

CANADA / JUDGMENT

J.L. v. L.M.

2024 BCSC 2468

COURT

Supreme Court of British Columbia

DECIDED

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2024 BCSC 2468 J.L. v. L.M.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

J.L. v. L.M.,

2024 BCSC 2468

Date: 20241218

Docket: E233371

Registry: Victoria

Between:

J. L.

Claimant

And:

L. M.

Respondent

Before: The Honourable Justice V. Jackson

Oral Reasons for Judgment

Counsel for the Claimant:

P. McLennan

Counsel for the Respondent:

R. Faber

Place and Date of Hearing:

Victoria, B.C.

December 17, 2024

Place and Date of Judgment:

Victoria, B.C.

December 18, 2024

- [1] These reasons were delivered orally. They have since been edited for publication without changing the substance.
- [2] Although I have fully considered the parties submissions and the case law and evidence to which they referred, I do not intend to refer in detail to all of the evidence, or to all of the cases.

Background and Nature of the Application

- [3] The parties met in 2010 in Winnipeg, Manitoba. The evidence is in conflict as to when they began a marriage-like relationship, whether that was in 2012 as the respondent deposes or whether that was in 2014 as the claimant alleges. The parties agree they separated September 9, 2023. Before they separated the parties had a daughter, A.L., who was born in 2021.
- [4] On the evidence of either party, although the parties were never legally married, they are spouses within the meaning of the s. 3 of the Family Law Act, S.B.C. 2011, C. 25 [FLA], having lived together in a marriage-like relationship for a continuous period of at least two years, and have a child with each other.
- [5] The parties are both physicians. The claimant is currently unable to work full-time as a physician due to disability. However, he owns and operates a company that carries on the business of a winery and an Airbnb operation, but has not paid himself a salary.
- [6] The claimant applies for an order of interim child support and interim spousal support, retroactive to the date of separation, and, at the hearing before me provided DivorceMate calculations through which he submitted that in 2023 his total income for the purposes of the Federal Child Support Guidelines, SOR/97-175 (adopted with certain modifications by Family Law Act Regulation, BC Reg 347/2012, s. 8) was \$152,535 (grossed up to account for the non-taxable disability benefits) and \$163,091 in 2024. The claimant submits the Guideline income of the respondent should be imputed to be \$385,000 (although at the hearing he argued that amount should be \$419,676, given the passage of time since the application was filed), based on her ability to earn that level of income.

- [7] The respondent consents to an order of child support but based on different total income amounts which she submits are correct.
- [8] The respondent opposes an order that she pay spousal support to the claimant.

Applicable Legal Principles

Guideline income principles

- [9] Generally, each parent of a child has a duty to provide support for the child: FLA, s. 147. Generally, if a court makes an order respecting child support, the amount of child support must be determined in accordance with the Guidelines: FLA, s. 150.
- [10] The application of the Guidelines requires a determination of each of the parents' Guideline income.

Spousal support principles

- [11] Section 161 of the FLA provides that in determining entitlement to spousal support, the Court must consider the objectives of spousal support which are:
 - (a) to recognize any economic advantages or disadvantages to the spouses arising from the relationship between the spouses or the breakdown of that relationship;
 - (b) to apportion between the spouses any financial consequences arising from the care of their child, beyond the duty to provide support for the child;
 - (c) to relieve any economic hardship of the spouses arising from the breakdown of the relationship between the spouses;
 - (d) as far as practicable, to promote the economic self-sufficiency of each spouse within a reasonable period of time.
- [12] Spousal support entitlement may be established on compensatory or non-compensatory grounds. In *M.S. v. K.S.*, 2019 BCSC 1458, the Court explained:
 - b) Compensatory support
- [38] Compensatory support is intended to provide redress to the recipient spouse for economic disadvantage arising from the marriage or the conferral of economic advantage on the other spouse: *Chutter v. Chutter*, 2008 BCCA 507 [Chutter] at para. 50, leave to appeal denied [2009] S.C.C.A. No. 41. The compensatory basis for relief recognizes that sacrifices made by a recipient spouse in assuming childcare and household responsibilities may impact their future financial prospects: *Chutter* at para. 50. There may be a corresponding advantage to the payor spouse in the ability to pursue career opportunities free of such responsibilities.
- c) Non-compensatory support

