

CANADA / JUDGMENT

J.M.F. v. J.S.F.

2024 BCSC 882

COURT

Supreme Court of British Columbia

DECIDED

23 May 2024

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2024 BCSC 882 J.M.F. v. J.S.F.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

J.M.F. v. J.S.F.,

2024 BCSC 882

Date: 20240523

Docket: E50853

Registry: Kamloops

Between:

J.M.F.

Claimant

And

J.S.F.

Respondent

Before: The Honourable Justice B. Smith

Reasons for Judgment

Counsel for the Claimant:

C.J.S. Gray

Counsel for the Respondent:

D.E. Komori

Place and Date of Hearing:

Kamloops, B.C.

January 31, 2024

Place and Date of Judgment:

Kamloops, B.C.

May 23, 2024

Introduction

- [1] This is a family law dispute. For ease of reference, I will refer to the claimant as the mother and the respondent as the father.
- [2] On January 31, 2024, on consent of the parties, and being satisfied that all the legal requirements of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) [DA] had been met, I ordered the parties divorced from each other.
- [3] The major outstanding issues involve changes to support obligations and appropriate remedies for failure to provide financial disclosure. There are cross-applications on the support issues. All of the orders sought are opposed.
- [4] The father seeks orders that his spousal support obligations be terminated as of October 1, 2022, that his child support obligations be decreased, and that the mother be held in contempt for failing to comply with a prior court order for financial disclosure, or in the alternative, an order that she provide disclosure.
- [5] The mother seeks an order imputing higher income to the father and an order that he pay increased child support.
- [6] Both parties also seek orders concerning s. 7 expenses. At the hearing of the applications, the mother applied to adjourn that portion of her application. The father was opposed. I granted an adjournment, because I was satisfied it was in the interests of justice to do so.
- [7] For the reasons that follow, I grant the father's application for an order that his spousal support obligation be terminated as of October 1, 2022, and his application for an order that his child support obligation be decreased. I dismiss the father's application for an order that the mother be found in contempt, and grant his application for an order that the mother provide disclosure. I dismiss the mother's application for an order imputing higher income to the father and an order that he pay increased child support.

Background

- [8] The parties had an eight-year relationship. They married in 2006 and separated in 2014. They have two children, a 16-year old daughter, E.F., and a 15-year old son, L.F. (the "Children"). L.F. is diagnosed with attention deficit hyperactivity disorder, oppositional defiant disorder and unspecified anxiety disorder. L.F. is prescribed medications for these disorders, is in a special education course, and is doing well.
- [9] The father is 56 years old. He has a professional agrologist designation, two technical diplomas and a certificate in law enforcement. He worked for the provincial Ministry of Forests for 32 years. In February 2022, that employment was terminated without cause. He received a severance package that provided him with his regular pay up to and including September 2023. Pursuant to the termination agreement, he was required to take his pension as of October 1, 2023. Having worked for 32 years in the provincial public service, he had plans to retire when he was 57 years old. That plan was accelerated by a year as a result of the termination of his employment. He has pension income of \$57,675 a year, and anticipated investment income of \$2,887. He is currently retired and lives with his mother D.F. on the family ranch (the "Ranch"). His family has worked the Ranch since 1900 and it was granted to his family as homesteaders. His father was deceased in 2017. He and D.F. own the Ranch and he helps D.F. operate it. D.F. suffered a stroke in September 2023 and now relies on volunteer labour. He is not paid for his work at the Ranch and derives no income from it.
- [10] The father has recently had health challenges which have resulted in serious physical limitations, the nature and effects of which are detailed in a report from his general practitioner, a medico/legal report from an orthopaedic surgeon, and one of his neighbours.
- [11] In summary, the father has severe osteoarthritis in his hips and only limited range of motion. He can only bend his hips between 45 to 55 degrees. He needs to be able to bend them to 90 degrees to be able to sit normally. This affects his day to day living and limits the work he can do around the Ranch and elsewhere. He has great difficulty bending down to pick things up and cannot sit for extended periods of time. He hopes that hip replacement surgery will help, but presently is unable to be employed at a desk job or doing physical labour. His work as an agrologist and at his other employment required that he do both.
- [12] Between 2007 and 2016, the father derived some farming income from breeding a small herd of cows. In 2017, he stopped breeding cows, because it was a money-losing venture.
- [13] The Ranch generates a modest income for D.F. The financial records of the Ranch indicate that from 2018 to 2022 ranching operations generated net income of between \$0 and \$14,231. In 2022, the Ranch only broke even.

