
CANADA / JUDGMENT

J.C. v. A.A.G.

2020 BCSC 1485

COURT

Supreme Court of British Columbia

DECIDED

6 October 2020

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2020 BCSC 1485 J.C. v. A.A.G.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

J.C. v. A.A.G.,

2020 BCSC 1485

Date: 20201006

Docket: 184208

Registry: Victoria

Between:

J.C.

Claimant

And

A.A.G.

Respondent

Before: The Honourable the Honourable Mr. Justice Punnnett

Reasons for Judgment

Counsel for the Claimant:

B. A. MacLeod

Counsel for Respondent:

Respondent on her own behalf

Place and Date of Hearing:

Victoria, B.C.

September 1, 4 and 15, 2020

Place and Date of Judgment:

Victoria, B.C.

October 6, 2020

- [1] The parties filed cross applications for interim parenting orders and support issues. Due to insufficient time, the financial issues were adjourned to address the parenting issue as their child was starting kindergarten.
- [2] On September 11, 2020, I ordered that the child attend kindergarten in Victoria with parenting time to be shared if the respondent chose to reside in Victoria at least part time, and that the residence of the child be with the claimant if the respondent did not. I am now advised that the respondent has chosen to remain in Duncan with weekend parenting time as ordered. The claimant's application for child support, including extraordinary expenses and retroactive support, and the respondent's application for payment of arrears of child support and retroactive support, were completed on the assumption that the current parenting arrangement will continue pending trial. Each applicant's application sought to impute income to the other.
- [3] The claimant and the respondent resided together in a marriage-like relationship from December 1, 2014 to May 28, 2015. The parties have a five-year-old son together ("the Child").
- [4] The parties entered into a separation agreement on December 23, 2015 that provided:
 - a) the Child reside primarily with the respondent;
 - b) the claimant's gross income for 2014 was \$82,200 consisting of \$72,000 from employment as a pharmacist, and \$10,200 in net rental income;
 - c) that after the respondent's maternity benefits ceased, she intended to become economically self-sufficient within a reasonable time;
 - d) for the claimant to have parenting time Tuesday evening, Thursday overnight, Sunday to Monday and such other times as the parties agreed to, with parenting to be reviewed periodically; and
 - e) that based on the claimant's income of \$82,200 and respondent's benefits of \$12,900, child support of \$769 per month was payable commencing on June 1, 2015 with extraordinary expenses to be shared, in proportion to incomes, including child care expenses, medical and dental expenses and other expenses as agreed, with child support to be reviewed as of June 15th each year.

- [5] The claimant is in arrears on the child support payments from the separation agreement in the sum of \$13,590.92 according to the respondent and the Family Maintenance Enforcement Program.
- [6] The parties followed the parenting schedule in the separation agreement until early October 2016. The respondent suggested the parties move to an equal parenting regime based on a two day/two day/three-day rotating schedule to which the claimant agreed. The new equal parenting regime was followed until February 12, 2018 when the respondent insisted upon a return to the separation agreement schedule with her having primary care of the Child.
- [7] In January 2018, the respondent informed the claimant she had purchased a home on Salt Spring Island (the "Duplex") but stated she would not be moving there. She intended to "fix it up" and rent it out and did rent it out short term through Airbnb.
- [8] Given the claimant did not agree to the change, the parties attended mediation from March to June 2018, without success.
- [9] Then on July 27, 2018, the respondent advised the claimant she planned to move with the Child to Salt Spring Island. As a result, the claimant brought an application in this Court and on September 27, 2018 an order was made prohibiting the respondent from moving the child to Salt Spring Island. Despite service of the order on the respondent on September 28, 2018, she moved with the child to Salt Spring Island on October 1, 2018. The claimant chose not to enforce the order and arranged shared parenting.
- [10] In April 2019, the parties and their counsel attended a judicial case conference and entered into a consent order before Master Bouck which provided that the previously agreed upon shared parenting continue with the Child being with the claimant Sunday to Wednesday of each week.
- [11] On January 28, 2020, the respondent gave notice of her intention to move to Duncan. Subsequently, a consent order was entered into in which she agreed not to move from Salt Spring Island or the greater Victoria area. In breach of that order, the respondent moved to Duncan in March, 2020.
- [12] On May 21, 2020, Steeves J. ordered an interim parenting schedule with shared parenting one week on and one week off. The schedule ended September 20, 2020 as the kindergarten school year was commencing then and, given the parties lived in Victoria and Duncan, the schooling needed to be addressed.

