
CANADA / JUDGMENT

J.K.C. v. D.H.C.

2005 BCSC 1166

COURT

Supreme Court of British Columbia

DECIDED

10 August 2005

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IN THE SUPREME COURT OF BRITISH COLUMBIA

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Citation:

J.K.C. v. D.H.C.,

2005 BCSC 1166

Date: 20050810

Docket: E001886

Registry: Vancouver

Between:

J.K.C.

Plaintiff

And

D.H.C.

Defendant

Before: The Honourable Madam Justice Loo

Reasons for Judgment

Counsel for the Plaintiff

M. J. Steven

Counsel for the Defendant

P. Daltrop

Date and Place of Trial/Hearing:

4 March and 27 May 2005

Vancouver, B.C.

- [1] Ms. D.H.C. applies for lump sum spousal support and retroactive and ongoing child support. Mr. J.K.C. applies for an order for payment out of \$404,000 held in trust.
- [2] At the heart of this dispute is the ability of each party to earn an income or a greater income. During the marriage the parties lived in exclusive parts of Vancouver, their children attended exclusive private schools, and they lived what Ms. D.H.C. describes as a lavish lifestyle. However, the parties lived beyond their means. At the time of separation they had no savings and little to divide. Both parties accuse the other of not working hard enough; both want the \$404,000.

A. The Background

- [3] Mr. J.K.C. is forty-seven years old. Ms. D.H.C. is fifty-two years old. They were married in March 1990, separated in February 2000 and divorced in September 2001. There are three children of the marriage who are fourteen, twelve and ten years old. The issue of custody has been resolved and the children spend close to six days every two weeks with Mr. J.K.C.. Mr. J.K.C. also has a child from a former marriage.
- [4] After high school, Ms. D.H.C. started university but left in the first year. She was a retail store manager for the next seven years. After completing a one year broadcasting program she was a disc jockey for seven years. She then became a television host for four years and worked part-time in her mother's store. When the television show was cancelled she managed her mother's store from 1986 to 1989. Ms. D.H.C. had also pursued a modelling and acting career when she was sixteen years old and appeared on a CBC show "H.[]". From time to time she was on various shows. Her last job as an actor was in 1989 when she appeared on "A.[]".
- [5] In 1991 and 1992 Ms. D.H.C. managed the books for N.1[] Ltd. ("N.1[] Ltd.") a chain of coffee and tea stores that Mr. J.K.C. then owned through a holding company, N.2[] Inc. After that, Ms. D.H.C. became a homemaker. She aspires to be an actor, but since the parties' separation in February 2000, she has earned less than \$150.
- [6] Mr. J.K.C. worked as a realtor for C.1[] from 1983 to 1995. From 1998 to 2002 he worked for his family's businesses that are largely owned and controlled by his parents. Mr. J.K.C. owns all of the shares in J.[] Ltd. Its only asset was shares in S.1[] Limited ("S.1[] Limited") a company controlled by his parents.

- [7] Over the years Mr. J.K.C. made various investments. In 1989, Mr. J.K.C. borrowed funds from S.1[] Limited to acquire, at a cost of approximately \$70,000 through B.1[] Ltd. and B.2[] Ltd., a 20 per cent interest in S.2[] Joint Venture ("S.2[] Joint Venture") which owned an apartment block in B.3[], Washington. The investment was ultimately expected to provide an income.
- [8] In 1995 Mr. J.K.C. borrowed funds from S.1[] Limited to acquire K.[] Inc. ("K.[] Inc.") for \$316,000. K.[] Inc. had an established commercial fishing camp business on W.1[] in K.[] Inc.. For two years the parties were afforded significant write offs against revenue from this investment.
- [9] Although a house, fish camp, and gas barge located on the K.[] Inc. property generated some revenue, around 1997 the commercial fishing enterprise floundered.
- [10] In addition to the S.2[] Joint Venture and K.[] Inc. investments, N.2[] Inc. also invested in a development site on G.1[] through a business partnership, however it wound down in 2000.
- [11] In about 1995 the parties sold their 1.5 acre S.3[] home in Vancouver for a \$1 million or \$1.25 million profit. Some of the proceeds were used to satisfy K.[] Inc.'s \$150,000 bank debt. The parties planned to invest the remainder of the proceeds and rent a house to live in.
- [12] In November 1997 Mr. J.K.C. began working as a property manager for C.2[] Ltd., a company effectively controlled by his parents. He earned a monthly salary of \$4,000, plus a bonus or dividend paid out towards the end of the year, bringing his total annual income to around \$68,000.
- [13] The parties spent more than what Mr. J.K.C. earned from employment and investments. The bank account they used for all business and personal expenses shows that between 1995 and 2000 the deposits totalled \$6,119,974, while the withdrawals totalled \$6,224,001.
- [14] By the time the parties separated in February 2000, the \$1 million or more profit realized from the sale of S.3[] had been depleted. It had not been used to acquire any other investments, but had been used to support the parties' lifestyle. As a result, they were left with debt, including more than \$30,000 owing for the children's private school expenses.
- [15] On November 30, 2000, J.[] Ltd. entered into a security agreement with S.1[] Limited in connection with the monies Mr. J.K.C. or his company had borrowed from time to time. As of December 31, 1999, the balance owing was over \$211,000.
- [16] Although the parties separated in February 2000, they continued to share the home they rented for approximately \$4,000 a month until October 15, 2001, when Mr. J.K.C. moved to premises owned by C.2[] Ltd. Ms. D.H.C. moved out two weeks later on October 31, 2001 when the lease terminated.
- [17] On September 10, 2001 Mr. Justice Wong ordered the parties divorced and by consent ordered other terms, including that:

- Mr. J.K.C. pay Ms. D.H.C. \$300,000 in full settlement of all of her claims to Mr. J.K.C.'s various business interests, including S.1[] Limited. Of that sum, \$250,000 was to be paid on or before January 31, 2002, and the balance of \$50,000 was to be paid on the earlier of January 31, 2003 or one year from the date that the \$250,000 payment was made;
 - Mr. J.K.C. pay the Royal Bank line of credit, credit card debt, the children's private school and uniform costs for 2001-2002 (these amounts appear to total approximately \$85,300), and any outstanding taxes;
 - Mr. J.K.C. have the children in his care roughly five and a half days every two weeks;
 - Mr. J.K.C. pay, on a without prejudice basis, spousal maintenance of \$6,000 a month on October 1, 2001 and on the 1st of each and every month up to and including January 1, 2002. If the parties could not agree on spousal support thereafter, they could apply;
 - The \$3,000 payments of spousal maintenance for each of the months of September 2000 to December 2000, and the \$6,000 payments of spousal maintenance for the months of January 2001 to September 2001, will be deemed to have been paid and received pursuant to the Order;
 - Mr. J.K.C. pay the costs of the preparation and filing of Ms. D.H.C.'s 2000 and 2001 income tax returns and provide her with payment of any tax liability that results from the inclusion of spousal maintenance in her 2000 and 2001 tax returns, such payment to be made contemporaneously, with the filing of her tax return.
- [18] Mr. J.K.C. planned to pay Ms. D.H.C. the \$300,000 property settlement from the sale of S.2[] Joint Venture, but the sale took longer than expected and generated far less than expected. Mr. J.K.C. used a line of credit to pay the \$6,000 monthly spousal support for four months beyond January 2002, that is, up to and including May 2002. He has not paid spousal support since.
- [19] To raise the \$300,000, Mr. J.K.C. asked his parents to transfer the security granted to S.1[] Limited against S.2[] Joint Venture, but they refused. Instead, on April 29, 2002, Mr. J.K.C. was dismissed from his employment with C.2[] Ltd. and was asked to vacate the premises that he had been living in on the basis that his occupancy was unauthorized. However, his salary and vehicle payments continued to July 31, 2002.
- [20] In June 2002, after satisfying the \$241,817.20 debt owed to S.1[] Limited, the sale of S.2[] Joint Venture resulted in the sum of \$107,008.94 which was paid to Ms. D.H.C..
- [21] In August 2002 Ms. D.H.C. caused Mr. J.K.C.'s shares in J.[] Ltd. to be seized to recover the balance of the \$300,000 that was owed to her. This event triggered a shotgun clause in S.1[] Limited's shareholders agreement in favour of his family and on the closing on January 6, 2003, the sum of \$965,646 was paid to J.[] Ltd.

[22] On December 31, 2002, Madam Justice Ross ordered that the funds be held in trust by Owen Bird, Barristers and Solicitors, until further order. On January 15, 2003, Madam Justice Ross ordered that the following amounts be paid from the trust fund, by consent:

- \$214,461.20 to Ms. D.H.C. in full and final settlement of Mr. J.K.C.'s obligations under the order of Mr. Justice Wong, \$8,973.35 for interest, \$5,622.85 for bailiff's fees, and \$7,000 for legal fees; without prejudice to Mr. J.K.C.'s right to apply for a determination as to his obligation to pay the legal and bailiff's fees;
- \$250,000 to Mr. J.K.C.;
- \$24,000 to Ms. D.H.C., on a without prejudice basis, as a credit towards any future order with respect to spousal and child maintenance.

[23] Mr. J.K.C. used the \$250,000 to pay debts.

[24] Ms. D.H.C. filed her tax returns without consulting Mr. J.K.C., and was reassessed by the CCRA for 2000 and 2001 as a result of the terms of the September 2001 order relating to spousal support. As of February 2005 she owed the CCRA a total of \$18,324.07 of which \$4,252.27 is for arrears interest and a late filing penalty. She also lost 50 per cent of the child tax benefit of \$333.31 a month, or \$10,999.23 and \$762 in GST credits because of the reassessment.

B. The Orders Sought by the Parties

[25] Ms. D.H.C. seeks orders that Mr. J.K.C. pay as follows:

1. \$18,324.07 to the CCRA from the trust fund at Owen Bird; and \$11,761.23 to her;
2. lump sum spousal support of \$126,000 (representing \$150,000 less the \$24,000 advance in 2003) based on her expenses of approximately \$50,000 as set out in her Financial Statement sworn February 21, 2005;
3. child support retroactive to September 2001, and paid from the trust fund in the amount of \$2,228 a month for a total of 47 months or \$104,716, and ongoing child support in the amount of \$2,228 each month for the three children; and
4. section 7 extraordinary and special expenses of approximately \$14,000 annually.