- [39] Non-compensatory support is "grounded in the 'social obligation model' of marriage in which marriage is seen as an inter-dependent union". Upon marriage dissolution, it falls on the former partner to meet the needs of a disadvantaged spouse and not the state: Chutter at para. 54. Need alone may be sufficient to ground a claim for spousal support: Bracklow v. Bracklow, 1999 CanLII 715 (SCC), [1999] 1 S.C.R. 420 at para. 43.
- [13] If, after considering the objectives of spousal support, the Court finds a spouse is entitled to spousal support, the other spouse has a duty to provide support for the spouse: FLA, s. 160. The amount and duration of spousal support is determined by the Court after considering conditions, means, needs and other circumstances of each spouse, including the length of time they lived together, the functions performed by each spouse during the period they lived together, and any agreement between the spouses relating to the support of either spouse: FLA, s. 162. Additionally, the Spousal Support Advisory Guidelines provide a "useful tool" for determining the quantum and duration of spousal support: Stober v. Stober, 2015 BCSC 743 at paras. 103-106. "Needs" is to be understood not as an "absolute quantity" but rather as a "flexible concept", driven by the context of each family's particular factual situation and circumstances: Myers v. Myers, 1995 CanLII 2274 (BC CA) at para. 10.
- [14] However, this is an interim application. Applications for interim support are typically made before the full evidence regarding family assets and the economic consequences of the breakdown of the marriage are fully developed; that context requires consideration of additional legal principles: Loesch v. Walji, 2008 BCCA 214 at para. 17. Applications for interim support typically focus on the needs of the party and the ability to pay with the need to achieve economic self-sufficiency often being less significant: Loesch at para. 17; A.L.P. v. E.L.G., 2016 BCSC 2180 at para. 18. Further, because the litigation is at a preliminary stage, "the court does not embark on an in-depth analysis of the parties' circumstances which is better left to trial" and "achieves rough justice at best": Robles v. Kuhn, 2009 BCSC 1163 at para. 12, and the cases cited therein. Where there is a need to resolve contested issues of fact, especially those relevant to the threshold issue of entitlement, interim support becomes "less advisable": Robles at para. 12, citing L.G.B. v. M.A.C.M., 2005 BCSC 1786 at para. 14.
- [15] In A.L.P., at para. 18, Justice Armstrong endorsed the principles applicable to interim support claims set out by Master Keighley in Robles at para. 12, including:
- b) An interim support order should be sufficient to allow the applicant to continue living at the same standard of living enjoyed prior to separation if the payor's ability to pay warrants it: Grossi v. Grossi, [1993] B.C.J. No. 878 (S.C.);
 - f) Interim support should be ordered within the range suggested by the Spousal Support Advisory Guidelines unless exceptional circumstances indicate otherwise: Ladd v. Ladd, [2006] B.C.J. No.1930, 2006 BCSC 1280 (S.C.);

- 9) Interim support should only be ordered where it can be said a prima facie case for entitlement has been made out: *L.G.B. v. M.A.C.M.*, [2005] B.C.J. No. 2966, 2005 BCSC 1786 (S.C.);
- [16] Where a prima facie entitlement to spousal support is made out, any interim award of spousal support made should be sufficient to allow the applicant to continue a standard of living and a pattern of spending at the level established during the course of the parties' marriage if the ability to pay warrants, but an applicant is not entitled to an award which will permit extravagant spending: *Grossi v. Grossi*, (1993) 48 R.F.L. (3d) 413 at para. 2 (B.C.S.C. Chambers), cited with approval at para. 18 of *Loesch*.