Claimant's Position

- [13] The claimant seeks the following:
- a) that the Respondent's income be imputed at \$50,000.00 annually for the purpose of child support and her proportionate share of the Child's extraordinary expenses, from September 2018 until February 2020;

- b) that the Respondent's income be imputed at \$60,000.00 annually for the purpose of child support and her proportionate share of the Child's extraordinary expenses, from March 2020 onwards;
 - c) that child support for the Child be ordered as a set off between the parties, retroactive to October 2018; and
 - d) that the Respondent pay to the Claimant her proportionate share of the Child's extraordinary expenses to the Claimant, for tuition and uniform expenses for the Child's attendance at private school, retroactive to September 2018.
- [14] The claimant submits the evidence is sufficient to resolve these issues on this interim application.

Respondent's Position

- [15] The respondent's application seeks to impute income to the claimant asserting his taxable income does not reflect the money available to him as a shareholder, director and officer of the pharmaceutical corporation, V Inc. She relies on Section 18 of the Federal Child Support Guidelines. In addition, she seeks payment of unpaid child support.

Parties' Incomes

Respondent

- [16] At the time of separation in 2015, the respondent was employed as an assistant to a director in the Ministry of Public Safety and Solicitor General. She remained in that position until 2018. She deposes the job involved frequent overtime. She further deposes that her long work hours, "working on the weekends at the Salt Spring Island house, daycare, and his dad's house was taking a toll" on her son. As a result, she "put her son first" and quit her job in May of 2018. She decided to work only part-time to spend as much time with her son as she could.
- [17] Her tax returns show line 150 income of \$16,098 in 2015, \$35,516 in 2016, \$39,152 in 2017, \$18,963 in 2018 and \$17,858 in 2019 (the latter does not include rental income).
- [18] After the move to Salt Spring Island, she obtained employment initially as a sales representative at \$23.00 per hour. She did not enjoy this position and took a reduction in pay to be a production assistant for the same employer at \$18.00 per hour. While the employer would have preferred she work full time, she worked only three 8 hour days a week, Monday to Wednesday, as she wished to spend the rest of the week caring for her son during her parenting time. She also had rental income from the other side of the Duplex. The respondent lived in one-half of the Duplex.

- [19] Since the move to Duncan, the respondent has been unemployed by choice. She has rented out both sides of the Duplex for \$2,000 and \$1,600 per month. After payment of the mortgage, taxes, insurance and utilities she anticipates a yearly net rental income of approximately \$21,000 to \$22,000.

Claimant

- [20] The claimant is the sole shareholder of a pharmaceutical corporation, J... Inc. Historically, he worked as a pharmacist with his income paid to the company and then him. He did full-time contract work, part-time contract work and locum work until August 2013 when he and a partner opened a pharmacy called V... Inc. He and his non-pharmacist partner invested their own capital in the pharmacy.
- [21] Initially he was employed full time as the sole pharmacist for \$60,000 per year. Then in June of 2018 he began to work as a pharmacist for H...Inc. for \$130,000 per year as director of manufacturing and extracts. That position required a licensed health care professional. He and his partner hired a pharmacist to replace him at V... Inc.
- [22] In June of 2019, his work hours were reduced from 40 hours to 25 hours per week and his salary to \$81,250. After June, he was not paid for all of his part-time hours so he returned to locum pharmacy work. He and his partner decided not to get rid of V... Inc. Inc.'s pharmacist. Once Covid-19 hit, the claimant's locum work lessened. Then in April 2020, he commenced full-time work at V... Inc.
- [23] In 2017, his income was \$86,314.
- [24] In 2018, he earned \$121,079, including rental income of \$4,828.56.
- [25] In 2019, he earned \$80,614.95 from H... Inc. and V... Inc. and other locum work and rental income.
- [26] He is currently employed as a pharmacist and anticipates income of approximately \$80,000 in 2020.

