
CANADA / JUDGMENT

J.S.W. v. C.M.W.

2009 BCSC 1214

COURT

Supreme Court of British Columbia

DECIDED

3 September 2009

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2009 BCSC 1214 J.S.W. v. C.M.W.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

J.S.W. v. C.M.W.,

2009 BCSC 1214

Date: 20090903

Docket: 76117

Registry: Kelowna

Between:

J.S.W.

Appellant

(Plaintiff)

And

C.M.W.

Respondent

(Defendant)

Before: The Honourable Mr. Justice Truscott

Reasons for Judgment

Counsel for the appellant/plaintiff:

D. King

Counsel for the respondent/defendant:

L. Thomson

Place and Date of Hearing:

Kelowna, B.C.

July 24, 2009

Place and Date of Judgment:

Kelowna, B.C.

September 3, 2009

- [1] The appellant appeals a master's interim order of January 21, 2009 that imputed a Guidelines income to him of \$175,000 for child support payments, on the basis that the master was clearly wrong in doing so in the absence of any evidence to support that decision.
- [2] The parties have a trial date of April 19, 2010, so the order of the master and any order issued on this appeal can only have effect on an interim basis until that trial or further order of the court.
- [3] A master's order can only be set aside on appeal, or varied, if it is clearly wrong or if the order by its nature is final or has a significant impact on the final determination of an issue covered by the order.
- [4] The master found that the appellant was intentionally underemployed and applied s. 19(1)(a) of the Child Support Guidelines.
- [5] Section 19(1) allows the court to impute such amount of income to a spouse as it considers appropriate in the circumstances, and one of those circumstances includes the situation where a spouse is intentionally underemployed or unemployed other than as required by the needs of any child.
- [6] The appellant concedes that he is intentionally underemployed and that an income should be attributed to him, but he submits that the attributed income should be based on his capacity to earn income and the best evidence of that was the income that he earned in 2003 of \$74,000.
- [7] The master imputed income to the appellant on the basis of what she referred to as sparse evidence of what he lives on and after applying some speculation on her part.
- [8] She said that where there has been no evidence she chose what she considered to be a very modest estimate of expenses which she suspected grossly underestimated the appellant's actual expenses.

- [9] She estimated his share of the rent of the condominium he is living in with his new partner, and estimated all other monthly expenses that he would likely incur. She arrived at a monthly after tax expense figure of \$9,133 and after grossing that up to a before tax figure set his Guidelines income at \$175,000 per year and his requirement for child support at \$2,366 per month.
- [10] The master also ordered retroactive child support back to September 1, 2006 which she assumed as the date of separation, while saying that this date was without prejudice to either party proving a different separation date at trial.
- [11] Other findings of the master were that much of the appellant's income was not reported for the reasons that the matrimonial home was assessed at over \$1,000,000; the parties owned a condominium at Big White in the past; they travelled out of the country for holidays; the children were in private school; and the appellant owned a motorcycle that at one time was valued at \$85,000.
- [12] In the view of the master no family could afford these luxuries on an income that the appellant declared in 2003 of \$74,000 and in 2004 of \$40,000.
- [13] The master also said that the appellant had a history of putting his assets in other people's names for business purposes.
- [14] She referred to evidence before her that the money available to the appellant for support payments and family debt that he was paying came from other sources since he chose not work and let other people support his family.
- [15] She referred to evidence that the appellant lives in a condominium with his current partner that is in her name and valued in excess of \$1,000,000 and she pays for all his living expenses and gives him \$2,500 spending money per month.
- [16] The master noted that the appellant had not filed tax returns for four years and so had not provided any income information for that period of time. He also had not provided any living expense information on his financial statement, which was late in coming, other than child related expenses that he was paying.
- [17] The master said that she had no hesitation in ordering the appellant to pay child support out of other people's money if that was how he had decided to support himself.
- [18] The appellant submits that the master was clearly wrong in imputing income to him based on assumed living expenses where the only evidence was that whatever living expenses there were, they were being paid by third parties.
- [19] The appellant submits that the proper basis for imputing income to him should be his capacity to earn income and he submits that the only evidence available on his capacity to earn income is his tax returns from 2003 and 2004.