[26] Mr. J.K.C. seeks an order that the approximately \$404,000 in funds remaining in trust with Owen Bird be paid out to him. Mr. J.K.C. also seeks an order that he should not be responsible for the full amount of the bailiff's fees of \$5,622.80 and legal fees of \$7,000, for a total of \$12,622.80 that was paid out of the trust fund pursuant to the January 15, 2003, Order.

C. Mr. J.K.C.'s Financial Circumstances and Income

- [27] After being dismissed from his employment from the family business in April 2002, Mr. J.K.C. looked for work but was unemployed until August 2003 when he found work as a sales manager with G.2[]. He earned a salary of \$5,000 a month, but this only lasted until February 2004 when his employment was terminated.
- [28] In February 2004, Mr. J.K.C. began efforts to qualify as a real estate agent and nominee, but due to his learning disability and dyslexia, he found the material too difficult. In January 2005, he qualified as a real estate salesperson. Since then he has been on commission with M.[] Ltd.
- [29] Mr. J.K.C.'s line 150 income is as follows:
- 2001 - \$182,234.73
- 2002 - \$224,329.00
- 2003 - \$ 38,346.23
- [30] Mr. J.K.C. has not filed his 2004 tax return because of various tax implications relating to the sale of the S.1[] Limited shares.
- [31] Ms. D.H.C. relies on \$148,303 as the average of his 2001 to 2003 income in support of her claim for child support of \$2,228 a month.
- [32] I do not find that Mr. J.K.C.'s Guidelines income is anywhere close of what Ms. D.H.C. claims. In 2001, Mr. J.K.C.'s income included over \$191,000 in RRSP income and a taxable gain of \$100,000. The same year he paid \$72,000 in spousal support and more than \$85,000 in family debts or expenses. In 2002, with the sale of J.[] Ltd.'s shares in S.1[] Limited, he had taxable capital gains of \$216,494 and RRSP income of \$7,835.96. His employment income to the end of July 2002 was only \$28,000. His only other income that year appears to be \$15,000 from K. [] Inc. rentals against which were lease fees and taxes of \$5,600. For 2003 Mr. J.K.C.'s employment income was \$21,373 plus capital gains of \$16,102 from a stock investment for which he borrowed \$7,500. In 2004, his income was \$29,549 comprised of \$7,500 from G.2[], and the balance from capital gains. Mr. J.K.C. anticipates that for 2005 he will be able to earn a gross taxable income of \$40,000 as a salesperson. Excluding the RRSP income and capital gains from the sale of the S.1[] Limited shares, Mr. J.K.C. earned an average income of just \$31,307 for 2001 to 2003 (\$43,000, \$21,373, and \$29,549).
- [33] A letter dated May 25, 2005, from J.F., Director of Administration at M.[] Ltd. stating that "Mr. J.K.C.'s outstanding production volume to date stands at \$17,635.20 Gross Commissions, before expenses and taxes of \$4,718.54 or Net Amount of \$12,916.66" was attached as an exhibit to an affidavit of Mr. J.K.C.. Although both parties seek final judgment under Rule 18A, and the content of the letter was not properly proved, Mr. Daltrop took no issue with the letter.

- [34] Both parties have filed expert reports dealing with the tax liabilities of Mr. J.K.C. and J.[] Ltd. relating to the sale of the S.1[] Limited shares. J.[] Ltd. has received a Corporation Notice of Assessment from the CCRA for \$295,767.46. Both experts agree that Mr. J.K.C. will owe taxes on dividends paid out of J.[] Ltd., but disagree on whether the effective tax rate is 22 or 32 per cent, that is, a tax liability of \$117,992 or \$171,624. Either way, the total tax liabilities resulting from the buyout of the S.1[] Limited shares exceed the \$404,000 remaining in trust from the sale of those shares.
- [35] Mr. J.K.C.'s Financial Statements sworn in October 2000 and February 2001 show annual expenses of \$128,807. The largest item was for housing and utilities at \$47,427. At the time, the parties were separated but still resided in the same house. The next largest item was \$37,000 for the children, including \$20,000 for private school tuition for two of the children, and \$9,600 for child support for his child from his former marriage.
- [36] Mr. J.K.C.'s Financial Statement for September 2001 shows an increase in his annual expenses to \$158,607.07. While his housing costs remained the same, the costs for the children increased to \$47,800 because of \$30,000 in private school tuition for all three children. Mr. J.K.C. was also paying \$27,000 annually towards debt.
- [37] Mr. J.K.C.'s Financial Statement sworn in April 2003 claims expenses of \$6,044 monthly, or \$72,528 annually. His housing costs were substantially reduced. The monthly expenses included \$963 for rent and utilities, \$750 for household expenses, \$830 in personal expenses, including \$360 for disability insurance, \$770 in children's expenses, \$500 for an RESP, \$400 for the child of his former marriage, and \$422 for debt payments.
- [38] His most recent Financial Statement sworn in July 2004 is similar. His expenses are listed at \$5,936 monthly or \$71,232 annually. The monthly support payments for the child from his former marriage had increased to \$800 a month, but he was no longer paying \$360 for disability insurance or contributing \$500 towards an RESP. His rent also increased slightly. For assets, he had a small amount in his chequing and savings accounts and J.[] Ltd. which he valued at \$398,000. His debts exceed his assets. As indicated earlier, Mr. J.K.C. has the burden of the tax debt arising out of the seizure of his company's shares and the sale of the S.1[] Limited shares.
- [39] To meet his expenses, in December 2004 Mr. J.K.C. obtained two loans, each in the amount of \$75,000. For one of the loans he mortgaged the assets of K.[] Inc.. The other loan is an unsecured line of credit.