Law and Discussion

- [27] As noted, each party seeks to impute income to the other. As this is an interim application, the issue of imputing income on an interim application arises. In *Kouznetsova v. Kouznetsov*, 2014 BCCA 160 at paras. 44-45, the Court of Appeal stated the primary purpose of interim orders in family matters is to maintain the status quo between the parties. Further, the issue of imputing income is better addressed at trial where the parties have fully canvassed their respective earning capacities and an evidentiary basis for such a finding can be properly established.
- [28] In *Elliott v. Pollock*, 2015 BCSC 2121, this Court also followed *Kouznetsova*, stating:

20 Further, the imputation of income to a party is better addressed at trial where there can be a more fulsome review of the evidence, particularly where relevant facts are in conflict:

Kouznetsova at para. 45. Here, there is either scant or conflicting evidence on the availability of work to each of the parties or their respective capacities to earn more income. The success of Ms. Elliott's claim for spousal support as well as retroactive child support will depend on whether the trial judge imputes income to one or both of the parties. For the interim period, I determine Ms. Elliott's income at \$24,952.58 and Mr. Pollock's income at \$56,983.00.

[29] Section 19 of the Guidelines provides:

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 reasonable educational or health needs of the spouse.

[30] Interpreting section 19 of the Guidelines was addressed by the Court of Appeal in *Barker v. Barker*, 2005 BCCA 177:

19 With deference to the view of the majority in *Hunt*, supra, I prefer the reasoning of the trial judges of this province who have looked for guidance to this court's early interpretation of s. 19(1) (a) in *Van Gool v. Van Gool* (1998), 166 D.L.R. (4th) 528, to find that the intent to evade or minimize the payment of child support is not required for a finding of intentional underemployment or unemployment, although if that intent exists that finding is required. What matters under the Guidelines is what mattered under the Divorce Act and the Family Relations Act before the Guidelines -- whether the parent is earning what the parent is capable of earning: As Julien D. Payne noted in *Child Support Guidelines in Canada 2004*, (Toronto: Irwin Law, 2004) at 153:

The majority judgment's endorsement [in *Hunt*] of a test based on the deliberate evasion of child support is difficult to reconcile with the overall content of section 19(1)(a) of the Federal Child Support Guidelines ... section 19(1)(a) of the Guidelines, when read in its entirety, appears to negate any requirement that a parent intend to evade his or her support obligations. If such an intention were required, Parliament would not have needed to create an express exemption in section 19(1)(a) of the Guidelines for a parent who is under-employed or unemployed because of the needs of a child or because of the reasonable education or health needs of the parent [see *Phipps v. Phipps*, [2001] A.J. No. 1206 (Q.B.); and *Nahu v. Chertkow*, [2003] B.C.J. No. 1940 (S.C.)].

[31] In *McCaffrey v. Paleolog*, 2011 BCCA 378, the Court of Appeal noted that the starting point of an analysis of s. 19 of the Guidelines is s. 88 of the Family Relations Act, now 147 of the Family Law Act, that each parent has a duty to provide support for their child. The court then said this:

58 In summary in a case like this:

- (1) income may be imputed to a parent who is intentionally under-employed or unemployed unless the parent establishes under s. 19(1)(a) of the Federal Child Support Guidelines that the needs of a child require the parent to remain at home;
 - (2) it is recognized that generally a newborn child or a child of very young age is a child who needs care at home in the context of s. 19(1)(a), but
 - (3) childbirth does not provide an automatic relief from a parent's child support obligations;
 - (4) the circumstances of each situation must be evaluated using all of the criteria articulated in *Donovan v. Donovan* (2000), 190 D.L.R. (4th) 696 (Man. C.A.) as adopted by this Court in *Watts v. Willie*, 2004 BCCA 600;
 - (5) any period of non-support must be reasonable in the circumstances.
- [32] Regarding business income earned by a sole shareholder and officer of a corporation, the test is described in *Weibe v. Treissman*, 2017 BCSC 1523, as:
- [88] Section 18 of the Guidelines addresses situations where a spouse is a shareholder, director or officer of a corporation. If such a spouse's annual income as determined under s. 16 (i.e., his line 150 income, as adjusted) "does not fairly reflect all the money available to the spouse of the payment of child support", the court can review corporate pre-tax income and impute all or part of that income to the spouse for child support purposes.
- [94] The burden of proving the reasonableness of deductions from business income, whether in the context of self-employment or within a wholly-owned corporation, lies with the spouse making the deduction. It is the obligation of that spouse to fully disclose the financial information and documentation relied upon to justify the deduction of each expense. It is not the other party's responsibility to hire, nor is it the court's obligation to appoint, an accountant or other professional to assess and challenge the reasonableness of the deduction, although of course both are at liberty to do so in appropriate circumstances. For a recent affirmation of these principles, see *Cunningham v. Seveny*, 2017 ABCA 4.

