. Ishwarlall contends, it should be assumed that the support payments made to date should first be attributed to child support. Accordingly, there has been no shortfall in payment of required child support to date. It remains open to Ms. Ishwarlall to seek an order for payment of retroactive spousal support and in my view, Mr. Ishwarlall is on notice that such an application will be made.

Conclusion

- [38] For the purposes of determining payment of interim child and spousal support going forward I find that Mr. Ishwarlall's income is \$451,242. Both parties agree that Ms. Ishwarlall's income should be imputed at \$45,000. Commencing May 1, 2022 spousal and child support and division of section 7 expenses shall be paid in accordance with these incomes. For the purposes of calculating the required monthly support payments, the parties shall complete a calculation using DivorceMate software.
- [39] I find that it is appropriate that the amount for spousal support to be paid should be the amount shown at the high end of the range provided by DivorceMate on the basis that the parties had a traditional marriage before separation, the significant difference in their income, Ms. Ishwarlall has been the sole parent of the child since separation; and, Mr. Ishwarlall's needs and therefore monthly expenses are lower.
- [40] Ms. Ishwarlall's claim for retroactive child support is dismissed - without prejudice to Ms. Ishwarlall's ability to claim for payment of retroactive spousal support at trial.
- [41] Sections 222 and 227 empowers this Court, as a form of conduct order, to order a party to do anything the court considers appropriate to facilitate arrangements pending final determination of a family law dispute. Ms. Ishwarlall wishes to have rental income from alleged family property in South Africa to be held in a Canadian solicitor's trust account. Mr. Ishwarlall is prepared to agree that rental income from the property in South Africa be held in trust with a solicitor in South Africa - so that these funds can be used to pay expenses including mortgage, strata fees and other costs in that country. There is no evidence on which I can conclude that if rental income is held in trust in South Africa that it will not be available when a final determination on division of family property is made at trial.
- [42] I order rental income from the property in South Africa be held in trust with a solicitor in South Africa - so that these funds can be used to pay expenses including mortgage, strata fees and other costs in that country. Further, I direct Mr. Ishwarlall to provide Ms. Ishwarlall with a regular accounting of rental income and expenditures for the South Africa properties.

"Mayer J."

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