D. Mr. J.K.C.'s Ability to Earn a Greater Income as an Investor

- [40] Ms. D.H.C. contends that Mr. J.K.C. has greater earning potential and an ability to earn more than the \$40,000 he expects to earn as a real estate salesperson. It is argued that he was and continues to be an investor: the severed relationship from his family has no impact on his ability to earn an income or to invest.

[41] I disagree. The position now taken by Ms. D.H.C. is at odds with her earlier position. In her affidavit sworn April 23, 2003 she deposed:

4. The Plaintiff and I did have various income from various sources which the Plaintiff afforded us in order to enjoy a home on S.[] Drive, to permit the children to attend an exclusive Private School and to afford us a very comfortable lifestyle. All this was an adjunct to the Plaintiff's ability to borrow against his shares in a family trust if needed to secure monies for investment purposes. The Plaintiff informed me that of all his siblings, he was the only one who continuously was able to pay back his advances from the family corporation. I have never had any reason to doubt this as we always had very strong support from his family prior to our separation. In fact, many times the Plaintiff's parents encouraged me to make sure we had a right of first refusal on the rental property at 1991 S.[] Drive and assured me that they would help us to purchase the property if it indeed came up for sale.

[Underlining added.]

[42] All of Mr. J.K.C.'s investments in the past had been acquired through his ability to borrow against his interest in the family business. He no longer has any connection to the family business and has had a falling out with his parents who not only controlled the purse strings, but enabled the parties to live in the style to which they became accustomed in the past. The family business was the source of all of Mr. J.K.C.'s funds: almost all of it was borrowed; all of it was spent. Seizing the shares in J.[] Ltd. severed the last remaining thread he had to the family businesses and his ability to borrow funds. The forced buy-out of the S.1[] Limited shares significantly impacted on his ability to be an investor.

[43] Ms. D.H.C. argues that Mr. J.K.C. has failed to make full disclosure. She refers to the Reasons for Judgment of Mr. Justice Masuhara: (J.K.C. v. D.H.C., 2003 BCSC 817, [2003] B.C.J. No. 1181 (QL)) who said that there were some inconsistencies in several of the Form 89s that Mr. J.K.C. had filed, for example, "the interest the plaintiff has in J.[] Ltd.; whether he is a beneficiary under a Trust; and an outstanding RESP for \$3,000 which counsel could not explain ". However, Mr. Justice Masuhara also stated that there has been a fair level of disclosure.

[44] Mr. J.K.C.'s financial circumstances as Mr. Daltrop stated in argument are "complex and complicated" as a result of the C. family businesses and a family trust. However, my review of the transcript of Mr. J.K.C.'s cross-examination on affidavit leads me to conclude that Mr. J.K.C. himself did not understand the financial intricacies. He clearly did not know whether something was a company or a trust, the extent to which he had an interest or interests in a family business, or even whether he was a beneficiary under a discretionary trust. It is apparent that in order to answer many of the questions that he has been asked, he has had to rely on others, such as accountants, so that he could provide the answers and the documents.

[45] Since October 2000 Mr. J.K.C. has been working with J.P., a registered psychologist. While Dr. J.P.' letters have not been tendered as expert reports, she states that Mr. J.K.C. has Adult Attention Deficit Disorder and "auditory and visual sequential processing disabilities". While Mr. J.K.C. has a quick mind and an aptitude for business deals, he needs assistants to organize him and to tend to the details. He had all of the necessary support while working in the family business. He does not now.

[46] I find Mr. J.K.C. is taking reasonable steps to earn as much as he reasonably can.

[47] While I recognize that lawyers draft the affidavits, it seems to me, based on the extensive and detailed affidavits sworn by Ms. D.H.C. in these proceedings, that she has a better understanding of the various business dealings and investments than does Mr. J.K.C.; at least she appears to have a grasp on how to read and interpret various financial documents. That may be due, in part, to her past experience as the manager of a retail business and looking after the books.

E. Ms. D.H.C.'s Financial Circumstances and Efforts to

Become Self Sufficient

[48] Ms. D.H.C. seeks lump sum spousal support of \$126,000 which represents

\$150,000 less the \$24,000 advanced to her in 2003, and is based on her expenses of \$50,000 as set out in her February 2005 Financial Statement.

[49] The objectives of a spousal support order are set out in s.15.2(1) and s.15.2(6) of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.). They provide:

15.2(1) A court of competent jurisdiction may, on application by either or both spouses, make an order requiring a spouse to secure or pay, or to secure and pay, such lump sum or periodic sums, or such lump sum and periodic sums, as the court thinks reasonable for the support of the other spouse.