- [14] The mother is 55 years old. She too has a professional agrologist designation. During the marriage she worked for a provincial government organization involved in managing invasive weeds in the Southern Interior of British Columbia, and had employment income of approximately \$60,000 a year. She took maternity leave for one year after each of the Children were born. She otherwise worked full-time during the relationship.
- [15] The mother says she was the primary caregiver for the Children during the marriage and that the father's full-time employment with the Ministry of Forests and part-time work at the Ranch would not have been possible if they shared care of the Children equally. The father disputes the mother's claim and says that other than when the mother took maternity leave, they shared care of the Children equally.
- [16] Sometime after separation, the mother either left or lost her job with the weed management organization. In 2017, she was involved in a car accident, following which she worked at other employment. The affect of the accident on her employability is unclear. At the time, she suffered a concussion which caused her to have a temporary inability to concentrate. She is now employed again, and has employment income of \$72,681 a year.

Discussion

Prior Orders

2015 Order

- [17] On January 28, 2015, the parties consented to various interim, without prejudice, orders at a Judicial Case Conference conducted by Master McDiarmid (the "2015 Order"). At that time, their respective Federal Child Support Guidelines [Guidelines] incomes were found to be \$94,200 for the father and \$59,500 for the mother. The father agreed to pay Guidelines child support of \$1,400 a month, and a proportional share of s. 7 expenses. The parties agreed to provide certain financial disclosure.

2018 Order

- [18] On May 31, 2018, the parties consented to various interim and final orders at a settlement conference conducted by Master McDiarmid (the "2018 Order"). Their respective Guidelines incomes were found to be \$98,615 for the father and \$33,971 for the mother. The father was ordered to pay interim child support of \$1,502 a month, s. 7 expenses of \$250 a month, and interim spousal support of \$527 a month, all effective June 1, 2018.
- [19] The 2018 Order allowed for a review of spousal support on or after June 1, 2020, to consider the financial circumstances of each party and the efforts of the mother to find full-time employment.

- [20] The 2018 Order further provided that the parties would review child and spousal support, by exchanging their income tax returns by June 1st of each year, commencing June 1, 2019, forthwith provide copies of any notice of assessment or reassessment, and advise each other in writing of any material change in circumstances.
- [21] The 2018 Order provided that either of the parties may apply for a variation in spousal support based on a material change in circumstances.
- [22] The father has continued to pay child and spousal support pursuant to the 2018 Order.
- [23] The mother agreed to termination of spousal support effective November 1, 2023.

Contempt

- [24] The father seeks an order that the mother be found in contempt of the 2018 Order, in that she has not provided her tax returns and notices of assessment as required, and has not provided evidence of any material change in her circumstances.
- [25] In the alternative to a finding of contempt, the father seeks an order that the mother comply with the 2018 Order.
- [26] The father says he has complied with the 2018 Order by providing the mother with his tax returns. The mother has refused to provide financial disclosure or agree to any variation of child support. He has sought variation of his child support obligations due to changes in his income through the Family Maintenance Enforcement Program.
- [27] The father is not completely without information about the mother's finances. Despite the mother's lack of disclosure, he is aware that:
- a) she purchased her step-father's company (the "Company") and worked there until the fall of 2021;
 - b) the Company continues to be active;
 - c) in February 2021, she began work as a vacation consultant for an international travel company and continues to work there;
 - d) in October 2022, she began working full-time for a provincial supplier of electricity;
 - e) at some point she began working for a national airline (the "Airline"), but has not provided any details of that employment;
 - f) she worked at the Airline until January 2023;
 - g) in May 2021, she purchased a townhouse in Kamloops for \$390,000; and
 - h) the source of her funding for the purchase of the townhouse is unknown.

Legal Principles

- [28] The father's notice of application does not indicate the basis upon which he is asking the court to exercise its power to find the mother in contempt of court.
- [29] Rule 21-7 of the Supreme Court Family Rules [the Rules] gives the court the power to punish contempt of court.
- [30] Section 7.5 of the DA provides for a finding of contempt of court as a remedy for non-compliance with an order for financial disclosure.
- [31] Section 21 of the Guidelines imposes obligations of financial disclosure on an applicant for a child support order. Where a spouse fails to comply with s. 21, the other spouse may apply for an order requiring the spouse who failed to comply to provide the court and the other spouse with the required documentation: s. 22(1)(b), Guidelines. Where the spouse fails to comply with an order issued on the basis of an application under s. 22(1)(b), the court may make a contempt order against the spouse: s. 24(b), Guidelines.
- [32] Section 213 of the FLA adds other enforcement options available to the court.
- [33] Non-disclosure or delayed disclosure of financial information is a costly impediment to the timely and just disposition of family disputes, and has been described as the "cancer of matrimonial property litigation": *Cunha v. Cunha* (1994) 99 B.C.L.R. (2d) 93 (SC); *J.D.G. v. J.J.V.*, 2013 BCSC 1274 at para. 1, *James v. James*, 2016 BCSC 292 at para. 498.
- [34] There must be personal service of an application for contempt upon the alleged contemnor party, service upon counsel is insufficient: *Bartch v. Bartch*, 2017 BCSC 1381, at para.
- [35] In *Bassett v. Magee*, 2015 BCCA 422, at paras. 33-35, Donald J. discussed the accepted principles governing a contempt application and said:
- [33] Both parties rely on *Peel Financial Holdings Ltd. v. Western Delta Lands Partnership*, 2003 BCCA 551 (Chambers), as setting out the proper procedure when making a finding of contempt. Peel was adopted by a division of this Court in *Jackson v. Honey*, 2009 BCCA 112 at para. 12, as setting out the proper principles governing a contempt application. Those principles are summarized in Peel at para. 18, as follows:
1. The proceedings are quasi-criminal in nature and the rules of *strictissimi juris* apply, meaning for example that the evidence supporting the motion must conform to the rules of admissibility at a trial; so no hearsay, opinion, conclusions and the like are receivable...
 2. The applicants bear the onus of proving the elements of contempt on the criminal standard, viz. beyond a reasonable doubt...
 3. If the order said to be breached is ambiguous, the alleged contemnor is entitled to the most favourable construction