The Parties' Guideline Income

- [17] The respondent submits the claimant's Guideline income in 2024 is \$163,091. The DivorceMate calculation provided by the claimant for 2024 uses the same Guideline income figure for him. I find the claimant's current Guideline income is \$163,091.
- [18] The respondent says income should not be imputed to her on this interim application. Further, she argues that the claimant is seeking to impute income to her based on the level of income she earned in 2020, as an emergency room physician during the COVID-19 pandemic, which she says was a unique situation that provided opportunities to work harder than was healthy for her, and in any event was before the parties' daughter A.L. was born in 2021.
- [19] I agree that it is not appropriate to impute income to the respondent in the particular circumstances of this interim application.
- [20] The party seeking to impute income bears the burden of establishing an evidentiary basis for the imputation of income: *MacCarthy v. MacCarthy*, 2015 BCCA 496 at para. 35 and the cases cited therein. As a general rule, income will not be imputed on an interim application unless the evidence is properly developed or there are exceptional circumstances: *Kadyschuk v. Behan*, 2022 BCSC 1370 at para. 33, and the cases cited therein; *Kouznetsova v. Kouznetsova*, 2014 BCCA 160 at para. 45. The objective of an interim support order is to fill the gap between filing a notice of family claim and trial, leaving the facts to be more fully canvassed at trial; an interim application is not intended to involve complex calculations: *Kadyschuk* at para. 45, and the cases cited therein.
- [21] In my view, at this interim stage it would be inappropriate to impute income based on the respondent working at a level that may not have been healthy for her during a global health crisis, and that predated the parties' lives as parents, or based on a decrease in the amount that she worked only for the initial three months following the date of separation, particularly given it is acknowledged by the claimant that A.L. was in the primary care of the respondent for between six and seven weeks following the date of separation, whether rightly or wrongly, about which I offer no comment. The parties' financial circumstances are complex, interrelated, and involve multiple corporations, including all the various expenses

associated with them, and businesses. A detailed examination, dissection, and assessment of the parties' intermingled financial affairs is not appropriate on interim application for support.

- [22] The respondent submits her Guideline income is \$307,107. However, I note that is a 2023 figure. In contrast, she has used the claimant's 2024 income in the DivorceMate calculation she provided to the Court. In my view, it is inappropriate to use a 2023 figure for one party and at 2024 figure for the other.
- [23] The respondent has not yet produced 2024 financial statements for the corporations through which she offers her physician emergency room services. However, she has deposed in her affidavit that under her current clinical services contract, a full-time emergency room physician receives a salary of \$365,451 per year, which is equivalent to approximately 14 eight-hour shifts per month.
- [24] At the hearing, counsel for the respondent advised the respondent works the equivalent of 15 full-time shifts per year, from which I infer she is working full-time and is currently earning that full-time amount of income, namely \$365,451, under that contract. If my understanding about the number of shifts she is working is incorrect, the respondent has not provided evidence to support a conclusion that she is working less than full-time under that contract, and so my finding with respect to her income would remain unchanged.
- [25] Although the respondent argues she has certain expenses that would be deductible for the purposes of Guideline income, I do not have any evidence with respect to those expenses for 2024, because it has not been provided on this application. While I appreciate the Supreme Court Family Rules may not require the production of 2024 corporate financial statements yet, that does not mean that a party responding to an application for interim child support has no obligation to put forward evidence to establish deductions which they say should be made in determining Guideline income. It may very well be that there are deductions, but I will not speculate.
- [26] Similarly, it is unclear to me based on the evidence filed whether the respondent is continuing to provide emergency services through the second contract (the virtual services contract) as she had done in 2023. If so, that income has not been disclosed in the material, but neither has she deposed she is no longer doing that work. There may be more income, and there may be some expenses which ought to be deducted, but I have evidence of neither. However, I'm satisfied that "rough justice" is achieved on this interim application by using the respondent's 2024 income earned providing full-time emergency room services in fulfillment of that contract. I find the respondent's current Guideline income to be \$365,451. If I am wrong, then there is ambiguity with respect to how many shifts she is working. If she is working less than full-time, I will not infer it.
- [27] On an interim basis, the claimant is ordered to pay the respondent monthly child support and s. 7 expenses for A.L. based on a Guideline income of \$163,091. On an interim basis, the respondent is ordered to pay the claimant monthly child support and s. 7 expenses for A.L.

based on a Guideline income of \$365,451. If the parties wish, those amounts can be paid by way of a set-off payment made by the respondent to the claimant. The order should be prepared including the amount payable by each of the parties, as well as the set off amount if they choose to fulfil their mutual obligations in that way.