15.2(6) An order made under subsection (1) ... provides for the support of a spouse should

- (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
- (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
- (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
- (d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

- [50] In argument counsel for Ms. D.H.C. gave greater emphasis to the argument that there should be a lump sum payment in order to promote a clean break between the parties.
- [51] However, I have already determined that Mr. J.K.C.'s means and ability to earn investment income is not anywhere close to what Ms. D.H.C. says it is or ought to be. The court is obligated to take into account the means, needs and other circumstances of both parties.
- [52] Ms. D.H.C.'s annual expenses have increased substantially according to her Property and Financial Statements filed in the last three years and appear to be greater than when the parties were residing together.
- [53] In her August 9, 2002, Financial Statement she claimed monthly expenses of \$6,867, or \$82,401 annually. The largest monthly item was for rent at \$2,650, housing and utilities at \$3,401, and household expenses at \$1,545. There were no amounts for private school tuition. She claimed debts totalling \$119,016, including \$90,143 borrowed from family and friends. She also claimed a debt of \$19,748 for private school tuition, which Mr. J.K.C. apparently paid for the 2001-2002 school year. She listed no financial assets.
- [54] In her Financial Statement sworn in March 2003 Ms. D.H.C. claimed annual expenses of \$92,543. The housing, utilities, and household expenses remained roughly the same as the August 2002 Statement, but her monthly personal expenses had increased in seven months from \$376 to \$1,080, including education at \$381 and more than twice the amount, or \$607 for clothes, hair, and gifts. On the positive side Ms. D.H.C. listed financial assets of \$246,575. Her debts totalled \$67,014 and included \$65,143 owed to her sisters.
- [55] In her most recent February 2005 Financial Statement, Ms. D.H.C.'s annual expenses total \$132,775, an increase of over \$40,000 in two years. Her housing and utilities costs have remained about the same but her monthly personal expenses have increased from \$376 in 2002 to \$1,471 in 2005. Clothing for the children increased from \$167 to \$559 a month and their activities and lessons increased from \$180 to \$1,139 a month. Ms. D.H.C. listed financial assets of \$51,789 and debts of \$73,269, including \$65,143 owed to her sisters, and \$8,655 in student loans.
- [56] There is little doubt that Ms. D.H.C. must reduce her expenses.
- [57] Ms. D.H.C. was 48 years old on separation in February 2000. She was a homemaker and had not worked outside the home since 1992. However, she was not so old that it was unreasonable to expect her to work. It has been over five years since the parties' separation and Ms. D.H.C. has not found work.
- [58] Dr. Allan Posthuma interviewed Ms. D.H.C. in preparation for a s. 15 psychological assessment report. In his report dated January 31, 2001, Dr. Posthuma states:

Mrs. D.H.C. states she started working for her husband, managing his books for a retail coffee store business that they operated during 1991 and 1992. She has not worked since that time. She states she prefers to be a full-time mother. She states her husband wishes her to return to work, and if forced she would like to become a landscape architect designing flower gardens. She states she is unaware of where she can obtain this training, but believes she would like the work.

- [59] There is no evidence that Ms. D.H.C. looked for work in the area of landscape or gardening. In March 2003 she deposed in an affidavit that she remained a stay-at-home mother, but planned to take an independent study program with the W.2[] in an effort to resume a career as an actor. She also attended various workshops.
- [60] However, Ms. D.H.C.'s career choice does not appear to have been reasonable or practical. Her income tax returns indicate that she has spent over \$4,000 on classes relating to an acting career, but had a gross income of only \$146.91 in 2003, and nothing in 2004.
- [61] In 2004 Ms. D.H.C. recognized that wanting to be an actor was not realistic. In October 2004 she enrolled in a four month entertainment administration certificate program at U.B.C. that began in January 2005. The cost of the program is \$7,950.

F. Should Income Be Imputed to Ms. D.H.C.?

- [62] Ms. D.H.C. states that she does "not have the skills to now get a job that will pay for a caregiver while I work at a bottom level entry position". However, the parties have a joint financial obligation to maintain the children in accordance with their relative abilities and capacity to earn income.
- [63] Mr. J.K.C. argues that the court should impute an annual income of \$20,000 to Ms. D.H.C..
- [64] Madam Justice Martinson in *Hanson v. Hanson*, [1999] B.C.J. No. 2532 (S.C.) (QL), dealt with the issue of whether income should be imputed when a court finds that a person has been intentionally under-employed or intentionally unemployed. She stated:
- [14] The following principles apply when determining capacity to earn an income. (See Dr. Julien D. Payne, *Imputing Income*,

"Determination of Income; Disclosure of Income", *Child Support in Canada*, Danrab Inc., August 3, 1999.)

1. There is a duty to seek employment in a case where a parent is healthy and there is no reason why the parent cannot work. It is "no answer for a person liable to support a child to say he is unemployed and does not intend to seek work or that his potential to earn income is an irrelevant factor." (Van Gool at para. 30.)
2. When imputing income on the basis of intentional under-employment, a court must consider what is reasonable under the circumstances. The age, education, experience, skills and health of the parent are factors to be considered in addition to such matters as availability of work, freedom to relocate and other obligations.