[Citations omitted.]

- [34] In short, a court must find that a contemnor "wilfully disobeyed a court order that was clear and precise in its meaning" beyond a reasonable doubt: Jackson at para. 13. A court must "ensure that no one is found to have transgressed without a full consideration of all the relevant information, including any explanations for the conduct of persons accused of violating court orders": Larkin v. Glase, 2009 BCCA 321 at para. 9. If an order directs a party to provide an item that is not in that party's possession, the party cannot be said to have wilfully or deliberately disobeyed an order that was "impossible" to comply with: Jackson at para. 14.
- [35] The notion of strictissimi juris encompasses more than the examples given in Peel. It requires close adherence to procedural requirements: a precision in pleadings, procedure and evidence appropriate to the nature of the process which engages the court in a conflict with one of the parties. The process must be carried out with great care. The order said to be breached must be clear, for it will be strictly construed.

Conclusion

- [36] I dismiss the father's application for the court to find the mother in contempt. I was not provided with any evidence that the application was personally served on the mother, and the requirements for a finding of contempt identified in Bassett have not been met.
- [37] I grant the father's application for an order for financial disclosure, because I am satisfied the mother has failed to comply with the financial disclosure terms of the 2018 Order.

Support

- [38] The father seeks a review of his obligation to pay child support, including special and extraordinary expenses, and that his child support obligations be reduced in light of the reduction in his income. The father seeks to have the mother imputed an income of \$70,000 a year.
- [39] The mother seeks an order imputing income to the father commensurate with his earning capacity, or alternatively, an order that he be found to have an income equal to his pension, plus income from his participation in the operation of the Ranch.
- [40] The mother seeks an order that the father pay her child support of \$1,453 a month.
- [41] The mother says the father received a severance package which provided him with regular pay to the end of September 2023, and that he had a year and a half to secure other employment, which he elected not to do. He is capable of continuing to work but has elected to retire early. He owns the Ranch with D.F. He is earning income from his work at the Ranch for which he receives financial benefits which he does not report. The income-generating capacity of the Ranch is under-utilized. He is the registered owner of three cattle brands associated with the Ranch which he can use to generate income. He could earn income as a "general farm worker" as indicated in the "NOC". He has delayed in getting

recommended surgery.

- [42] The mother says the father's 2022 income tax return shows his 2022 income from employment was \$94,857. She seeks to have his income imputed at \$94,857 or more for the purposes of child support and s. 7 expenses, because he has the capacity to continue working.
- [43] The mother says that since May 2018 she has commenced and left various employment positions. She is currently working full-time at a provincial electricity supplier as an Express Connect Coordinator. Her projected income for 2023 is \$72,681.

Legal Principles

- [44] The application is brought pursuant to the DA.
- [45] The power to vary interim child and spousal support orders made pursuant to the DA derives from the court's inherent jurisdiction, and is critical to ensuring fairness and justice as between the parties, given that temporary orders are often imperfect solutions based on limited information before trial: *Janmohamed v. Janmohamed*, 2014 BCSC 107 [Janmohamed] at para. 43, citing Chappel, J. in *Damaschin-Zamfirescu v. Damaschin-Zamfirescu*, 2012 ONSC 6689 at para. 19.
- [46] As Donegan J. concluded in *Janmohamed*, at para. 45:
- [45] The law here seems very clear. There is no statutory provision in the Divorce Act to vary an interim order for support. Such an order can only be varied pursuant to the court's inherent jurisdiction. This jurisdiction should only be exercised in compelling circumstances that are urgent and cannot wait for trial. The onus upon the applicant is a heavy one.
- [47] In order to vary a support order, a court must be satisfied there has been a material change in circumstances since the time of the order. This means a change such that, if known at the time, it would likely have resulted in different terms: *Willick v. Willick*, [1994] 3 S.C.R. 670, cited in *Janmohamed* at para. 46.
- [48] Section 15.1 of the DA governs the award of child support, and provides that if a court decides to order child support under s. 15.1(1), the award must be in accordance with the applicable Guidelines. The court can depart from the table amounts only as permitted in the Guidelines or the DA: *Mancuso v. Weinrath et al*, 2005 BCSC 1606, at para. 19.
- [49] The court is required to determine annual income, for the year in which the application is heard, based on the most current information available concerning each source of income: *Fuzi v. Fuzi* [1999] B.C.J. No. 2263, at para. 16.
- [50] Pursuant to s. 19 of the Guidelines, the court may impute such amount of income to a spouse as it considers appropriate in the circumstances, which includes a number of enumerated factors.