Discussion

- [33] As noted, the claimant submits the evidence is sufficient to address the imputing of income to the respondent despite the concern expressed in *Kouznetsova* and *Elliott* above respecting imputing of income.
- [34] I do not agree. The respondent deposes that in January of 2018 their son was showing signs of stress and anxiety explaining he evidenced unexplained fear, anger and crying such that she decided it was in his best interests she be more available for him. In my view, as noted, imputing income requires "a more fulsome review of the evidence" as it relates to the reduced past employment of the respondent (*Elliott* at para. 20).
- [35] In addition, the order of *Bouck J.* provided:

When the Claimant is travelling during his parenting time, [the Child] will remain in the care of the Respondent. There will be no makeup time provided. As a result, the parties agree on a without prejudice basis that the parenting time herein does not constitute a shared parenting arrangement as the Claimant will likely have less than 40% of the parenting time due to his travel commitments.

[36] The parties disagree on what travelling time occurred. This too requires evidence at trial.

[37] As a result, imputing of income from 2018 to the present is to await trial.

[38] That does not, however, prevent imputing of income going forward, particularly given the respondent states she is returning to work. Other than the respondent's assertion she will be seeking work and will obtain work, there is no evidence of the actual availability of work for her in Duncan. Her work history, however, shows she can find employment and has the ability, experience and education to do so. Any order made for imputed income is interim and is subject to a determination at trial of either actual income earned in the interim or imputed.

[39] In the circumstances, I impute interim employment income of \$18.00 per hour to the respondent based on her last employment on Salt Spring Island. Assuming she can obtain at least part-time work, being available 24 hours a week, this amounts to \$22,000 per annum. Her additional rental income of \$21,000 results in a total income of \$43,000 per annum for the purposes of determining interim child support payable by the respondent to the claimant. This does not commence until November 1, 2020 in order to provide time for her to find employment.

[40] During submissions, the respondent abandoned her application to impute income to the claimant from his corporate interests, at least on the interim application. However, the claimant addressed the issue and, given the claimant's income is in issue respecting extraordinary expenses, I will address s. 18 of the Guidelines.

[41] As noted, the claimant is an equal partner in V... Inc. There are expenses claimed that may have a personal component such as automotive, office, telephone, internet, accounting and legal, repairs and maintenance, subcontracts and the like. The claimant has filed an affidavit of his business partner reviewing such expenses and stating neither he nor the claimant run any personal expenses through V... Inc. The respondent challenges that assertion in her submissions but provides no evidence in support, simply asserting the partners are friends hence the partner "is not telling" the truth.

[42] On this interim application, I accept the evidence of the claimant and claimant's partner and do not add back any such expenses to the claimant's reported income. Nor, given the financial records of the company, do I deduct capital cost allowance from income or find that depreciation is unreasonable as they appear reasonable and exist for legitimate business reasons. The claimant has met the onus on this interim application of providing evidence that the company's pre-tax income is not available to him. This too is an issue for

final determination at trial.

- [43] Given the claimant is currently the primary parent, and the respondent's imputed income is \$43,000, the Guideline amount of child support payable is \$404 per month. Such payments are to commence November 1, 2020.
- [44] Regarding special or extraordinary expenses from November 1, 2020, the evidence does not provide the current day care or kindergarten costs for the Child given the uncertainty of where the Child will attend school. On an interim basis, those costs are to be shared by the parties proportionate to their incomes.
- [45] The claimant seeks as well an order respecting the respondent's share of extraordinary expenses from March 2020 onwards, and a set-off of child support retroactive to October 2018. He also seeks an order that the respondent pay her proportionate share of the Child's extraordinary expenses for tuition and uniform expenses for the Child's attendance at private school, retroactive to September 2018.
- [46] Regarding the respondent's claim for support arrears, the parties' claims for imputing of income against the other and the claimant's application to set such off against the arrears retroactively, those matters are best left for the trial judge who will have the full evidence of the parties in order to determine their incomes and, from that, address the issues of imputed income and retroactive payments (Kouznetsova at para. 45; Elliott at para. 20).
- [47] As a result, the respondent shall pay child support of \$404 per month along with her proportionate share of extraordinary expenses commencing November 1, 2020. Prospectively, this child support order is to be set-off against the claimant's arrears.

Costs

- [48] Costs shall be in the cause.

"The Honourable Mr. Justice Punnett"

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