- [28] I make no order as to retroactive child support. In my view, it is inappropriate to do so on this interim application given the significant issues in dispute, including who has been the primary caregiver for A.L. throughout A.L.'s life, including since the date of separation, and whether there are facts that justify an award of child support payable by the respondent to the claimant despite the fact that A.L. was in the respondent's primary care for several weeks following the date of separation. The claimant has alleged bad conduct and bad faith on the part of the respondent which I do not feel I am able to determine on the material before me, nor in my view is it appropriate for me to do so on this interim application.

Spousal Support

- [29] Entitlement is a threshold issue on any application for spousal support: *M.S. v. K.S.*, at para. 37. The claimant bears the burden to establish a prima facie entitlement to spousal support on this interim application: *M.S.* at para. 42 citing *Robles* at para. 12. I find he has failed to do so.
- [30] The claimant advances a claim for compensatory child support on the basis that he has been A.L.'s primary caregiver since her birth and on the basis that during the course of the parties' relationship he contributed more than the respondent to Sail Away Vineyards Ltd. ("Sail Away"), a company of which he is the sole legal owner and for which he advances, at least in part, an excluded property claim.
- [31] There is a conflict in the evidence with respect to the role of each of the parties in providing primary care to A.L. during the parties' relationship, whether the respondent is intentionally underemployed, and whether the claimant is intentionally underemployed. Even the length of the parties' relationship is not agreed to by the parties.
- [32] The claimant submits the respondent stands to benefit from his contributions to Sail Asway when the family property is determined and divided, based on the assertion that there has been an increase in the company's value over the course of the parties' relationship in which the respondent will share. The assertion that the value of Sail Away has increased was not supported by any filed evidence. Indeed, the evidence filed establishes Sail Away is carrying significant debt. Further, I was taken to no case law that supports the claimant's argument that an unequal contribution by him, if established in the evidence, is a basis for an entitlement to spousal support on a compensatory basis.
- [33] Further, in my view the claimant has failed to establish a prima facie case for entitlement to spousal support on a non-compensatory basis. In my view, the claimant has failed to provide the financial information necessary for the Court to adequately assess any "need" he may have. In the evidence he has provided, he mingled the corporate expenses of Sail Away with

his personal expenses. Further, he has not provided current financial information with respect to Sail Away business. A bald assertion, without evidence, that it is netting approximately the same amount in 2024 as it did in 2023, is insufficient. Finally, the claimant is the sole owner, officer, and director of Sail Away. In my view, it is not appropriate to take into account expenses associated with maintaining a company he asserts is his excluded property in considering the degree of his financial need. His opinion that the respondent and A.L. will be better off if that business is maintained, a view which I note is not shared by the respondent in the evidence she has filed, is far from determinative of the issue.

- [34] I recognize that the claimant is currently disabled from working full-time as a physician, however in my view it is not appropriate, again on this interim application, to make findings with respect to his ability to earn income from other sources, including the Sail Away business which he owns and operates.
- [35] The evidence is that the claimant's current grossed up income comes close to covering his current expenses. To that income can be added the set off amount of child support which I have ordered. I am mindful that the claimant is currently paying the mortgage on the family home, however, he's also residing there, where as the respondent is incurring, and paying, the cost of her rental accommodations.
- [36] I am mindful that this litigation is far from approaching an endpoint. No examinations for discovery have been scheduled. There is no trial date set. Even where a trial date is set, it has been recognized that the notion that the matter may result quickly is a fiction, as matters may be bumped because of a lack of judges, or for other reasons. I am also mindful that an interim order under the FLA can only be varied where there has been a material change in circumstances. Given the early stage of the litigation, it is important for me to consider that any interim order made may have a significant shelf life.
- [37] I am not satisfied the claimant has established a prima facie entitlement to spousal support. That aspect of his application is dismissed.
- [38] Costs will be in the cause.
- [39] I wish to thank both counsel for their very helpful submissions.

"V. Jackson J."

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