Conclusion

- [51] I grant the father's application to pay reduced child support, because there have been two material changes in circumstances since the 2018 Order, which, if known at the time, would likely have resulted in different terms. The first is the decrease in the father's income. The second is the increase in the mother's income.
- [52] Based on the evidence before me, including the father's financial documentation, I am satisfied the father's income is \$57,675 (\$54,788 pension plus \$2,887 investment) and the mother's income is \$72,681.
- [53] I dismiss the mother's application to impute income of \$94,857 or more to the father, because I am satisfied he is neither intentionally under-employed nor unemployed. The mother's claims are not anchored in evidence. Through no fault of his own, the father's long-term employment was terminated before his planned retirement at age 57. The father is now 56 years old and retired. As I understand it, the fact of the father's intended retirement at age 57 is something which was known to the mother before his employment was terminated. Although the father retired sooner than anticipated, he received severance and has continued to pay the mother support in compliance with the 2018 Order. In addition, he now has significant physical limitations. I accept the father's evidence that he does not earn any income from either the three cattle brands or the Ranch. I accept the father's evidence that he is only joint owner of the brands and the Ranch for estate planning purposes.
- [54] The mother's assertion that the father could earn income as a "general farm worker" is speculative and ignores the reality of his significant physical limitations. There is also no evidence of the availability of employment locally for such workers, or the numbers of hours they might be offered work.
- [55] I do not accept the mother's submission that the father has delayed in getting recommended surgery, because deciding to undergo major surgery is something deserving of careful forethought, planning for surgery to occur when it is minimally impactful on important activities of daily living is appropriate and expected, and the timing of the availability of surgery is, to some degree, not within the control of the recipient.
- [56] The mother's submission that the Ranch is being under-utilized in terms of its income generating capacity is also unanchored in evidence.
- [57] I place no weight on the extract from the "NOC". There is no evidence about the "NOC", how its content is prepared, any limitations upon the interpretation of its content, or its intended audience.

Termination of Obligation of Spousal Support

[58] I grant the father's application for an order that his obligation to pay spousal support is terminated effective October 1, 2022, because I am satisfied the mother's receipt of spousal support between October 1, 2022 and October 31, 2023 was predicated upon incorrect information concerning her income, which was caused by her failure to provide financial disclosure as the 2018 Order required her to do.

Orders

[59] I make the following orders:

1. The father is a resident of British Columbia and has Guidelines income of \$57,675 a year;
2. The mother is a resident of British Columbia and has Guidelines income of \$72,681 a year.
3. The father will pay the mother \$895 a month for the support of the E.F., [date of birth omitted] and L.F., [date of birth omitted];
4. The father's obligation to pay \$250 a month for s. 7 expenses will continue in accordance with the 2018 Order, subject to agreement by the parties or order of the court.
5. The father's obligation to pay the mother spousal support is terminated effective October 1, 2022;
6. The mother shall forthwith comply with her financial disclosure obligations pursuant to the May 31, 2018 order of Master McDiarmid. Without in any way limiting the generality of the foregoing, the mother shall provide, within 30 days of these reasons for judgment:
 - a) her 2018, 2019, 2020, 2021, 2022 and 2023 tax returns, with all attachments, as well as any Notice of Assessment or Reassessment pertaining to those tax returns;
 - b) her Record of Employment for any employment she has engaged in since May 31, 2018;
 - c) all paystubs and other documentation showing all her sources of income for 2023;
 - d) information concerning the settlement of her claim arising out of a motor vehicle accident on August 22, 2017;
 - e) information concerning any self-employment and, in the event of any self-employment, for the three most recent taxation years, the financial statements of the business, corporation or professional practice, and a statement showing a breakdown of all salaries, wages, management fees or other payments or benefits paid to, or on behalf of persons or corporations with whom she, the business, corporation or professional practice does not deal at arms length.

Costs

[60] The father has been successful on this application and is entitled to his costs.

"B. Smith J."

B. SMITH J.

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