3. A parent's limited work experience and job skills do not justify a failure to pursue employment that does not require significant skills, or employment in which the necessary skills can be learned on the job. While this may mean that job availability will be at the lower end of the wage scale, courts have never sanctioned the refusal of a parent to take reasonable steps to support his or her children simply because the parent cannot obtain interesting or highly paid employment.
4. Persistence in unremunerative employment may entitle the court to impute income.
5. A parent cannot be excused from his or her child support obligations in furtherance of unrealistic or unproductive career aspirations.
6. As a general rule, a parent cannot avoid child support obligations by a self-induced reduction of income.

[65] Ms. D.H.C. has nearly six days every two weeks when the children are not with her. They are in school full-time, and I see nothing preventing her from finding even part-time work. Although I recognize she has no formal training, she does have experience of the books of business in her family's ladies wear business and buying inventory, as well as the books of N.1[] Ltd.. There is no evidence that she is physically or mentally unable to work.

[66] Ms. D.H.C. has only sought work as an actor. She ought to have done more, even if it meant a lower paying job, or a job that was other than acting so that she could carry out her financial obligation towards the children. I find that Ms. D.H.C. has the capacity to earn an income but has failed to take reasonable steps to earn an income, and therefore I impute to her an annual income of \$15,000. That figure will be increased to \$20,000 as of February 1, 2006, when the parties will have been separated for six years.

[67] Ms. D.H.C. is in need of some additional support, but to pay the support from the trust fund is akin to redistributing the capital. However, Mr. J.K.C. has no other means with which to pay lump sum support. I therefore order that Mr. J.K.C. pay Ms. D.H.C. lump sum spousal support in the amount of \$30,000.

G. Shared Custody, Retroactive and Ongoing Child Support

[68] Section 9 of the Guidelines provides:

Shared custody

9. Where a spouse exercises a right of access to, or has physical custody of, a child for not less than forty percent of the time over the course of a year, the amount of the child support order must be determined by taking into account
 - (a) the amounts set out in the applicable tables for each of the spouses;
 - (b) the increased costs of shared custody arrangements; and

(c) the conditions, means, needs and other circumstances of each spouse and of any child for whom support is sought.

[69] Ms. D.H.C. contends that even though the children spend more than 40 per cent of their time with Mr. J.K.C., she should receive child support retroactive and ongoing based on the Guidelines because she has borne a disproportionate share of the cost of raising the children.

[70] For 2003, 2004 and 2005 Mr. J.K.C.'s income was or will be \$38,346, \$29,549 and \$40,000 respectively. However I think it is appropriate to consider his Guidelines income at \$40,000 for any retroactive support and ongoing support.

[71] Using \$40,000 as Mr. J.K.C.'s Guidelines income for all of those years, child support payments would be \$745 a month for three children. Based on an imputed income of \$15,000 child support payable by Ms. D.H.C. would be \$278 a month. The difference between the two amounts is \$467 a month.

[72] The court has some discretion in determining the appropriate award of child support under s.9 of the Guidelines: *Green v. Green* (2000), 75 B.C.L.R. (3d) 306, 2000 BCCA 310; *C.R.H.E. v. F.G.E.*, [2004] B.C.J. No. 1057, 2004 BCCA 297.

[73] Mr. J.K.C.'s Financial Statements set out the cost of the children as follows:

Date of Financial Statement

Annual Cost of the Children

October 2000

\$37,000 including \$9,600 support for child from a previous marriage and \$20,000 for school fees

February 2001

\$37,000

September 2001

\$47,800 including \$9,600 for support for child from a previous marriage, and \$30,000 for school fees and supplies.

April 2003

\$9,240

July 2004

\$7,320

[74] Ms. D.H.C.'s Financial Statements claims expenses for the children as follows:

Date of Financial Statement

Annual Cost of the Children

August 2002

\$10,057.80

March 2003

\$13,914.00

February 2005

\$29,512.08

- [75] Mr. J.K.C. bore the lion's share of the child care expenses until the spring of 2003 when they both had roughly the same amount of expenses, except for extraordinary expenses which Ms. D.H.C. claimed at \$2,160. Ms. D.H.C.'s annual expenses for 2005 took a giant leap from her annual expenses reported in her Financial Statement of 2003. Between March 2003 and February 2005, her housing costs remained about the same, but her household expenses increased from \$1,593 to \$2,361 largely because more money was spent on food and meals outside the home. Her monthly personal expenses increased from \$1,080 to \$1,472; the children's monthly expenses increased from \$1,160 to \$2,459. Their clothing costs had increased from \$295 to \$559, while the cost of their activities and lessons had increased from \$180 to \$1,139. I will deal with Ms. D.H.C.'s claim for extraordinary extracurricular expenses later.
- [76] Ms. D.H.C. either lives a more extravagant lifestyle than Mr. J.K.C., or she is not good at managing money. While the children spend roughly the same amount of time in each household, Ms. D.H.C. spends more than four times as much on food and meals outside the home, more than three times as much on personal expenses, and almost three times more on children's clothing.
- [77] I do not think it is realistic to spend more than \$9,000 a year on children's clothing when the sole income earner expects to earn just \$40,000 this year.
- [78] Ms. D.H.C. may have lived a lavish lifestyle during the marriage and would like to continue living a similar lifestyle. However, that is not possible: there is not enough money to go around. There never was.
- [79] Ms. D.H.C. seeks retroactive child support to September 2001. On this issue the Court of Appeal in *M. [] Ltd. v. M. [] Ltd.* 2005 BCCA 23 stated:
- [30] I will set out the passage from Madam Justice Rowles' reasons in *L.S. v. E.P.* (1999), 67 B.C.L.R. (3d) 254, at paras. 66 and 67 where she lists the factors which militate for and against retroactivity, in a non-exhaustive list, in this way:

A review of the case law reveals that there are a number of factors which have been regarded as significant in determining whether to order or not to order retroactive child maintenance.

Factors militating in favour of ordering retroactive maintenance include: (1) the need on the part of the child and a corresponding ability to pay on the part of the non-custodial parent; (2) some blameworthy conduct on the part of the non-custodial parent such as incomplete or misleading financial disclosure at the time of the original order; (3) necessity on the part of the custodial parent to encroach on his or her capital or incur debt to meet child rearing expenses; (4) an excuse for a delay in bringing the application where the delay is significant; and (5) notice to the non-custodial parent of an intention to pursue maintenance followed by negotiations to that end.

Factors which have militated against ordering retroactive maintenance include: (1) the order would cause an unreasonable or unfair burden to the non-custodial parent, especially to the extent that such a burden would interfere with ongoing support obligations; (2) the only purpose of the award would be to redistribute capital or award spousal support in the guise of child support; and (3) a significant, unexplained delay in bringing the application.

[32] Mr. Justice Davies made these helpful observations on retroactive awards as potentially constituting redistribution of capital or disguised spousal support in *S.E.C. v. D.C.G.* (2003), 43 R.F.L. (5th) 41:

135 In almost any situation in which a custodial parent seeks an order for retroactive support, such an award may have the effect of awarding the custodial parent funds that will not have to be immediately expended to support the child. That is so because the child will have already lived through the period in question without the benefit of the funds that could or should have been available for his or her support. While the creation of an immediately available pool of capital for the non-custodial parent may be the practical result of a retroactive order, it does not necessarily follow that a retroactive award will constitute capital re-distribution.

136 If, as in this case, the custodial parent has borne a disproportionate share of the cost of raising a child, a retroactive order is better viewed as a re-capitalization of the custodial parent rather than as a re-distribution of capital. In such circumstances there is no reason why a retroactive child support order should not be made even though the custodial parent may be the main beneficiary of the award. The award arises not from a re-distribution of capital but rather from the recognition and enforcement of joint parental responsibility for child support. (See: *Cherry v. Cherry* (1996), 24 B.C.L.R. (3d) 158 (C.A.); *Hess v. Hess* (1994), 2 R.F.L. (4th) 22 (Ont. Gen. Div.) and *Collins v. Collins* (1998), 221 A.R. 111 (Q.B.)).

[80] Mr. J.K.C. has paid a total of \$138,000 in spousal support. He paid \$3,000 for the months of September to December 2000 and \$6,000 for the months of January to September 2001. This gave Ms. D.H.C. a similar or greater income to Mr. J.K.C.. For September 2001 Mr. J.K.C. paid the rent on the house they shared. I therefore do not find that there should be retroactive child support retroactive to September 2001. There should however be child support retroactive to June 2002 when Ms. D.H.C. began bearing a greater proportionate share of the cost of raising the children.

[81] The retroactive amount payable from June 1, 2002 to July 2005 is \$17,279 (\$467 a month x 37 months). Ms. D.H.C. will have that amount paid to her from the monies held in trust. As of August 1, 2005 Mr. J.K.C. will pay child support of \$467 a month, payable on the first of each month until February 1, 2006, when the amount payable will be reduced to \$346 (\$745 - \$399).

H. Extraordinary Extracurricular Expenses

[82] Ms. D.H.C. claims special and extraordinary expenses of \$15,260.73 incurred in 2003 and itemized in a written argument as follows:

- i. \$ 797.94 - school
 - ii. \$3,156.89 - drum lessons and costumes
 - iii. \$3,079.71 - drum lessons and drum kit
 - iv. \$2,520.00 - voice lessons
 - v. \$2,527.64 - acting lessons/coach
 - vi. \$ 806.51 - acting materials/costumes
 - vii. \$1,574.14 - tailored fitness/lessons
 - viii. \$ 682.00 - Children's dental
 - ix. \$ 115.90 - Children's prescriptions
- \$15,260.73 - Total

[83] Ms. D.H.C. claims that Mr. J.K.C. should pay one half that amount or \$7,630.36, and up to the same amount for 2005 and each year thereafter upon being provided with the appropriate receipts and proof of payment.

[84] Ms. D.H.C. does not consult Mr. J.K.C. regarding the activities that the children are enrolled in. Except for the "fitness/lessons" item, there is no evidence to indicate for which child the expenses were incurred, the number of activities each of the children is involved with, the overall cost of the activity, or whether any of the children has any special needs or talents. The fact that the expenses are incurred does not make them recoverable as extraordinary expenses.