- [20] He says he has been paying \$700 per month child support at least since October 2007 and he submits that any retroactive child support order should only apply as of the time of the respondent's application made on September 30, 2008.

Analysis

- [21] On the issue of ongoing child support on an interim basis, I agree with appellant's counsel that it was clearly wrong for the master to have assumed living expenses for the plaintiff as a basis for determining his capacity to earn income, where the only evidence was that any living expenses, whatever they might be, including expenses for his children, are being paid by third parties.
- [22] I understand why the master considered it necessary to use assumed living expenses as a basis for determining capacity to earn income when there was no recorded income for the period of time after 2004, because the appellant was a non-resident Canadian in 2005 and 2006 but was apparently still living quite well off with his new partner.
- [23] It may be, as the master said, that the matrimonial home is now valued at over \$1,000,000, but it was purchased back in 2001 when the purchase price was probably for a lot less money. I do not know what the story is on the Big White condominium as that evidence is not before me. While there is evidence before me that the parties travelled out of country it appears to have been in the years 2005/2006 when the defendant and children were visiting the plaintiff in Costa Rica and when the plaintiff says that both he and the defendant were living off the \$135,000 line of credit that had been registered against the matrimonial home. The plaintiff's motorcycle was worth \$85,000 in 1999 but the plaintiff says it is now only worth \$25,000 and there is no contrary evidence to that.
- [24] I have the same suspicions that the master had that the plaintiff has more resources at his disposal that he is not disclosing in order to keep his child support payments as low as possible but the court cannot issue orders on mere suspicion.
- [25] The plaintiff says he has not worked since 2004 and yet the defendant has produced an email from him of July 8, 2008 saying that he is just finishing a job. This apparent evidence of recent employment has not been further investigated to my knowledge.
- [26] The plaintiff says in his affidavit of November 19, 2008 that his new partner, Joan, gives him \$2,500 per month to cover his personal living expenses, which he says are primarily for lease payments and insurance costs for the vehicles registered in his name.
- [27] In his financial statement of the same date, November 19, 2008, the plaintiff does not disclose any motor vehicles. The only vehicle disclosed in that financial statement is his motorcycle for \$25,000.

- [28] The plaintiff has not offered any explanation for this apparent conflict between what he refers to as vehicles registered in his own name and no disclosure of those vehicles in the financial statement. There is also no evidence of what he is leasing.
- [29] However, this is only an interim order and it can be adjusted to a proper amount in any final order at trial on full evidence. It is not an order that should necessarily reflect what the final order is likely to be in the absence of clear evidence that the final order will likely be the same or thereabouts.
- [30] That situation does not exist here with the competing affidavits, without cross-examination, and without full investigation of all the issues involving the appellant's history of income over the years, his capacity to earn income and his sources of monies through the years.
- [31] The master said that the appellant had a history of putting his assets in other people's names for business purposes. I am unable to see in the affidavits where this evidence is that would allow this conclusion to be reached.
- [32] It is with some reluctance that I am compelled to allow the appeal on the basis that the master's conclusion as to the amount of income to be attributed to the appellant is clearly wrong on the basis of the affidavit evidence. In the absence of the evidence of the plaintiff that all his expenses and payments are being funded by third parties, I could accept the master's use of assumed expenses, but I am not able to do that with the plaintiff's affidavit evidence to the contrary.
- [33] I allow the appeal and set the appellant's Guidelines income at \$75,000 based on the income he did earn in 2003 and I order ongoing child support of \$1,120 per month on an interim basis commencing at the time of the master's order on January 19, 2009.
- [34] Retroactive child support at this rate will continue to be ordered as at September 1, 2006. The appellant says in his affidavit that he has been making monthly child maintenance payments to the respondent since May 2006 and if that is true, then the matter was broached between the parties at least as of that date.
- [35] Accordingly, as at September 1, 2006, the appellant's child support obligation on an interim basis will be ordered at \$1,120 per month. This will be without prejudice to either party being able to revisit the issue of child support since the date of separation, at trial, on better evidence.
- [36] The respondent will be given credit for all child support payments that he did in fact make since September 1, 2006 to date as the master has already directed.
- [37] Extraordinary expenses will be apportioned between the parties on the basis of the appellant's income of \$75,000 and the respondent's income of \$25,000.

"Truscott J."

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