[85] Mr. J.K.C. in his July 2004 Financial Statement, claims \$5,887.50 for annual extraordinary expenses for the three children. He also claims extraordinary expenses of \$4,062.50 for his child from a former marriage. On an anticipated income of \$40,000, and both parties living off of borrowed funds, the children of these parties cannot realistically afford extraordinary costs of over \$21,000 ($\$15,260.73 + \$5,887.50 = \$21,148.23$).

- [86] There is little evidence about the children, likely because the issue of custody has been settled. The only evidence relating to the extraordinary extracurricular expenses relates to the youngest child who wants to be an actor. In her March 2003 affidavit, Ms. D.H.C. deposed that the youngest child was in grade two and wanted to be an actor. He had a resume, the same agent as Ms. D.H.C., one acting tryout, and was registered in drama and theatre classes. I can only assume that the total of \$5,854.15 for voice and acting lessons are for the youngest child, but there is no evidence whether he possesses the talent to be an actor so that the court could properly determine whether, given Mr. J.K.C.'s anticipated \$40,000 income, the expenses are necessary and reasonable.
- [87] It is difficult to decide the issue of extraordinary expenses on the scant evidence. However, Mr. J.K.C. proposes that he annually contribute \$5,000 towards the extraordinary expenses incurred by Ms. D.H.C. upon being provided with the appropriate receipts and proof of payment. I agree that should be a term of the order. Ms. D.H.C. has liberty to bring an application for payment of extraordinary expenses upon the proper evidence being tendered, and in any event, no sooner than one year from the date of these reasons for judgment.

I. The Remaining Orders Sought

- [88] Ms. D.H.C. may not have filed her tax returns without consulting Mr. J.K.C., however the intent of the order of Mr. Justice Wong was for Mr. J.K.C. to pay Ms. D.H.C. for any tax liabilities that accrued to her as a result of including spousal maintenance in her 2000 and 2001 tax returns following the order. There is no evidence that Mr. J.K.C. took any steps towards preparing and filing Ms. D.H.C.'s tax returns so the late filing penalty that he objects to paying would likely have been incurred in any event.
- [89] Mr. J.K.C. will pay to the CCRA from the trust fund, the sum of \$18,324.07, plus such additional amount that has accrued between February 2005 and the date of these Reasons. In addition, Mr. J.K.C. will pay to Ms. D.H.C. the sum of \$11,861.23 less the \$7,000 legal fees, or \$4,861.23 (\$11,861.23-\$7,000) for the reasons set out below.
- [90] Mr. J.K.C. ought not be responsible for Ms. D.H.C.'s legal fees. Requiring Mr. J.K.C. to pay \$7,000 for Ms. D.H.C.'s legal fees is akin to an award of special costs. Mr. J.K.C.'s conduct was not deserving of an award of special costs. The evidence discloses that Mr. J.K.C. was not deliberately avoiding his court ordered obligations, but was making an effort to satisfy them. Ms. D.H.C. knew that he wanted to pay her the \$300,000 from the sale of S.2 [] Joint Venture and that the sale was taking longer than expected. Seizing the shares in J.[] Ltd. which divested him of his interest in his family's business was a harsh step. Securing the balance of the sale proceeds after she had received the \$300,000 was also harsh because there was no support order and Mr. J.K.C. had been unemployed since 2002. However, there was nothing preventing Ms. D.H.C. from taking the steps she did. She was successful and is entitled to the \$5,622.86 for bailiff's fees. Accordingly, the \$7,000 which was paid out of the trust fund pursuant to the terms of the order of January 15, 2003, shall be deducted from the

\$11,761.23, other payable to Ms. D.H.C..

J. Summary

- [91] Ms. D.H.C. sought an order that Mr. J.K.C. pay \$18,324.07 to the CCRA. I order Mr. J.K.C. to pay that amount to the CCRA from the trust fund at Owen Bird. Ms. D.H.C. also sought an order that Mr. J.K.C. pay \$11,761.23 to her. I order that Mr. J.K.C. pay \$4,861.23 to her.
- [92] In addition Ms. D.H.C. sought an order that Mr. J.K.C. pay \$126,000 lump sum spousal support, and \$104,716 retroactive child support. I order that Mr. J.K.C. pay to Ms. D.H.C. \$30,000 lump sum spousal support and \$17,279 retroactive child support. Mr. J.K.C. will also pay, for the months of August 2005 through January 2006 inclusive, child support of \$467 a month. Beginning February 1, 2006, Mr. J.K.C.'s child support payments will be reduced to \$346 a month.
- [93] Finally, Ms. D.H.C. sought an order that Mr. J.K.C. pay \$14,000 annually for extraordinary expenses. I order that Mr. J.K.C. pay \$5,000 annually to Ms. D.H.C. for extraordinary expenses.
- [94] The balance remaining in trust at Owen Bird is to be paid out to Mr. J.K.C..
- [95] In view of the divided success, the parties will bear their own costs.

"L.A. Loo, J."

The Honourable Madam Justice L.A. Loo

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